Jessica A. Skelton, OSB No. 102714
jessica.skelton@pacificalawgroup.com
Gregory J. Wong, *Admitted Pro Hac Vice*
greg.wong@pacificalawgroup.com
Alanna Peterson, *Admitted Pro Hac Vice*
alanna.peterson@pacificalawgroup.com
PACIFICA LAW GROUP LLP
1191 2nd Ave, Suite 2000, Seattle, WA 98101
Telephone: 206-245-1700

Jeffrey B. Dubner, *Admitted Pro Hac Vice*
jdubner@democracyforward.org
Josephine T. Morse, *Admitted Pro Hac Vice*
jmorse@democracyforward.org
Javier M. Guzman, *Admitted Pro Hac Vice*
jguzman@democracyforward.org
DEMOCRACY FORWARD FOUNDATION
1333 H Street NW, Washington, DC 20005
Telephone: 202-701-1773
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

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

Plaintiff,

v.

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

Defendants.

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

In its opening brief, the County showed that the 2018 Tier 1 FOA violates Congress's requirements for the Teen Pregnancy Prevention Program and is arbitrary and capricious. Defendants' principal response is that this Court cannot consider their conduct at all. First, they assert that the County lacks standing to pursue its claims—a contention that misconstrues the relevant law and Plaintiff's allegations. Second, they assert that HHS's TPPP funding decisions are committed to agency discretion by law and therefore wholly unreviewable. But Congress placed multiple restrictions on the Program that, as one court has already determined, readily lend themselves to judicial review. Third, they argue that the decisions they made in issuing the new FOA were not final agency action, because they have not yet awarded grants. But the criteria adopted in the new FOA are both definitive and outcome determinative and have already had binding effects on the agency and the County.

As a fallback position, Defendants defend their actions on the merits by denying that the statute or their own statements have any content at all. They seek to define Congress's restrictions out of existence, arguing for conflicting and implausible interpretations of "programs that have been proven effective through rigorous evaluation" and reading "replicating" out of the statute altogether. And they argue that the Court should ignore a decade of history showing what the terms set by Congress and used by Defendants in the 2018 Tier 1 FOA mean. Neither of these arguments should be accepted: words have meaning, and Defendants should not be allowed to escape either Congress's choices or their own.

Finally, Defendants argue that they are entitled to summary judgment on the County's "unalterably closed mind," political interference, and *ultra vires* claims, asserting a cramped view of those claims that ignores the bulk of the County's allegations.

On the face of the administrative record by itself, and in light of the additional evidence the County has presented, the new FOA cannot be reconciled with Congress's design. This Court should therefore grant the County summary judgment and deny Defendants' motion.

ARGUMENT

I. This Court Has Jurisdiction to Hear Multnomah County's Claims

A. Multnomah County Has Standing to Pursue Its Claims

Defendants do not dispute that Plaintiffs have satisfied the injury-in-fact and causation requirements of Article III standing. Instead, they focus only on whether the relief requested would redress the County's injuries. It would. If the Court enjoins Defendants from awarding grants under the 2018 Tier 1 FOA and requires Defendants to preserve the appropriated funds for a lawful competition, the County's "actual, here-and now injury" of "intensified . . . competition for a share in a fixed amount of money" will be eliminated. *Sherley v. Sebelius*, 610 F.3d 69, 74 (D.C. Cir. 2010).

Defendants contest redressability solely on the theory that vacating the 2018 Tier 1 FOA would permanently deprive all applicants of funding, leaving the County with only the "psychic satisfaction" of victory. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 107 (1998). This critique is misguided for at least four reasons. First, vacatur of the 2018 Tier 1 FOA would not force Defendants to leave their appropriation unspent. To the contrary, they have numerous options for obligating the remaining funds, which will be a small fraction of the overall TPPP appropriation once the original grantees are funded.[1] Second, the County has requested that the Court enjoin and preserve awards for fiscal year 2018, Pl.'s Br. at 35; Am. Compl. at 38-39, a well-established remedy that would protect applicants' opportunities to pursue funding beyond September 30, 2018. *City of*

[1] For example, Defendants could fully fund the 2015–2020 grantees with this year's appropriation, preserving the unobligated balances from previous years to cover any shortfalls in future years or granting carryover requests to increase the budgets for existing projects. Nothing obligates Defendants to instead use unobligated balances from prior years to fund portions of the 2018 awards owed to the 2015 grantees, as they appear to be doing.

Houston v. Dep't of Hous. & Urban Dev., 24 F.3d 1421, 1426 (D.C. Cir. 1994). Third, even assuming that the County had sought only vacatur, that remedy would nonetheless alleviate those components of the County's competitive injury sounding not in the opportunity for grant funding, but in the immediate "increase" of competition and attendant burdens of competing on unlawful terms. *Sherley*, 610 F.3d at 74. Fourth, courts have refused to find competitive injury cases nonjusticiable where, as here, doing so would likely render the underlying activity "unreviewable." *Nat. Law Party of U.S. v. Fed. Elec. Comm'n*, 111 F. Supp. 2d 33, 50 (D.D.C. 2000). Indeed, Defendants' argument proves far too much: under their theory, an agency could unlawfully award funds from an appropriation yet avoid liability or judicial review, simply by beginning the competition close to the end of the fiscal year. *Cf.* Defs.' Br. at 35 (arguing that it can and must award funds "regardless of whether the funding conditions at issue here are found unlawful").

In short, Defendants "do not seriously contend that [the County] fails adequately to demonstrate . . . redressability," and the Court should therefore rule that the County has Article III standing to pursue its claims. *Hispanic Affairs Project v. Perez*, 206 F. Supp. 3d 348, 371 (D.D.C. 2016) (noting that a competitive standing plaintiff need only articulate the "basic economic logic" undergirding its claims to demonstrate redressability).

B. The Altered Criteria in the 2018 Tier 1 FOA Are Not "Committed to Agency Discretion by Law"

The APA "embodies a basic presumption of judicial review." *Beno v. Shalala*, 30 F.3d 1057, 1066 (9th Cir. 1994) (internal quotation marks and citations omitted). Defendants invoke the exception for review of agency action "committed to agency discretion by law," 5 U.S.C. § 701(a)(2); Defs.' Br. 14, but this "very narrow exception" is only "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

This is not a case with "no law to apply." As Defendants admit, Congress provided specific statutory limitations on HHS's implementation of the TPP Program, requiring that TPPP grants be "age appropriate and medically accurate" and that the funds at issue go to "replicating programs that have been proven effective through rigorous evaluation." 2018 CAA, 132 Stat. at 736; Def.'s Br. at 1, 16 (acknowledging the statute's "restrictions" and "guidance"). As one district court concluded upon examining these very statutory constraints, they "impose restrictions on how HHS may distribute TPP funding, and the court has manageable standards to ensure that it acts accordingly." *Healthy Teen Network v. Azar*, No. 18-cv-468, 2018 WL 1942171, at *8 (D. Md. Apr. 25, 2018).

Outside of these statutory restrictions, Plaintiff's claims rest on ample additional law constraining HHS's allocation of TPPP funds, including the transfer restrictions in the 2018 CAA and the Purpose Statute, 31 U.S.C. § 1301(a); the agency's own regulations, *see* 45 C.F.R. § 87.3(l); and in the Appropriations Clause of the U.S. Constitution. Consistent with the long line of authority providing for judicial review of claims involving Congressionally-funded programs, there are multiple, meaningful standards to enable this Court to adjudicate the County's claims. *See, e.g.*, *Healthy Teen Network*, 2018 WL 1942171, at *8 -*9; *Planned Parenthood of Wisconsin, Inc. v. Azar*, No. 1:18-CV-01035, 2018 WL 3432718, at *5 (D.D.C. July 16, 2018); *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1348 (D.C. Cir. 1996); *Cmty. Action of Laramie Cty., Inc. v. Bowen*, 866 F.2d 347, 352 (10th Cir. 1989) ("It is beyond doubt that the district court in this instance possessed jurisdiction to determine whether HHS violated federal statutes in terminating CALC's grant").

Defendants' principal case, *Lincoln v. Vigil*, 508 U.S. 182 (1993), is inapposite. *Lincoln* dealt with a challenge to an agency's decision to end a children's health program that had been funded through an unrestricted "lump-sum appropriation" that did "not so much as mention the [p]rogram" at issue, *id.* at 193-94. In holding that the decision to terminate the program was committed to the agency's discretion, the *Lincoln* Court contrasted the circumstances before it with

the situation here—where, by expressly funding a program not through a lump-sum appropriation but by designating specific funds for specific and limited uses, "Congress [has] circumscribe[d] agency discretion to allocate resources by putting restrictions in the operative statutes," such that the "agency is not free simply to disregard statutory responsibilities." *Id.* at 193; *accord Healthy Teen Network*, 2018 WL 1942171, at *9 (TPPP appropriation "not an unrestricted sum of money to use for any purpose that might fall within HHS's broad mandate, but rather directs the agency to use the funds to support proven or innovative medically accurate methods of preventing teenage pregnancy").[2]

Nor do Defendants' other cases support a finding of unreviewability here. For example, in *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 751 (D.C. Cir. 2002), cited in Defs.' Br. at 15, 16, the court declined to review a decision to allocate farm subsidies under a broad statutory provision dictating that the funds be disbursed "in a manner determined appropriate by the Secretary" that left funding determinations to the "Secretary's sole judgment." But Defendants ignore the other holding of *Milk Train*, where the court reached the *opposite* conclusion for a challenge under a separate appropriations provision for "economic losses incurred during 1999." The court held this claim reviewable because "Congress limited the Secretary's authority to disburse funds" and thereby provided the court with a "statutory reference point." *Id.* at 752.[3] Defendants' citation (Defs.' Br. at 15, 16) to *Alan Guttmacher*

[2] *See also, e.g.*, *Ramah Navajo Sch. Bd., Inc.*, 87 F.3d at 1347 (*Lincoln* did not apply where there is "evidence that Congress intended the [statute] to limit the Secretary's discretion in funding matters"); *Southcentral Found. v. Roubideaux*, 48 F. Supp. 3d 1291, 1303 (D. Alaska 2014) (same, where "Congress's appropriations to [the agency] specifically indicated that the funds should be used for" the programs at issue).

[3] *Compare Serrato v. Clark*, 486 F.3d 560, 568 (9th Cir. 2007) ("Here, as in *Lincoln,* the agency program at issue is funded from lump-sum funds in an appropriation from Congress that does not specify how much money should be used for the program.") *and Los Coyotes Band of Cahuilla & Cupeno Indians v. Jewell*, 729 F.3d 1025, 1038 (9th Cir. 2013) ("The Tribe does not identify any specific appropriation it believes should have been allocated for law enforcement on the reservation, let alone specific language in an appropriation that deprives the Secretary the discretion to allocate the funds."), *with Planned Parenthood of Wisconsin, Inc.*, 2018 WL 3432718, at *5 (finding standards to review claim

Inst. v. McPherson, 597 F. Supp. 1530 (S.D.N.Y. 1984)—where the statutory authorization allowed the President to award assistance "on such terms and conditions as he may determine," *id.* at 1535 & n.1—similarly is of no use to Defendants because Congress here has plainly circumscribed HHS's authority with multiple, substantive statutory requirements. *See King Cty. v. Azar*, No. C18-0242-JCC, 2018 WL 2411759, at *6 (W.D. Wash. May 29, 2018) (distinguishing *Alan Guttmacher Inst.* as not involving a "targeted appropriation" and the other cases cited by Defendants on pp. 16-17 & n.3 as not providing a "manageable standard" of review (citations omitted)).

Defendants are likewise wrong that review of Plaintiff's claims is "foreclosed" by one district court's decisions that HHS's termination of TPPP grants was presumptively unreviewable. Defs.' Br. at 15-16. Despite applying a presumption of unreviewability, that court found the terminations reviewable under standards furnished by HHS's regulations and did not make any finding regarding whether the 2018 CAA itself provided standards that would rebut the presumption. *See Policy & Research LLC v. HHS*, No. 18–cv–00346, 2018 WL 2184449, at *8-*9 (D.D.C. May 11, 2018); *see also Healthy Futures of Tex. v. HHS*, No. 1:18–cv–992, 2018 WL 2471266, at *7 (D.D.C. June 1, 2018). This conclusion actually *supports* review here, where the County challenges HHS's adoption of unlawful criteria for reviewing grant applications that are contrary to multiple, specific limitations set forth by statute, HHS regulations, and the Constitution. Nor does the fact that "there is no regulation setting forth the criteria to include in TPP FOAs," Defs.' Br. at 16, have any impact on the reviewability of Plaintiff's claims. Here, Congress *itself* has circumscribed HHS's authority in exactly the way courts found to be lacking in *Lincoln* and its progeny. Defendants tellingly ignore the three other district courts (including two within the Ninth Circuit) that declined to adopt Defendants' argument for presumptive unreviewability. *See Healthy Teen Network*, 2018 WL 1942171, at * 11; *King Cty.*, 2018 WL 2411759, at *6; *Planned Parenthood of Greater Wash. & N. Idaho*, No. 2:18-

---

involving funding opportunity announcement and reasoning that case was "comparable to a review of the Government's compliance with [the 'economic losses'] statute" in *Milk Train*).

cv-0055, 2018 WL 1934070, at *8-*10 (E.D. Wash. Apr. 24, 2018). The omission is glaring: as noted above, one of these courts specifically rejected the very argument that Defendants advance here to conclude that the TPPP statute "impose[s] restrictions on how HHS may distribute TPP funding" so that the "the court has manageable standards to ensure that it acts accordingly." *Healthy Teen Network*, 2018 WL 1942171, at * 8. This Court should conclude the same.

C. The Altered Criteria in the 2018 Tier 1 FOA Are Reviewable "Final Agency Action"

In a final attempt to shield their actions from this Court's review, Defendants contend that HHS has not taken any "final agency action." *See* 5 U.S.C. § 704. They are mistaken.

For agency action to be "final," two conditions must be met: (1) "the action must … 'mark the consummation of the agency's decisionmaking process' and (2) 'be one by which rights or obligations have been determined, or from which legal consequences will flow.'" *Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). The core question in determining whether agency actions are final is whether they "impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process." *Ukiah Valley Med. Ctr. v. F.T.C.*, 911 F.2d 261, 264 (9th Cir. 1990) (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103, 113, (1948)). Courts must take a "pragmatic and flexible" approach to this finality inquiry, disregarding "label[s]" to "focus on the practical and legal effects of the agency action." *Oregon Nat. Desert Ass'n*, 465 F.3d at 982, 985.

Both of the finality conditions are met here because HHS's decision to adopt the unlawful criteria in the 2018 Tier 1 FOA is unequivocal and imposes significant legal and practical consequences on both the County and the agency. *First*, HHS's announcement of the new criteria for TPPP awards in the April 2018 Tier 1 FOA marks the "consummation" of a lengthy agency process to abandon the Tier 1 statutory standard for replicating rigorously evaluated programs in favor of requiring applicants to replicate a "tool." The agency confirmed that it had reached the

conclusion of its decisionmaking in a declaration submitted in one of the TPPP termination cases, explaining that prior to publishing the 2018 Tier 1 FOA, it "spent a year analyzing the TPP Program and developing a new approach to the program consistent with its statutory goals," an "effort[] involving $8 million dollars in research efforts and at least 150 hours of staff time." Dubner Decl. (ECF No. 33), Ex. 34 at 2; *see California ex rel. Harris v. Fed. Hous. Fin. Agency*, No. C 10-03084 CW, 2011 WL 3794942, at *10 (N.D. Cal. Aug. 26, 2011) (finding final agency action where agency presented statement at issue as "the consummation of a decision-making process that involved careful review and over a year of working with federal and state government agencies" (internal quotation marks omitted)). HHS has likewise made clear in its filings in this case that the altered FOA criteria are the agency's "last word" on eligibility for TPPP funding, and that it has no intention of deviating from these criteria or reverting to another view. *Oregon Nat. Desert Ass'n*, 465 F.3d at 984 (quoting *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 478 (2001); *see* Defs.' Br. at 21 (HHS "reconsidered" its prior approach to adopt "a new set of programs").

Second, HHS's imposition of the new criteria has already triggered significant "practical and legal effects" for both the County and the agency, setting the substantive terms on which the agency can award—and applicants can receive—federal funding to operate TPPP programs. The requirement that prospective applicants use one of two tools is a threshold "eligibility" requirement for Tier 1 funding, meaning that if applicants do not comply, their application will be "eliminate[d] … from the competition" at the outset, "will *not* be reviewed[,] and will receive *no* further consideration." Dubner Decl., Ex. 1 at 29, 30-31 (emphasis in original). This has binding significance under HHS regulations. *See* 45 C.F.R. § 75.203(c) (requiring FOAs to include "[s]pecific eligibility information, including any factors or priorities that affect an applicant's or its application's eligibility for selection"); *id.* at App'x I to Part 75 (FOA must make clear eligibility requirements that "will preclude the HHS awarding agency from making a Federal award"). These changes, to borrow

Defendants' own phrasing, are plainly "outcome determinative," Defs.' Br. at 13, binding the agency to disqualify applicants who do not apply with one of the HHS-sanctioned tools and thus compelling the County and other grantees to either comply with this new eligibility condition, or be disqualified and not compete at all.[4]

Recent decisions in suits seeking to enjoin the ongoing competition for Department of Justice grants due to the agency's addition of new, unlawful application criteria are instructive here. District courts have held in these cases that adding new eligibility criteria to the grant application process was final and reviewable because, as one court explained, "legal consequences clearly flow from the imposition of the certification condition" because "[r]eceipt of the grants is conditioned on certifying compliance with the federal government's interpretation" of the law. *State ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015, 1031–32 (N.D. Cal. 2018); *see also City of Philadelphia v. Sessions*, No. 17–3894, 2018 WL 1305789, at *7 (E.D. Pa. 2018) (same). So too here, HHS has conditioned receipt of the 2018 Tier 1 TPPP grants on the use of one of two tools, likewise requiring applicants to either cede to the agency's changed "interpretation" of the TPPP statute or not compete at all. Given this, Defendants' efforts to distinguish these cases as falling into an "exception" for a "change to a grant's threshold eligibility criteria," Defs.' Br. at 13 n.2, proves the County's point: the County is challenging HHS's changes to TPPP grant eligibility criteria, Dubner Decl., Ex. 1 at 29-31, that, if disregarded, mean an applicant is disqualified from the competition, full stop.[5]

---

[4] *See, e.g.*, *Nat'l Min. Ass'n v. Jackson*, 768 F. Supp. 2d 34, 45 (D.D.C. 2011) (change to permitting requirements was final agency action; "practical impact[s] imposed upon permit applicants … are sufficient to satisfy the *Bennett* finality test because the 'finality' element is interpreted in a pragmatic way" (internal quotation marks and citations omitted)); *Arizona v. Shalala*, 121 F. Supp. 2d 40, 48-49 (D.D.C. 2000) (change to criteria for block grant program was final agency action where proposals "must comply" with new directive or else "must be resubmitted," leading applicants to believe that "non-complying plans would not be approved").

[5] A recent, non-precedential decision by a district court in the District of Columbia, *Planned Parenthood of Wisconsin, Inc. v. Azar*, 2018 WL 3432718, is distinguishable on the same grounds. That case held that changes to "scoring criteria, *not eligibility criteria*" for a competition arising under a different statute were not final agency action because "instead of setting *eligibility requirements*, or

HHS, moreover, has also adopted new, mandatory abstinence-only priorities that carry the single highest point value in the competition and that all applicants are required to engraft onto their proposed curricula, notwithstanding that the priorities have not been proven effective and may require grantees to alter programs rather than replicate them. 2018 Tier 1 FOA at 14-16; 59-60; Defs.' Br. at 20 (referring to "priority" as a "requirement"); Kantor Decl. ¶¶ 26-33. These "priorities," which have already affected the terms on which the County has applied to conduct a Tier 1 grant, Toevs Decl. ¶¶ 5, 10-13, not only dictate the outcome of the grants competition but also how grantees are obligated to operate their programs in the event they are funded. *See* 45 C.F.R. § 75.203(c)(1)(i) (approval needed from HHS to "change … the scope or the objective of the project of program"); 2018 Tier 1 FOA at 67; *see also* Dubner Decl., Ex. 1 at 58 ("Federal staff and an independent review panel will assess all eligible applications according to the [review] criteria").[6] By any measure, these changes to HHS's grantmaking criteria have had, and will continue to have, a "direct and immediate effect on the day-to-day operations" of the County and the agency and are therefore final and reviewable by this Court. *Oregon Nat. Desert Ass'n*, 465 F.3d at 982; *see* Toevs Decl. ¶¶ 5, 10-13 (explaining the "impossible choice" the County faces under the new FOA); *see also Bennett*, 520 U.S. at 156 (agency action final where "legal consequences will flow" from it).

---

binding the final decisionmaker, the challenged Announcement lays out the criteria for an intermediate stage in the grant review process." *Id.* at *6-7 (emphases added). To the extent it could be read to hold that establishing mandatory scoring criteria is not final agency action, this case was wrongly decided. Here, the imposition of mandatory and heavily weighted abstinence-only "priorities" for every would-be grantee has dispositive legal and practical effects for both the agency and applicants (*see infra* at 8-9).

[6] To the extent Defendants contend that these priorities cannot be a basis for final agency action because award selections from among eligible applicants are ultimately made by the "Director of OAH, in consultation with the ASH" at a later stage in the process (Defs.' Br. at 14), they are incorrect. The text of the 2018 Tier 1 FOA makes clear that, as part of their review, these officials may only "take into consideration … *additional* factor(s)," none of which is the "priorities," making clear that the officials are *required* to take into account both the priorities themselves and the application score generated by the panel that likewise was *required* to reward points based on adherence to these priorities. Dubner Decl., Ex. 1 at 58, 63 (emphasis added).

Finally, Defendants argue that there is no finality because "several steps" remain "for a grant to be awarded." Defs.' Br. at 14.[7] But this "misses the point of [the County's] claim: that the process itself is unlawful, and not simply any decisions that may result from the application of that process." *Nat'l Mining Ass'n*, 768 F. Supp. 2d at 46 (rejecting agency's argument that its actions could not be final until it granted or denied any permit). To be clear, the County is not claiming an entitlement to any TPPP funding, but is challenging the unlawfully altered criteria under which HHS has decided to compete those grants.[8] In adopting these criteria, the agency has clearly taken a final, impactful action that is subject to this Court's review.

II. The Court May Consider the County's Additional Evidence

Defendants repeatedly assert that the Court is limited to what they claim belongs in the administrative record and may not consider the additional material submitted by the County in its motion and this opposition. *See* Defs.' Br. at 24-25, 29-30, 32. As explained below, the existing record shows that HHS has acted unlawfully in creating the 2018 Tier 1 FOA. But the administrative record is not complete and additional evidence further underscores HHS's unlawful actions.

---

[7] Defendants' citation to *Rattlesnake Coalition v. EPA*, 509 F.3d 1095 (9th Cir. 2007), and *Citizens Alert Regarding Env't v. EPA*, 102 F. App'x 167, 168 (D.C. Cir. 2004), lends no support to their finality position. Neither case involved an agency action that conclusively imposed unlawful requirements on grant applicants. Rather, in both cases, third-party plaintiffs brought suit based on their fears that EPA would approve construction projects without findings mandated by the National Environmental Policy Act ("NEPA"). Both courts held that there was no final action to challenge until EPA had either conducted its NEPA review or approved a project without one. *Rattlesnake Coal.,* 509 F.3d at 1104; *Citizens Alert*, 102 Fed. App'x at 168. Thus, *Rattlesnake Coal.* and *Citizens Alert* stand for the unremarkable proposition that "agency action" cannot be "final" if there is no "agency action" to begin with. Here, in issuing the 2018 Tier 1 FOA, HHS consummated the very type of intervening final action that would have sufficed to supply jurisdiction in these cases.

[8] *See City of Philadelphia*, 2018 WL 1305789, at *7 (E.D. Pa. 2018) (rejecting government's argument that finality was lacking because "DOJ has not yet made a decision in response to the City's … funding application, and as such could not possibly have imposed conditions on the grant of an award that has not yet been granted").

The Ninth Circuit has explained that "[r]eview may … be expanded beyond the record if necessary to explain agency decisions." *Sw. Cen. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996). Specifically, the Ninth Circuit allows for consideration of materials outside the administrative record when, as relevant here, "supplementing the record is necessary to explain technical terms or complex subject matter," or "plaintiffs make a showing of agency bad faith." *Id.* (internal quotation marks and citations omitted). Both circumstances are present here.

First, supplementation "is necessary to explain technical terms or complex subject matter." *Id.* As discussed in greater detail below, the 2018 CAA and the 2018 Tier 1 FOA use concepts and terms of art from the fields of public health, evidence-based health education, and sexual health education. *See infra* 17-21; *see, e.g.*, Kantor Decl. ¶¶ 14-16. Material extrinsic to the administrative record will assist the Court both in interpreting the 2018 CAA (and its identical predecessors), as well as in understanding the terms used by Defendants in the new FOA. The Court can and should "go outside the administrative record … for background information," *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980), not to pass on the wisdom or justifiability of Defendants' choices, but to carry out the Court's duty to "interpret … statutory provisions, and determine the meaning or applicability of the terms of an agency action," 5 U.S.C. § 706.[9]

Second, the Court may consider materials outside the administrative record because the County has more than made the requisite showing of bad faith. *See Sw. Cen.*, 100 F.3d at 1450. HHS's intent to deviate from the letter and spirit of Congress's Program is plain: first, HHS appointed a senior official who had repeatedly stated that the Program needed to be "abolished" and "eliminated." *See* Dubner Decl., Exs. 14-15; Morse Decl., Exs. 7-10. Within a month of her

[9] *See also, e.g.*, *Utah v. Evans*, 536 U.S. 452, 454 (2002) (using "technical literature" and "expert opinion" to identify and interpret a term); *Lubrizol Corp. v. EPA*, 562 F.2d 807, 816 & n.23 (D.C. Cir. 1977) ("The Supreme Court has identified those people who are familiar with 'the field,' or 'the art or science' being regulated, as proper sources for the meaning of words … ."); *Alsea Valley All. v. Evans*, 143 F. Supp. 2d 1214, 1217 (D. Ore. 2001) (expert opinion permissible to explain complex material, but not regarding sufficiency of the record).

appointment, HHS did exactly that, unlawfully terminating 81 grants without explanation. *See Healthy Futures of Texas v. Dept of Health and Human Servs.*, No. 18-cv-992, 2018 WL 2463074, at *4 (D.D.C. June 1, 2018). *One day* after the first court found those terminations unlawful, Defendants issued the new FOA.[10] This history strongly suggests that the new FOA is a continuation of Defendants' attempt to kill the TPPP through whatever means are available, making it appropriate to consider extra-record material to prove whether that is the case.

Defendants' bad faith is also shown by their shifting and prejudged rationales and the selective nature of the administrative record. Outside of the courtroom, Defendant Huber has been clear that the supposed ineffectiveness of the Program is only one of many reasons that TPPP should be "abolished" and funds redirected toward sexual risk avoidance grantees. To take just one example, Huber repeatedly provided materials to HHS before her appointment that argued that the Program "[n]ormalizes teen sex," is "[a]nother location for Planned Parenthood funding & staffing," and is part of the "[m]yth of 'evidence based programs'"—*before* briefly arguing that it is "[i]neffective." Dubner Decl., Ex. 14 at 6-7. *After* joining HHS, she justified HHS's unlawful attempt to terminate the grants not only because it is "ineffective" but because "it's a current funding stream for Planned Parenthood" and it "normalizes teen sex." *Washington Watch with Tony Perkins*, Family Research Council (Aug. 14, 2017), www.frc.org/wwlivewithtonyperkins/bishop-harry-jackson-valerie-huber-e-calvin-beisner ("*Washington Watch*"). While she provides these justifications to sympathetic audiences, they are troublingly absent from the administrative record.[11]

---

[10] *See Healthy Futures of Texas v. HHS*, --- F. Supp. 3d ----, 2018 WL 2471266, at *6 (D.D.C. June 1, 2018) ("HHS formally opened the recompetition on April 20, 2018, the day *after* this Court orally announced in *Policy and Research, LLC* that the agency's decision to shorten the project periods of four TPPP grantees without providing any explanation for doing so violated the APA."); *id.* (describing HHS's approach as "willful blindness").

[11] Defendant Huber has also shown a willingness to shade the truth publicly about her efforts to abolish the Office of Adolescent Health ("OAH"), which manages the Program and which she discussed eliminating with HHS officials. *Compare Teen Pregnancy Prevention Programs Lose Funding*, WOSU Public Media (Sept. 4, 2017) (48:25-48:40), http://radio.wosu.org/post/teen-pregnancy-

This selective assembly of the administrative record also excluded contrary evidence. The longtime Director of OAH—one of the offices that issued the FOA and the office that runs TPPP—explained in writing why the information contained in two of the documents in the record was incorrect and did not call the existing program into question. *Compare* AR 000442-43, 000029-31 *with* Dubner Decl., Ex. 20. Yet the record does not include *any* documents reflecting the Director's analysis. *See, e.g.*, *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) ("The whole administrative record … consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position." (internal quotation marks omitted); *Oceana, Inc. v. Pritzker*, No. 16-cv-6784, 2017 WL 2670733, at *2 (N.D. Cal. June 21, 2017) ("An agency may not exclude information it considered on the grounds that it did not rely on that information."). Similarly, HHS relies on the findings of a draft study by Abt Associates that was presented at a panel conference in November 2017. AR 0008-22. But it omits two studies presented at the very same panel that discussed positive findings from the same series of replications—one of which was authored by OAH staff and one of which was commissioned by HHS and authored by Abt Associates. *See* Morse Decl., Exs. 1-3. It also omits multiple program evaluations that Abt Associates conducted for HHS, which were published in the peer-reviewed *American Journal of Public Health* alongside other program evaluations and numerous articles written by OAH staff or funded by HHS that evaluated the results of the 2010–2015 grant cycle and their implications for refining the Program. *See* Morse Decl., Exs. 4-5.

This strong showing of bad faith provides a second basis for the Court to consider materials outside the administrative record as Defendants have defined it.

---

prevention-programs-lose-funding-0#stream/0 (Q: "I've read that [OAH] may be eliminated—is that something that's on the schedule for HHS?" A: "To my knowledge, there have really not been discussions in that regard."), *with* Dubner Decl., Exs. 14-15 *and* Morse Decl., Exs. 7-10.

III. The 2018 Tier 1 FOA Is Unlawful

For nearly a decade, Congress has charted a clear, unchanging path for the TPPP, including, most relevantly, the requirement that 75% of its substantive funding go to "replicating programs that have been proven effective through rigorous evaluation." 132 Stat. at 733. Defendants concede that this language provides "restrictions" and "guidance" for their duty to implement the Program. Defs.' Br. at 1, 16. But their defense of the 2018 Tier 1 FOA removes all content from that guidance, allowing them to substitute their own judgment for that of Congress. Similarly, they defend their imposition of mandatory abstinence-only principles, against Congress's carefully considered choice otherwise, by pretending that phrases with a specific meaning among public health practitioners—and, most importantly, in Defendants' own writing—have virtually no meaning at all. None of Defendants' arguments save the 2018 Tier 1 FOA from its manifest flaws.

A. The 2018 Tier 1 FOA Is Contrary to the 2018 CAA

1. The 2018 Tier 1 FOA Does Not Replicate Programs Proven Effective Through Rigorous Evaluation

Much of the parties' dispute comes down to a question of statutory interpretation: what did Congress mean when it directed HHS to "replicat[e] programs that have been proven effective through rigorous evaluation"? 132 Stat. at 733. Defendants do not and could not dispute that the FOA must be invalidated if the County's interpretation is correct.

Instead, as in their reviewability argument, Defendants assert that Congress's guidance has little if any content. Defendants seize on a single word, "program,"—ignoring the accompanying terms "replicating" and "rigorous evaluation"—to argue that HHS can replicate any "plan or system under which action may be taken toward a goal," Defs.' Br. at 18 (quoting the *third* definition of "program" in *Merriam Webster's Collegiate Dictionary* (11th ed.) ("*Merriam-Webster's*")). Defendants then assert that the "elements" of effective programs identified by the TAC or SMARTool, or the TAC and SMARTool themselves, come within that dictionary definition. *Id.* at 17, 19. Defendants further

claim that because the TAC and SMARTool attempted to synthesize their recommended elements from programs that had been found effective, all "[p]rojects incorporating these 'elements,'" however cobbled together, will necessarily have been "proven effective through rigorous evaluation." *Id.* at 19.

Defendants' dissection of the statute disregards basic canons of construction. Most fundamentally, Congress's words must be read in context to understand their meaning in light of the goals Congress sought to achieve. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("The definition of words in isolation, … is not necessarily controlling in statutory construction. … Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). And when Congress legislates in a specialized field, it often "incorporate[s] words having a special meaning within the field." *Corning Glass Works v. Brennan*, 417 U.S. 188, 201-02 (1974). In interpreting such terms of art, "it is proper to explain them by reference to the art or science to which they are appropriate." *Id.* (internal quotation marks and alterations omitted). This is so even when the words Congress chose could carry a more generic meaning outside of the particular field at issue.[12]

Here, Congress was creating evidence-based public health programs. Within the field of public health and its subfield of sexual health education, the concept of programs—and more specifically, replicating programs and rigorous evaluation of programs—is well established and well understood. *See* Kantor Decl. ¶¶ 14-16. As explained by Dr. Leslie M. Kantor, the Chair of the Department of Urban-Global Public Health at the Rutgers School of Public Health and a public health professional with three decades of experience in program development, implementation, and

[12] *See, e.g.*, *id.* (finding "working conditions" to be term of art); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 371-72 (1986) (finding "charges," "classifications," and "practices" to be terms of art); *Cable Arizona Corp. v. Coxcom, Inc.*, 261 F.3d 871, 874 (9th Cir. 2001) (finding "dedicated" to be term of art).

evaluation, a "program" is a "planned, coordinated group of activities, processes, and procedures designed to achieve a specific purpose" and includes "manuals and appropriate training and technical support." Kantor Decl. ¶ 16. Indeed, the TAC and the SMARTool—the very sources Defendants purport to find authoritative in this field—both use similar definitions. *See* Pl.'s Br. at 18-19 & n.3. Neither the TAC nor the SMARTool is a "program" under this definition, nor does either describe themselves as such. *See id.*; Kantor Decl. ¶¶ 20-23 (explaining that "the TAC and SMARTool are guidelines for choosing a program, much like a school district might consider certain guidelines in choosing a new math text book," and "cannot be used as programs any more than the school district's guidelines are a textbook which can be used to teach math to students"). And, outside of this litigation, even Defendants view the SMARTool as simply a tool. Two months *after* issuing the FOA (and two weeks after the County explained in its original complaint why replicating elements of the SMARTool is inconsistent with the 2018 CAA), Defendants proposed a data collection referring to the SMARTool as "a tool for sexual risk avoidance (SRA) curriculum developers and implementing organizations," not a program. Morse Decl., Ex. 5 at 2.

Thus, in the context of evidence-based public health programs, Congress's guidance has a clear meaning—and one that precludes Defendants' approach in the 2018 Tier 1 FOA. Defendants' preferred dictionary meaning, by contrast, is internally inconsistent and often incoherent. As a preliminary matter, Defendants' argument depends on rejecting the very dictionary they rely on. Relying on the SMARTool and TAC, Defendants assert that "a curriculum is not a 'program.'" Defs.' Br. at 19. But *Merriam-Webster's* explicitly provides "curriculum" as a definition of "program." Defendants' argument appears to be that the dictionary definition trumps the definition in the two tools, except when the tools' definition trumps the dictionary definition. This exposes their proposed "ordinary meaning" for what it is: a self-servingly hand-picked definition, rather than the meaning used in the field and intended by Congress.

Similarly, in the 2018 Tier 1 FOA, Defendants identified the TAC and SMARTool as the "programs" that applicants would "replicate." *See, e.g.*, Dubner Decl., Ex. 1 at 3. Now, in litigation, Defendants assert that the "elements" identified by the TAC and SMARTool are themselves the "programs." *See, e.g.*, Defs.' Br. at 19 ("HHS did not err in determining that the 'essential elements' outlined in the FOA constitute 'programs.'").[13]

But even if replication of *elements of* programs were compatible with Congress's mandate of replication of programs, Defendants cannot claim that these elements have been rigorously evaluated and proven effective. At most, they say some "[p]rojects incorporating those 'elements'" have been. *Id.* None of the sources they cite evaluate the SMARTool or TAC, much less in a rigorous evaluation. *Cf.* Kantor Decl. ¶ 24 ("[T]he TAC and the SMARTool are not themselves 'programs,' and have not been 'rigorously evaluated' as such for effectiveness … ."). Indeed, Defendants' recently proposed data collection mentioned above is intended to obtain "preliminary evidence on the effectiveness of SRA curricula that are aligned with the SMARTool." Morse Decl., Ex. 5 at 2 (emphasis added). Thus, outside of this courtroom, Defendants recognize the absence of even *preliminary* evidence on the effectiveness of programs that embody the SMARTool's factors, belying their argument that the new FOA replicates proven programs by replicating the elements of the tools.

Defendants' litigation position, moreover, is flatly inconsistent with their purported rationale for jettisoning their previous approach. They claim that a review of the 2010–2015 replications showed that the programs being replicated were not always effective. But the TAC and SMARTool

[13] This is not the only time Defendants' motion rewrites the 2018 Tier 1 FOA. For example, Defendants assert that the new 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," purporting to quote directly from the new FOA. Defs.' Br. at 2 (citing Dubner Decl., ECF No. 33, Ex. 4 at 4). In fact, they are quoting not from the 2018 Tier 1 FOA but the *2010* Tier 1 FOA. The quoted language appears nowhere in the new FOA; rather, as the County showed in its opening brief and Defendants do not dispute, the concepts of proof and rigorous evaluation are altogether missing. *See* Pl.'s Br. at 12.

would allow applicants to select programs that had inconclusive or negative findings in this review. *See* Kantor Decl. ¶¶ 24-25. Nothing in the new FOA prevents Defendants from funding programs that have already been proven *in*effective, provided they echo the elements in the TAC or the SMARTool.

Defendants' attempt to call the 2010 and 2015 FOAs into question also fails. Citing the TAC and SMARTool, Defendants make the banal point that a curriculum is just one part of a sexual health education program. Defs.' Br. at 19. But the 2010 and 2015 FOAs explicitly recognized this, requiring replications of programs rather than merely the curricula they included. *See, e.g.*, Dubner Decl., Ex. 3 at 3 ("Funding is available for two broad program types: 1) *curriculum-based programs* … and 2) youth development programs …." (emphasis added)); Dubner Decl., Ex. 9 at 13 (defining an implementation-ready programs as, *inter alia*, a "program [that] has clearly defined curricula").

Finally, Defendants argue that they are entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Skidmore* deference is a minimal form of deference, applicable only to the extent an agency's litigation position is persuasive or long-standing. *See generally Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 825-33 (9th Cir. 2012) (analyzing *Chevron* and *Skidmore* deference). Under *Skidmore*, an agency's litigation position only receives such weight as its "thoroughness, rational validity, and consistency with prior and subsequent pronouncements" warrant. *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1068 (9th Cir. 2003). No level of deference can "go[] beyond the limits of what is ambiguous and contradict[] what … is quite clear." *Whitman*, 531 U.S. at 481. Defendants' analysis lacks both thoroughness and rational heft, as discussed above, and is directly contrary to the agency's prior pronouncements. Even if *Skidmore* deference applies, it cannot save the agency's tortured and makeweight interpretation.

2. The 2018 Tier 1 FOA Unlawfully Transfers Funds to the Sexual Risk Avoidance Education Program ("SRAEP") and Tier 2 Appropriations

After attempting to strip Congress's words of their meaning, Defendants do the same with their own words. As the County showed in its opening motion and Dr. Kantor further confirms, the terms used in the new FOA—"optimal health," "cessation support," "clearly communicate risk," and "provid[e] skills to avoid sexual risk," 2018 Tier 1 FOA at 14-16—are terms that Defendant Valerie Huber and other abstinence-only proponents have used for years to describe the "sexual risk avoidance model." *See* Pl.'s Br. at 8; Dubner Decl., Exs. 10-12; Kantor Decl. ¶¶ 26-32. As a result, the FOA represents an invalid shifting of TPPP funds to abstinence-only programs—a wholly separate Congressional appropriation. In their motion, by contrast, Defendants suggest that these terms are only "general guidelines," Defs.' Br. at 24, broad hortatory terms that have no real substance.

This view cannot be squared with the history of these terms or the emphasis they are given in the new FOA. The prioritized terms have a particular meaning within the field of sex education. *See* Pl.'s Br. at 8; Dubner Decl., Ex. 10-12; Kantor Decl. ¶¶ 26-32. Indeed, the definitions in the new FOA are continuations of the same abstinence-only ideology rejected by Congress in creating TPPP, now couched in anodyne terms. *See, e.g.*, Kantor Decl. ¶¶ 26-32 (explaining, e.g., that "cessation support" is "a repackaging of the concept of 'secondary virginity' used in abstinence-only-until-marriage curricula in the 1980s, '90s and early 2000s").[14] Defendants' argument that the new FOA "do[es] not comport with SRAE[P]'s mandate to 'exclusively' teach 'refraining from non-marital sexual activity,'" Defs.' Br. at 24 (quoting 2018 CAA, 132 Stat. at 733), is therefore incorrect. The

[14] *See, also, e.g.*, Valerie Huber, *From First Blush to Sexual Chaos*, at approx. 3:30, YouTube (Mar. 3, 2015), www.youtube.com/watch?v=b8orU7_ISKM ("[W]hen we're having this conversation in the general public, it takes on a life of its own, and we have to talk about things differently, and in a way that can resonate with those who may not have a faith perspective … . "); *id.* at approx.. 58:30-59:05 ("[W]e don't use the word chastity, and we are moving away from the word abstinence. And the reason for that is the baggage attached to both of those terms in the public arena.").

concepts the County has highlighted are not broader than sexual risk avoidance, as Defendants contend, but the very core of it.

Equally important for the purposes of this case, these terms are *untested*. Kantor Decl. ¶ 33. Engrafting these messages onto existing programs "shift[s] programs further away from being evidence-based." *Id.* Indeed, because these concepts have not been proven effective, they "may actually interfere with the likelihood that a chosen or developed program will be effective." *Id.* Thus, even if these mandated priorities did not amount to an augmentation of SRAEP with TPPP funds, they would violate the 2018 CAA by thwarting the goal of replicating programs that have been proven effective through rigorous evaluation.

For this very reason, Defendants also fail in their attempt to explain why they are not also unlawfully transferring funds to the *Tier 2* appropriation for testing new and innovative teen pregnancy interventions. Defendants contend that prospective Tier 1 grantees are "not being asked to test unproven strategies," Defs.' Br. at 23, but that is precisely what the new FOA does in requiring applicants to infuse "every component" of their projects with "untested content," Kantor Decl. ¶¶ 33-34, and what Congress separately funded under the Tier 2 appropriation. 2018 CAA, 132 Stat. at 733.

B. The 2018 Tier 1 FOA Is Arbitrary and Capricious

As Defendants say, the APA requires that they lay out a "rational connection between the facts and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). But they cannot identify *anywhere* in the record where they attempt to connect their new approach to their supposed concerns—and certainly not in the new FOA itself, which does not even "display awareness that it is changing position." *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 978 (9th Cir. 2015). None of Defendants' arguments overcome the several flaws the County identified in its opening brief:

1. Lack of a Reasoned Explanation.

When changing policy, an agency must "include a reasoned explanation … for disregarding facts and circumstances that underlay . . . the prior policy." *Id.* (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)) (internal quotation marks omitted). The 2018 Tier 1 FOA is completely silent as to what facts justify its 180-degree turn, which should end the inquiry. Instead of pointing to anything in the new FOA, Defendants cobble together three categories of "explanation" that supposedly undergird their analysis. None of these come close to justifying Defendants' actions, whether viewed singly or in combination.

Most significantly, Defendants point to a press release and a PowerPoint summarizing an unpublished study (the "Juras study") as supposed justification for "tak[ing] a different approach with the TPP Program." Defs.' Br. at 27. The facts in the press release, which merely restates Defendant Huber's preexisting criticisms of TPPP, were rebutted in detail by OAH staff, an analysis that Defendants tellingly leave out of the administrative record. *See* Dubner Decl., Ex. 20 at 4-5; *see Mt. Diablo Hosp. v. Shalala*, 3 F.3d 1226, 1232 (9th Cir. 1993) ("[A]n action will not be upheld where the agency has intentionally omitted evidence from consideration").

Worse, Defendants' brief misrepresents the Juras study. Defendants claim that the study "showed that there was little evidence that any specific program affected outcomes," Defs.' Br. at 27. Defendants reach this conclusion by misreading the authors' statement that they found "[n]o strong evidence that any program or individual characteristics affected outcomes." AR0017; *see* Defs.' Br. at 6. In context, it is clear that this statement refers to the absence of strong evidence for the effectiveness of any *program characteristics*, not (as Defendants have it) the effectiveness of any *programs*. Indeed, on the very same page, they report "[s]uggestive evidence that two *program characteristics* positively affected outcomes." AR0017 (emphasis added). This follows from the purpose of the study, which was to answer the question "What do successful programs have in

common?"—not to evaluate whether particular programs were successful. AR 0010. Even when correctly read to refer to program *characteristics*, the Juras study does not offer the failure to find positive impacts as a definitive conclusion but surmises that it may be due to an insufficient evidence base, e.g., "not enough variation across studies to model" or "variation correlated with unmeasured characteristic." AR 0020. And where effectiveness of a *program* has been studied, the authors reported on the very first page of the PowerPoint that "[t]welve of the evaluations [funded by OAH] found evidence of effectiveness," AR 0009, belying Defendants' interpretation.

Far from supporting Defendants' use of the TAC and SMARTool, the Juras study actually undermines it. The "Key Question" of the Juras study, as just noted, was whether any particular characteristics—that is, elements—of effective programs could be isolated. AR 0010. This is, of course, the same methodology of the TAC and SMARTool, which have never been subjected to a similar evaluation. *See* Kantor Decl. ¶ 24.[15] If anything, the Juras study contradicts the premise that a program is "proven effective" if it merely "replicates the essential elements" of successful programs.

Of equal importance, the record shows absolutely no consideration of an obvious alternative to the radical departure made in the 2018 Tier 1 FOA. *See Mt. Diablo*, 3 F.3d at 1232 ("Agency actions cannot be sustained where the agency has failed to consider significant alternatives."). Both the Juras study and HHS's *American Journal of Public Health* article reported statistically significant evidence of positive outcomes for many of the Tier 1 replications and new Tier 2 programs in the 2010–2015 evaluations. If these findings warranted a change, as Defendants purport to believe, an

[15] The stated purpose of the Juras study is almost indistinguishable from that of the TAC and SMARTool. *Compare* AR 0011 (Juras study: "Rigorously answering this question can … [h]elp program developers design more effective programs [and] [h]elp practitioners select programs most appropriate to the characteristics of their communities") *with* AR 1903 ("Although the TAC is designed primarily to help you select effective programs, it can also be used to help you … *assess* curricula and to select one that is likely to be effective at changing behavior in your community … [and] *develop* from scratch a new effective curriculum for your community.") *and* AR 1829("[T]he SMARTool can serve as a resource to curriculum developers and educators and offer methods for comparing different curricula to one another.").

obvious change would be to limit the list of programs that could be replicated to the programs found successful in these evaluations of 2010 -2015 grant projects. Defendants might not have ultimately chosen this approach, but the absence of any evidence that they ever entertained any alternatives other than jettisoning the entire TPP Evidence Review—as Defendant Huber had predetermined to do, *see* Dubner Decl., Exs. 14-15—shows that the agency "failed to consider significant alternatives" and its action therefore was arbitrary and capricious. *Mt. Diablo*, 3 F.3d at 1232.[16]

In addition to Defendants' supposed concerns about the results of the 2010–2015 grant cycle, Defendants point to the TAC and SMARTool themselves—but as discussed above, neither tool supports its use as a substitute for rigorous evaluation. *See supra* 15-20; Kantor Decl. ¶¶ 24-25. Finally, Defendants point to the 2018 Tier 1 FOA's background section and its mandatory abstinence-only priorities, but cannot identify any reasoned analysis of *why* the "replicating elements" strategy or the mandate of abstinence-only principles would be expected to improve the situation described in the background section. *See* 2018 Tier 1 FOA at 6-8, 14-16. Indeed, the 2018 Tier 1 FOA background section is largely drawn from the 2015 Tier 1 FOAs' background section, *see, e.g.*, Dubner Decl., Ex. 9 at 8-13, and Defendants provide no reason that the same basic facts suddenly point to a diametric solution. *See Fox Tele. Stations*, 556 U.S. at 516 (requiring a "reasoned explanation … for disregarding facts and circumstances that underlay … the prior policy"); *Ctr. for Biological Diversity v. Zinke*, 868 F.3d 1054, 1061 (9th Cir. 2017) ("Our task is to review the change of course to ensure that it is based on new evidence or otherwise based on reasoned analysis.").

[16] Defendants assert that the "County disagrees with HHS's assessment of the success of these replication studies." Defs.' Br. at 29. But the County's arguments are not based on its assessment of the studies; they are based on the chasm between the studies and what HHS actually chose to do.

2. Reliance on Factors That Congress Has Not Intended It to Consider.

While Defendants may be entitled to "take additional considerations into account once [they] ha[ve] determined that a proposed project 'replicat[es] programs … proven effective," Defs.' Br. at 27, what they have done in the 2018 Tier 1 FOA is something quite different: they have interposed specific abstinence-only content as a mandatory component of all programs, even though this content has not been rigorously evaluated and may require deviations from the replication of effective programs. *See supra* 15-20. Indeed, the first "priority" the new FOA mandates is the imposition of an "optimal health" model even though, by Defendants' own acknowledgement, that model *does not yet exist* and therefore cannot have been proven effective. *See* Pl.'s Br. at 18 & n.2; Ex. 26 at 00:55-01:15.[17]

Defendants again deny that the 2018 Tier 1 FOA mandates abstinence-only principles, which, as already discussed, cannot be credited. Similarly, Defendants assert that the new FOA "adequately explains why its public health considerations are consistent with Congress's stated goals for the TPP Program," Defs.' Br. at 27-28, but they tellingly do not cite to any place in the FOA (or elsewhere) where this explanation can be discerned. Even leaving aside the inappropriateness of the *mandatory* imposition of unproven content, to the detriment of replication, the absence from the record of any explanation of how the "priorities" advance Congress's goals renders the new FOA arbitrary and capricious.

[17] Defendants do not dispute this point, instead pointing to one of the two sources in the FOA that purportedly underlie the "optimal health" concept. Neither remotely supports the FOA's usage. One, the Constitution of the World Health Organization, never uses the phrase. *See* AR 3220-37. The other—a four-paragraph summary of a journal's mission, combined with an advertisement for paid subscriptions—simply states a platitude. AR 0006-07 ("Optimal health is not a static point that we either achieve or do not achieve. It is a dynamic condition that changes with life circumstances. … Optimal health is a dynamic balance of physical, emotional, social, spiritual, and intellectual health.").

3. Acting Contrary to the Record.

Defendants assert that the County "regards the TPP Evidence Review as synonymous with Congress's directive that HHS fund projects 'replicating programs proven effective.'" Defs.' Br. at 28. This is a strawman; the County's claim is that Defendants arbitrarily and capriciously ignored and made decisions contrary to the record HHS had assembled, not that Congress mandated the TPP Evidence Review. HHS updated the TPP Evidence Review simultaneously with the new FOAs, finding that four additional programs had been proven effective through rigorous evaluation, but finding insufficient evidence for 12 others. Dubner Decl., Ex. 25. Yet the 2018 Tier 1 FOA makes *any* program eligible for replication—including the programs the TPP Evidence Review simultaneously rejected—so long as they can meet the "essential elements" outlined in the TAC or SMARTool. Congress by no means mandated the TPP Evidence Review, but it did mandate that agencies not act contrary to the record the agency has developed.

As to the sources cited in the 2018 Tier 1 FOA, which make up the vast majority of the administrative record as defined by Defendants, Defendants make no attempt to show how they support any of the decisions made in issuing the FOA. In particular, Defendants do not dispute that the sources repeatedly find comprehensive sexual education superior to abstinence-only programs. *See* Pl.'s Br. at 27 & nn. 5-6. Defendants again dispute whether the new FOA's mandatory priorities constitute abstinence-only, but there is no dispute that if they are (as the County showed above), the 2018 Tier 1 FOA is contrary to the evidence in the record.

4. Failure to Consider an Important Aspect.

Finally, Defendants do not dispute that one of the aspects they must consider in determining whether to fund a program is "whether the program has achieved proven results." *Healthy Teen Network*, 2018 WL 1942171, at *9. FOA has *no* requirement that a grant applicant make any showing

about a program's prior effectiveness. *See* Dubner Decl., Ex. 1 at 58-62. Defendants are entirely silent as to how this can possibly cohere with Congress's express requirement.

C. Defendants' "Unalterably Closed Mind" Requires Vacatur

In moving for summary judgment against the County's abuse-of-discretion claim, Defendants misstate the law. Defendants assert that agency officials' "unalterably closed mind" is irrelevant as long as some other officials have a subsequent or final role in decision-making. Defs.' Br. at 31-32. This is inconsistent with both the cases Defendants cite and the County's cases ignored by Defendants.

Defendants principally rely on *Alaska Factory Trawler Ass'n v. Baldridge*, 831 F.2d 1456, 1467 (9th Cir. 1987), which held that "[a] decision-maker in an informal rulemaking should be disqualified only when 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." Because Defendant Huber is not "*the* 'decision-maker' here," Defendants assert, her unalterably closed mind is irrelevant. Defs.' Br. at 32 (emphasis added). But she in fact is the decision-maker here; as the Amended Complaint alleges and Defendants do not dispute, "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." Am. Compl. ¶ 83. In any event, *Alaska Factory Trawler Ass'n* said no such thing; to the contrary, it entertained a claim against an official who had only "participat[ed]" in the decision as part of a lower-level Council and the Secretary of Commerce's review process. *Id.* The court's actual basis of decision was merely that participation by the same person at multiple levels of the process did not present a conflict of interest. *Id.*

Similarly, in *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, No. 08-cv-2649, 2009 WL 185423 (N.D. Cal. Jan. 20, 2009), the plaintiffs raised "serious questions" as to whether "DOJ's rule was so tainted by bias that it was not a valid exercise of rulemaking" by showing possible bias by "a

member of the working group developing the regulation"—not the ultimate decisionmaker, the Attorney General. *See id.* at *9; *see also* Motion for Partial Summary Judgment and/or Preliminary Injunction, *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, No. 08-cv-2649, ECF No. 56, at 24-28 (N.D. Cal. Dec. 26, 2008) (spelling out basis of plaintiffs' unalterably closed mind argument). Or, in *Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830 (E.D. Cal. 2008), the court disqualified the Secretary of the Department of Housing and Urban Development even though the Fair Housing Act Commissioner, rather than the Secretary, was "the decision-making official for the rule at issue." *Id.* at 848.[18]

The cases Defendants rely on to argue that Ms. Huber's partiality does not rise to the level of an unalterably closed mind illustrate just how egregious the facts are in this case. In *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1210 (D.C. Cir. 1980), for example, the agency official had given a single speech containing a "general expression of solidarity" with an affected group, a general call for "congressional candidates sympathetic to her agency's mission [that] did not bear on any specific issues in the case," and remarks bearing "very generally" on a single factual issue in the case *after the record had been closed and the facts evaluated by the agency*. Of course, "[m]ere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not … disqualify a decisionmaker." *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976). In *C & W Fish Co. v. Fox*, 931 F.2d 1556, 1564-65 (D.C. Cir. 1991), the official had previously served as the chairman of a group advocating on a general policy issue (the ban of a fishing technique) and said after his appointment that there was "no question" about the ban. The court

[18] To be sure, *Nehemiah* questioned whether vacatur would be appropriate *solely* on the basis of the Secretary's bias, given that he "was never involved with [the rulemaking] process in the first instance." 546 F. Supp. 2d at 848. The court did not need to reach this issue because it vacated on other grounds—but it proceeded to disqualify the Secretary from proceedings on remand. *Id.* This suggests that Defendant Huber's disqualification from further proceedings is an appropriate equitable remedy even if the Court allows HHS to proceed with the grant competition under the 2018 Tier 1 FOA. *Cf.* Am. Compl. at 39 (requesting "any other relief this Court deems appropriate").

refused to disqualify the official based on his "mere discussion of policy or advocacy on a legal question" or his holding of a "policy view[] on [a] question[] of law." *Id.* at 1565 (quoting *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1171, 1174 (D.C. Cir. 1979)).

Neither approaches the level of consistent, unrelenting, and single-minded statements Defendant Huber has made[19] about the exact grant program at issue here. Immediately before her appointment, she vigorously lobbied HHS on multiple occasions to "[d]efund the *Teen Pregnancy Prevention (TPP) Program* and restore this funding to SRA programs." Dubner Decl., Ex. 14 at 4; *see also* Dubner Decl., Ex. 15; Morse Decl., Exs. 7-10. After her appointment, she continued to show her animus for the program, calling it "a waste of taxpayer dollars. It's ineffective. Most parents would not support it, and … it's a current funding stream for Planned Parenthood." *Washington Watch* (19:25-20:00). This is not a mere "policy view[] on [a] question[] of law," as in *C & W Fish*; 931 F.2d at 1565, but a preconceived view that specific entities and programs should be precluded from a specific stream of funding, and that that funding should instead be redirected toward other entities—the exact choice Defendants made here. It is a textbook example of prejudgment of factual matters that the Department was required to impartially review.[20]

---

[19] Defendants assert that the Court should disregard Defendant Huber's statements prior to her appointment—even those made just weeks before, in her direct lobbying on this precise issue—because they are not part of the administrative record. Defs.' Br. at 32. But, as explained *supra*, courts regularly consider extra-record evidence where that evidence makes out "a 'strong showing' of agency bad faith." *Nehemiah*, 546 F. Supp. 2d at 848 (quoting *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988)). This is especially important in the context of an "unalterably closed mind" claim because otherwise "it is hard to imagine what evidence could possibly satisfy the standard … in the context of a prejudgment claim where the comments at issue were made outside the administrative record." *Id.*

[20] To the extent that the Court finds the County's evidence suggestive but not dispositive, or finds it necessary to determine Defendant Huber's precise role in the agency's decision-making, the answer is not to grant Defendants' motion but to deny both parties' motions and proceed to discovery. *See Animal Def. Council*, 840 F.2d at 1437 (discovery permissible where plaintiff makes a "strong showing of bad faith" (quoting *Public Power Council v. Johnson*, 674 F.2d 791, 795 (9th Cir. 1982)); *see supra* 11-15. But the Court need not reach this issue if it finds for Plaintiffs on another ground.

D. Defendants' Actions are *Ultra Vires*

Defendants do not dispute that the County has properly alleged an *ultra vires* claim. They merely recycle their arguments regarding HHS's purportedly unlimited discretion to act in the TPPP arena, seeking to distinguish recent findings of *ultra vires* action in other grants cases as due to the "detailed limits on grantmaking discretion" imposed by the statutes at issue in those cases. Defs.' Br. at 25. As explained above, the statute here likewise limits HHS's discretion, enumerating specific statutory factors that must be used in administering TPPP grants (*see supra* 3-7). Defendants point to no principle of *ultra vires* law, and there is none, that would limit the doctrine to particular types of grant statutes. Rather, when agencies act "beyond their jurisdiction"—as HHS here has done by deliberately disregarding Congress's directives (*see supra* 15-21)—"what they do is *ultra vires*." *City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087 at 1095-96 (quoting *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013)).

E. Defendants' Motion for Summary Judgment on Count Three Should Be Denied

Finally, Defendants move for summary judgment on the County's claim that Defendants violated 45 C.F.R. § 87.3(l), which provides that "[d]ecisions 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." In moving for summary judgment, Defendants *entirely ignore* the first half of the regulation, portraying it as *solely* "prohibiting decisions 'on the basis of the religious affiliation, or lack thereof, of a recipient organization.'" Defs.' Br. at 32 (quoting 45 C.F.R. § 87.3(l)). They are completely silent regarding the County's allegation that "Defendants have engaged in impermissible political interference in … the drafting and administration of the 2018 Tier 1 FOA," Am. Compl. ¶ 114, and do not deny that the Amended Complaint sufficiently pleads that claim.

Even as to the religious prong that Defendants portray as the totality of § 87.3(l), Defendants' argument misses the mark. Defendants rely exclusively on Establishment Clause cases. Defs.' Br. at 33. But the County did not bring an Establishment Clause claim, and § 87.3(l) is not the Establishment Clause. If the requirement that grant decisions be "made on the basis of merit, not on the basis of the religious affiliation, or lack thereof, of a recipient organization" was coextensive with the Establishment Clause, it would be wholly redundant. Defendants' interpretation of § 87.3(l) thus cannot be correct. *See, e.g.*, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 668-69 (2007) (rejecting reading that would "render the regulation entirely superfluous"). Because Defendants suggest no other basis for granting summary judgment, their motion must be denied.

IV. If the Court Does Not Grant Summary Judgment to Multnomah County, a Preliminary Injunction Is Appropriate

If the Court grants summary judgment to Multnomah County on any of its claims, the County's request for a preliminary injunction will be moot. If the Court grants summary judgment or dismissal to Defendants on all claims, the request will likewise be moot. If, however, the Court grants summary judgment to Defendants on some (but not all) claims, or is unable to decide the motion for summary judgment on the current record, a preliminary injunction is appropriate to preserve the status quo and prevent irreparable injury to the County until the Court can resolve all claims. *See, e.g.*, *Regents of Univ. of Cal. v. Am. Broad. Cos., Inc.*, 747 F.2d 511, 514 (9th Cir. 1984) ("[T]he function of a preliminary injunction is to preserve the status quo *ante litem*.").

Defendants principally argue that the County has not established irreparable harm. But Defendants do not dispute that, once they award funds pursuant to the new FOA, those funds cannot be reclaimed, nor can other funds be made available to fund a lawful competition. This alone suffices to establish irreparable harm: if HHS uses its limited appropriation on this unlawful competition, there will be no funds to conduct a lawful competition in which Multnomah County can compete. *See* Pl.'s Br. at 33 & n.7.

Instead of addressing this indisputable irreparable harm, Defendants cite wholly inapposite cases. They rely on *Ctr. for Competitive Politics v. Harris*, 296 F. Supp. 3d 1219 (E.D. Cal. 2017), which dealt not with an unlawful governmental grant competition but with a plaintiff's decision not to fundraise from third parties rather than comply with a state law requiring disclosure of donors. The plaintiff "produce[d] no evidence to suggest that their significant donors would experience threats, harassment or other potential chilling conduct as a result of the ... disclosure requirement," and thus its rights were not actually burdened at all. *Id.* at 1225 (quoting *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1314 (9th Cir. 2015)). The plaintiff made no showing of harm to its activities and did not suggest it was unable to comply with the law; it just preferred not to. Here, by contrast, the County has explained in detailed declarations—ignored by Defendants—why it *cannot* comply with the new FOA as drafted, due to its imposition of abstinence-only requirements that conflict with Oregon law and preclude the County's proposed programs. *See* Pl.'s Br. at 32; *see also* Toevs Decl., Leonard Decl., Saunders Decl. Furthermore, the new FOA places the County in competition with numerous applicants who could not have applied under a lawful FOA that required replication of a "tool," materially decreasing the County's chances in the competition. *See* Pl.'s Br. at 31-32.

Defendants' reliance on *Caribbean Marine Servs. Company v. Baldridge*, 844 F.2d 668 (9th Cir. 1988), is even further afield. There, the Department of Commerce had ended a policy prohibiting women from serving as marine observers on fishing boats. *Id.* at 670. The owners of a fishing boat sought to enjoin the presence of a female observer, alleging with "no evidence" that their "employees would respond negatively to a female observer and that this subjective response might cost the owners money," that the "employees [might] assault or harass the observer and thereby subject them to an increased risk of liability," or that "they will catch fewer fish if a woman is on board." *Id.* at 675-76. That Defendants must compare the undisputed increase in competition faced by the County to this farcical speculation shows the weakness of their position.

As to the balance of the equities, Defendants' sole argument is that they might be unable to obligate all TPPP funds "by the end of the fiscal year" if they cannot do so pursuant to the rewritten FOA. Defs.' Br. at 35. The implication appears to be that Defendants would be unable to award funds after that date. As discussed above, that is incorrect; Defendants ignore "the equitable doctrine permitting a judicial award of funds" after a statutory appropriation has lapsed, "as long as the lawsuit was instituted on or before" the lapse date. *W. Va. Ass'n of Cmty. Health Cens., Inc. v. Heckler*, 734 F.2d 1570, 1577-78 (D.C. Cir. 1984); *see also City of Houston, Tex*, 24 F.3d at 1426. The law does not make Defendants' conduct irremediable simply because they waited until the last minute to enact their lawless scheme. *See supra* 2-3.

CONCLUSION

For the foregoing reasons and those stated in Multnomah County's opening motion, the Court should grant partial summary judgment to the County or, in the alternative preliminarily enjoin Defendants from awarding grants pursuant to the 2018 Tier 1 FOA.

Dated: July 27, 2018.

PACIFICA LAW GROUP LLP

s/ Gregory J. Wong

Jessica A. Skelton, OSB No. 102714
jessica.skelton@pacificalawgroup.com
Gregory J. Wong, *Admitted Pro Hac Vice*
greg.wong@pacificalawgroup.com
Alanna Peterson, *Admitted Pro Hac Vice*
alanna.peterson@pacificalawgroup.com
PACIFICA LAW GROUP LLP
1191 2nd Ave, Suite 2000
Seattle, WA 98101
Telephone: 206-245-1700
Facsimile: 206-245-1750

Jeffrey B. Dubner, *Admitted Pro Hac Vice*
jdubner@democracyforward.org
Josephine T. Morse, *Admitted Pro Hac Vice*
jmorse@democracyforward.org
Javier M. Guzman, *Admitted Pro Hac Vice*
jguzman@democracyforward.org

DEMOCRACY FORWARD FOUNDATION
1333 H Street NW
Washington, DC 20005
Telephone: 202-701-1773

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2018, I electronically filed the foregoing document with the Clerk of the United States District Court District of Oregon using the CM/ECF system which will send notification of such filing to all parties who are registered with the CM/ECF system.

DATED this 27th day of July, 2018.

s/ Gregory J. Wong