UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION,

Plaintiff,

v.

ROBERT R. KENNEDY, JR., Secretary of Health and Human Services, et al.,

Defendants.

Civil Action No. 25-1265 (ACR)

MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF

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Defendants Robert F. Kennedy, Secretary of Health and Human Services, Dorothy Fink, Acting Assistant Secretary for Health, and Amy L. Margolis, Deputy Director of the Office of Population Affairs (collectively, "Defendants" or "HHS"), respectfully move to dismiss the complaint or, in the alternative, for summary judgment pursuant to Federal Rules of Civil Procedure ("Rules") 12(b)(1), 12(b)(6), and 56.

INTRODUCTION

Plaintiff National Family Planning & Reproductive Health Association ("Plaintiff") brings this lawsuit, purportedly on behalf of fourteen of its members, while only identifying Essential Access Health and Missouri Family Health Council,[1] under the Administrative Procedure Act ("APA") (Counts I–IV), and, in the alternative, alleging that Defendants' actions are *ultra vires* (Count V). *See* Compl. (ECF No. 1). Plaintiff claims that HHS, under 45 C.F.R. § 75.371(a), has improperly withheld Title X grants for federally funded family planning services from Title X grantees, because HHS allegedly has failed to make any determination that the grantees violated any federal statutes, regulations, or the terms and conditions of a Federal award, and thus Defendants' actions allegedly are contrary to law. *Id.* ¶ 1. The gravamen of Plaintiff's Complaint is that grantees have not been paid monies that they are purportedly due under the notice of awards, and those funds allegedly should be restored. *Id.*

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[1] As previously mentioned, on June 25, 2025, Defendants notified Essential Access Health and Missouri Family Health Council that their Title X grants were restored, and each entity should have started to receive funding again. Thus, the claims relating to those entities are moot. *See* Defs.' Supp. Pre-Motion Notice (ECF No. 22). And because Plaintiff has not identified any other members in its Complaint besides those two entities who have allegedly suffered an injury, Plaintiff lacks Article III standing. *Id.* At the July 15, 2025, hearing, the Court stated it did not want briefing on this issue and ordered Plaintiff to either file an amended complaint or declaration identifying the other members. To the extent that Plaintiff fails to formally identify the other members, Defendants intend to supplement this motion with an argument that Plaintiff lacks Article III standing, for the reasons Defendants previously indicated in their Supplemental Pre-Motion Notice.

As discussed further below, this Court should dismiss the Complaint in its entirety. As a threshold matter, this Court lacks jurisdiction over Plaintiff's claims because Plaintiff's claims are fundamentally contractual and must be heard by the Court of Federal Claims. There is also a second jurisdictional barrier: Plaintiff's claims are not ripe for judicial review. Further, Plaintiff fails to state claim, because it is not challenging a final agency action, and Plaintiff has other adequate alternative remedies, which forecloses relief under the APA. As for Plaintiff's *ultra vires* claim, Plaintiff misses the mark completely because there is alternative review for this claim. Finally, should the Court nonetheless find that it has jurisdiction over Plaintiff's claims and there is final agency action, HHS's decision to temporarily withhold the funds is not arbitrary or capricious and not contrary to law.

BACKGROUND

I. Statutory and Regulatory Background

Congress enacted Title X of the Public Health Service Act, 42 U.S.C. §§ 300, *et seq.*, as a means of "making comprehensive voluntary family planning services readily available to all persons desiring such services." Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, § 2(1), 84 Stat. 1504 (1970). The statute authorizes the Secretary of Health and Human Services to "make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)." 42 U.S.C. § 300(a). Projects funded under this program provide the services "necessary to aid individuals to determine freely the number and spacing of their children." 42 C.F.R. § 59.1.

Family planning services "include a broad range" of methods and services, 42 U.S.C. § 300(a). Congress also provided that Title X grants "shall be made in accordance with such

regulations as the [HHS] Secretary may promulgate," 42 U.S.C. § 300a-4(a), and "shall be payable . . . subject to such conditions as the Secretary may determine to be appropriate to assure that such grants will be effectively utilized for the purposes for which made," 42 U.S.C. § 300a-4(b). The implementing regulations explicitly incorporate requirements found at 45 CFR part 75. *See* 42 C.F.R. § 59.9 ("Any funds granted under this subpart shall be expended solely for the purpose for which the funds were granted in accordance with the approved application and budget, the regulations of this subpart, the terms and conditions of the award, and the applicable cost principles prescribed in 45 C.F.R. part 75."). Regulations prescribe record retention and access requirements, 45 C.F.R. § 75.364, as well as remedies for non-compliance. 45 C.F.R. § 75.371–.372.

II. Factual Background

On March 31, 2025, the Office of the Assistant Secretary for Health ("OASH") notified fourteen alleged members of Plaintiff, including Essential Access Health and Missouri Family Health Council, that pursuant to 45 C.F.R. § 75.371(a) a disbursement under the Title X grant award was being temporarily withheld based on possible violations of the terms and conditions set forth in the notice of award. *See* Compl. ¶ 4; AR at 441–59. To assess compliance with the terms and conditions of the notice of award, OASH asked each entity provide a response or documents, including, but not limited to, a statement of position, a copy of nondiscrimination policies, and a copy of any complaints or grievances alleging discrimination against a job applicant on the basis of race. *Id.*

On April 10, 2025, grantees Adagio Health, Converge, Essential Access Health, and Missouri Family Health Council adequately responded to OASH's March 31 letters. *See* Ex. 1 at 000004–9, 18–20. Additional grantees AccessMatters, Bridgercare, and Maine Family Planning, provided responses partially addressing OASH's concerns. *Id.* at 00001–03, 10–17. Another set

of grantees—all Planned Parenthood affiliates—sent what was essentially a template letter response, with no underlying records. *Id.* at 000021–63.

On June 25, 2025, OASH notified the entities that either their funds were restored or requested additional information and/or documents to ensure compliance with the terms and conditions of the notice of award. More specifically, Adagio Health, Converge, Essential Access Health, and Missouri Family Health Council were notified that their Title X funding was restored, *see* Ex. 2; while AccessMatters, Bridgercare, Maine Family Planning, and the Planned Parenthood affiliates were notified that OASH remained concerned about possible violations of Federal civil rights law and requested additional information, including remedial steps taken, to confirm that any policies and practices that may be in violation of Federal civil rights laws have been appropriately addressed, *see* Ex. 3.

On July 16, 2025, the Planned Parenthood affiliates were notified in writing, as acknowledged by the affiliates' letters sent to OASH on April 10, that OASH did not receive a complete response to its March 31, 2025, letter, and, further, OASH did not receive any response to its June 25, 2025, letter from the Planned Parenthood affiliates; thus, OASH remained concerned about potential violations of Federal civil rights law and requested a complete response to its outstanding inquiries by 5:00 pm EDT on July 18, 2025; OASH also indicated that it was concerned about compliance with the records requirements provided in 45 C.F.R. 75.364. *See* Ex. 4. On July 18, 2025, the Planned Parenthood affiliates responded to OASH's letters, *see* Ex. 5, and OASH's review of the overdue material remains ongoing.

On July 23, 2025, AccessMatters, Bridgercare, and Maine Family Planning were notified that their Title X funding was restored. *See* Ex. 6. As of this filing, these entities should have started to receive funding again.

As of the date of this filing, the only entities whose funds remain paused are those that (a) provided no records in response to the March 31 Letter and admitted that they had not "respond[ed] fully"; that also (b) provided no records and response at all to the June 25, 2025, Letter; and that also (c) only finally produced records for review, as required under 45 C.F.R 75.364, on July 18, 2025, approximately one week before this filing. *See* Ex. 5

III. Procedural Background

On April 24, 2025, Plaintiff filed this action purportedly on behalf of fourteen of its members against Defendants for temporarily withholding Title X funding. *See generally* Compl. Plaintiff alleges violations of the APA (Counts I–IV) and bring an *ultra vires* claim (Count V). *Id.* at 26–33.

On June 23, 2025, the parties filed their Pre-Motion Notice, *see* ECF Nos. 13, 14, and appeared for a Pre-Motion Conference on July 15, 2025, *see* July 15, 2025, Min. Entry for Video Proceedings. At the Pre-Motion Conference, the Court set a briefing schedule. *Id.*

In conformance therewith, Defendants now move to dismiss the Complaint or, in the alternative, for summary judgment.

LEGAL STANDARDS

I. Rule 12(b)(1)

Under Rule 12(b)(1), a plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A court considering a Rule 12(b)(1) motion must "assume the truth of all material factual allegations in the complaint and 'construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged.'" *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (quoting *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005)). A court

may examine materials outside the pleadings as it deems appropriate to resolve the question of its jurisdiction. *See Herbert v. Nat'l Acad. of Scis*., 974 F.2d 192, 197 (D.C. Cir. 1992).

II. Rule 12(b)(6)

Under Rule 12(b)(6), the Court may dismiss a Complaint where a plaintiff fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When resolving a motion to dismiss pursuant to Rule 12(b)(6), the pleadings are construed broadly so that all facts pleaded therein are accepted as true, and all inferences are viewed in a light most favorable to the plaintiff. *See Iqbal*, 556 U.S. at 678. However, a court is not required to accept conclusory allegations or unwarranted factual deductions as true. *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. Likewise, a court need not "accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Ultimately, the focus is on the language in the complaint and whether that sets forth sufficient factual allegations to support a plaintiff's claims for relief.

III. Rule 56

Summary judgment is warranted "when there is no genuine dispute as to any material fact and [] the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In cases challenging agency action under the APA, the district court "sits as an appellate tribunal," and review "is based on the agency record and limited to determining whether the agency acted arbitrarily or capriciously." *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009) (quotation marks omitted). A reviewing court may set aside agency action that is "arbitrary, capricious, an abuse of discretion," "otherwise not in accordance with law," or "unsupported by substantial

evidence." 5 U.S.C. § 706(2)(A), (E). Substantial evidence is that which "a reasonable mind might accept as adequate to support the [agency's] conclusion." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263 (D.C. Cir. 2016). This "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *Epsilon Elecs., Inc. v. Dep't of Treasury*, 857 F.3d 913, 918, 925 (D.C. Cir. 2017) (cleaned up). "Under this highly deferential standard of review, the court presumes the validity of agency action and must affirm unless the [agency] failed to consider relevant factors or made a clear error in judgment." *Nat'l Lifeline Ass'n v. FCC*, 983 F.3d 498, 507 (D.C. Cir. 2020) (cleaned up). So long as an agency "articulate[s] a satisfactory explanation for its action including 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) (internal quotation marks omitted), a court may not "substitute [its] judgment for the agency's," even if it "might have reached a different conclusion in the first place." *Epsilon Elecs.*, 857 F.3d at 918.

ARGUMENT

I. This Court Does Not Have Jurisdiction Over Plaintiff's Claims.

A. Plaintiff's Claims Belong in the Court of Federal Claims.

In its Complaint, Plaintiff seeks to reverse the temporary withholding of contractual agreements and obtain a court order that requires Defendants to pay out money it states is due under those agreements. *See* Compl. ¶ 1; *see also id.*, Prayer of Relief. Plaintiff's claims should be dismissed at the threshold because, as the Supreme Court recently confirmed, district courts lack jurisdiction under the APA "to enforce . . . contractual obligation[s] to pay money" against the federal government. *Dep't of Educ. v. California*, 145 S. Ct. 966, 968 (2025) (quoting *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002)). Rather, "the Tucker Act grants the Court of Federal Claims jurisdiction over suits based on 'any express or implied contract

with the United States.'" *Id.* at 968–69 (quoting 28 U.S.C. § 1491(a)(1)). That jurisdictional principle applies with equal force to any such obligations created by the grant agreements in this case. The proper course here would be for the parties to the grant agreements to seek appropriate recourse under the terms of the grant agreements—not for Plaintiff, as a non-party, to seek such relief through this suit.

"[T]he party asserting federal jurisdiction . . . has the burden of establishing it." *Jenkins v. Howard Univ.*, 123 F.4th 1343, 1347 (D.C. Cir. 2024) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006)); *see Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 603 (D.C. Cir. 2017) ("Before delving into the merits, we pause to assure ourselves of our jurisdiction, as is our duty."). To "bring a claim against the United States," the plaintiff must "identify an unequivocal waiver of sovereign immunity." *Franklin-Mason v. Mabus*, 742 F.3d 1051, 1054 (D.C. Cir. 2014); *see Perry Capital*, 864 F.3d at 619 (noting that sovereign immunity is "jurisdictional in nature"). Plaintiff here asserts claims under the APA, Compl. at 1, 26–33, which "provide[s] a limited waiver of sovereign immunity for claims against the United States 'seeking relief other than money damages' for persons 'adversely affected or aggrieved by agency action.'" *Crowley Gov't Servs., Inc. v. Gen. Servs. Admin.*, 38 F.4th 1099, 1105 (D.C. Cir. 2022) (quoting 5 U.S.C. § 702). "But even for claims that are not for money damages, the APA confers no 'authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.'" *Albrecht v. Comm. on Emp. Benefits*, 357 F.3d 62, 67 (D.C. Cir. 2004) (quoting 5 U.S.C. § 702). This "important carveout" to the APA's sovereign immunity waiver "prevents plaintiffs from exploiting" that waiver "to evade limitations on suit contained in other statutes." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012).

Here, Plaintiff's attempt to use the APA to compel the federal government to continue to provide funding under the terms of a grant agreement is "impliedly forbid[den]," 5 U.S.C. § 702, by the Tucker Act, 28 U.S.C. § 1491(a)(1)—which provides for judicial review of "any express or implied contract with the United States," *California*, 145 S. Ct. at 968 (quoting 28 U.S.C. § 1491(a)(1)). That is, "the Tucker Act . . . 'impliedly forbid[s]' contract claims against the government from being brought in district court under . . . the APA." *Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 618–19 (D.C. Cir. 2017) (citing *Albrecht*, 357 F.3d at 67–68). Thus—regardless of how a claim is styled—a district court lacks jurisdiction over that claim if it "is in 'its essence' contractual." *Id.* at 619 (quoting *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967 (D.C. Cir. 1982)).

That jurisdictional barrier exists for good reasons. It ensures that contract claims against the federal government are channeled into a court "that possesses expertise in questions of federal contracting law." *Alphapointe v. Dep't of Veterans Affairs*, 475 F. Supp. 3d 1, 11 (D.D.C. 2020); *see also*, *e.g.*, *Ingersoll-Rand Co. v. United States*, 780 F.2d 74, 78 (D.C. Cir. 1985). And it respects Congress's deliberate choice to limit the remedies available for such claims. *See Megapulse*, 672 F.2d at 971. Relevant here, a plaintiff "cannot maintain a contract action in either the district court or the Court of Claims seeking specific performance of a contract." *Id.*; *see Ingersoll-Rand* at 79–80.

Determining whether a claim "is 'at its essence' contractual"—and therefore falls outside of the APA's waiver of sovereign immunity—"depends both on the source of the rights upon which the plaintiff bases its claims, and upon the type of relief sought (or appropriate)." *Crowley*, 38 F.4th at 1106 (quoting *Megapulse*, 672 F.2d at 968). Applying the *Megapulse* factors here confirms that Plaintiff's claims amount to the very sort of contractual claims for monetary relief against the federal government over which this Court lacks jurisdiction.

In terms of the first factor, in examining the "source of the rights" prong, the D.C. Circuit has "rejected the 'broad' notion 'that any case requiring some reference to or incorporation of a contract is necessarily on the contract and therefore directly within the Tucker Act.'" *Id.* at 1107 (quoting *Megapulse*, 672 F.2d at 1107). But the Circuit has also warned that plaintiffs cannot avoid the Tucker Act and its jurisdictional consequences by artfully crafting a complaint to disguise what is essentially a contract claim as a claim for equitable relief under a separate legal authority. *See id.*; *Kidwell v. Dep't of Army, Bd. for Corr. of Mil. Recs.*, 56 F.3d 279, 284 (D.C. Cir. 1995); *see also Megapulse*, 672 F.2d at 969–70 ("This court retains the power to make rational distinctions between actions sounding genuinely in contract and those based on truly independent legal grounds."). A court must therefore consider, among other factors, whether "the plaintiff's asserted rights and the government's purported authority arise from statute"; whether "the plaintiff's rights 'exist[] prior to and apart from rights created under the contract"; and whether "the plaintiff 'seek[s] to enforce any duty imposed upon' the government 'by the . . . relevant contracts to which' the government 'is a party.'" *Crowley*, 38 F.4th at 1107 (citation omitted).

Here, like the *California* plaintiffs, Plaintiff seeks relief based upon a grant award; Plaintiff has no statutory or constitutional right to such funding. Indeed, Plaintiff cannot point to the APA or any regulation, including 45 C.F.R. part 75, as the source of a right whereby Defendants *must* continue funding. To the contrary, the source of rights underlying Plaintiff's claims are the grant agreements. The grant agreements are prototypical contracts: they set out obligations that the grantee must accept and fulfill in exchange for consideration from the government. And Plaintiff's claims are effectively based on an alleged right to continued funding under the various grant agreements. Plaintiff's theories of standing, relief, and harm hinge entirely on contractual routing of future funding to the grantees as provided for in the grant agreements. And deciding whether

HHS breached those grant agreements by unlawfully withholding the funding points right back to the terms and conditions of each grant agreement.

In terms of the second prong, the relief Plaintiff seeks only confirms that its claims are essentially contractual in nature. *See Crowley*, 38 F.4th at 1110 ("We turn next to 'the type of relief sought.'"). Indeed, courts have found this factor "dispositive." *U.S. Conf. of Cath. Bishops v. Dept of State*, 770 F. Supp. 3d 155, 163 (D.D.C. 2025), *appeal dismissed*, No. 25-5066, 2025 WL 1350103 (D.C. Cir. May 2, 2025). In *Catholic Bishops*, for example, it was determinative that "[t]he nature of the relief the Conference seeks"—an "order [that] the Government . . . stop withholding the money due under the Cooperative Agreements"—"'sounds in contract.'" *Id.* at *5. So too here. Plaintiff seeks an order "[d]eclar[ing] unlawful and set[ting] aside the Agency's withholding of funding pursuant to the March 31 Letters," Compl. at 34 (Prayer for Relief)—i.e., an order that the government keep paying money due under the agreements. In other words, "[s]tripped of its equitable flair," Plaintiff "seeks the classic contractual remedy of specific performance." *U.S. Conf. of Cath. Bishops*, 770 F. Supp. 3d at 163 (quoting *Spectrum Leasing*, 764 F.2d at 894); *see also Vera Inst. of Just. v. Dep't of Just.*, Civ. A. No. 25-1643 (APM), 2025 WL 1865160, at *13 (D.D.C. July 7, 2025), *appeal pending*, No. 25-5248 (D.C. Cir. filed July 10, 2025) (concluding that the plaintiffs seek continued payment of the grants—in other words, specific performance and thus, the remedy sought also marks the claim as essentially contractual). And a request for an order that the government must perform or for "specific performance" on the grant agreements "must be resolved by the Claims Court." *Vera Inst.*, 2025 WL 1865160, at *13 (citing *Ingersoll-Rand*, 780 F.2d at 80).

Indeed, like the *California* plaintiffs, Plaintiff asserts a challenge under the APA, including on the ground that the agency action is arbitrary and capricious. In *California*, the Supreme Court

held that the government was "likely to succeed in showing the District Court lacked jurisdiction to order the payment of money under the APA," *id.* at 968, reasoning that "the Tucker Act grants the Court of Federal Claims jurisdiction over suits based on 'any express or implied contract with the United States.'" *Id.* (quoting 28 U.S.C. § 1491(a)(1)). And, like the district court in *California*, 145 S. Ct. at 968, this Court too "lack[s] jurisdiction . . . under the APA" to compel Defendants "to pay money" under the grant awards. Plaintiff's claims are exactly those traditional contract claims that this Court is precluded from reviewing; *California* is instructive and confirms that dismissal is appropriate. *See, e.g., Vera Inst.*, 2025 WL 1865160, at *13 (dismissing APA claims because they were essentially contractual); *Sustainability Inst. v. Trump*, No. 25-1575, 2025 WL 1587100, at *1 (4th Cir. June 5, 2025) (staying injunction based on *California* where grants "were awarded by federal executive agencies to specific grantees from a generalized fund"); *Am. Library Ass'n v. Sonderling*, Civ. A. No. 25-1050, 2025 WL 1615771 (RJL), at *5–9 (D.D.C. June 6, 2025) (after granting TRO, denying preliminary injunction where plaintiffs alleged grant terminations, because *California* "cast[] doubt on district courts' jurisdiction to hear cases involving grant terminations"); *U.S. Conf. of Cath. Bishops*, 770 F. Supp. 3d at 163 (denying TRO after concluding that the court lacked the authority to "order the Government to pay money due on a contract").[2]

[2] In *Widakuswara v. Lake*, No. 25-5150, 2025 WL 1288817 (D.C. Cir. May 3, 2025) (per curiam), a D.C. Circuit motions panel relied on *California* to stay a preliminary injunction that required the federal government to restore grants to federally funded broadcast networks that the government had terminated. The panel explained that the district court's injunction, "[w]hether phrased as a declaration that the agreements remain in force" or "an order to pay the money committed by those agreements," amounted "in substance" to an order for "specific performance of the grant agreements"—a remedy that is "quintessentially contractual." *Id.* at *4. The panel accordingly concluded that, as the "claims of government nonpayment necessarily challenge[d]" the government's "performance under the grants," such claims "are squarely contract claims under the Tucker Act." *Id.* The en banc D.C. Circuit subsequently denied the government's stay motion. *Widakuswara v. Lake*, No. 25-5150, 2025 WL 1521355 (D.C. Cir. May 28, 2025). That action does not undermine Defendants' position here. In denying a stay, the en banc court considered whether the government made a "'strong showing' of a likelihood of success"; that standard is

B. Plaintiff's Claims Are Not Ripe for Review.

If the Court determines this case does not belong in the Court of Federal Claims, this Court lacks subject matter jurisdiction over Plaintiff's claims for another reason: the claims are not ripe. The ripeness doctrine requires that a litigant's claims be "constitutionally and prudentially ripe," so as to protect (1) "the agency's interest in crystallizing its policy before that policy is subjected to judicial review," (2) "the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting," and (3) "the petitioner's interest in prompt consideration of allegedly unlawful agency action." *Asante v. Azar*, 436 F. Supp. 3d 215, 224 (D.D.C. 2020) (quoting *Nevada v. Dep't of Energy*, 457 F.3d 78, 83–84 (D.C. Cir. 2006). "Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)).

Here, Plaintiff fails to demonstrate that its claims are prudentially ripe. To satisfy the prudential elements of ripeness, courts consider "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n*, 538 U.S. at 808. In actions against agencies, the inquiry focuses on: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further

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distinct from a finding of actual success or even a preliminary injunction stage finding that a *plaintiff* is likely to succeed. *Id.* at *1. The court also acknowledged that its order was necessarily preliminary and "of course does not constrain the ability of the panel that hears the government's appeals to reach any conclusion following full merits briefing and argument." *Id.*

factual development of the issues presented." *Nevada v. Dep't of Energy*, 457 F.3d 78, 84 (D.C. Cir. 2006) (quoting *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998)).

Plaintiff attempts to challenge a temporary withholding of funds, *see generally* Compl., however, as elaborated further below, Plaintiff does not challenge any final agency action. The temporary withholding of the funds was merely the first stage of a process, and the review process is underway. As the March 31, 2025, Letters, advised the grantees, there is a need for Defendants to determine whether the grantee violated the terms and conditions set forth in the respective notices of award. *See* AR at 441–59. HHS requested that each grantee provide a response or documents, including, but not limited to, a statement of position, a copy of nondiscrimination policies, and a copy of any complaints or grievances alleging discrimination against a job applicant on the basis of race, in order for HHS to determine compliance. *See id.* At the time of the Complaint, Defendants had not issued a formal finding, and the March 31, 2025, letter is not the consummation of Defendants' fact finding. During the review, the entities will be able to produce documentation and explain any discrepancies that may be found during such review.

As noted, the review process is very much still *ongoing*, which is underscored by the fact that in the intervening period between the filing of the Complaint and the date of this filing, records have been received and reviewed by HHS, and funding already has been restored to entities that responded to HHS's request for records and satisfied their obligations under 45 C.F.R. § 75.364. *See* Exs. 1–6. Further, when HHS renewed its March 31 request for records from the non-responsive entities, responses and records were only recently received as of July 18. *See* Ex. 5. Any intervention by the Court at this time would be premature and would circumvent the administrative process, which is very much still active and ongoing.

Importantly, "[t]his Circuit has previously held that courts should refrain from intervening into matters that may best be reviewed at another time or in another setting, even if the issue presented is purely legal and otherwise fit for review." *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25, 40 (D.D.C. 2012) (internal quotation marks and citations omitted). The Court would benefit from further factual development of the issues presented in this case. If Plaintiff eventually challenges Defendants' final agency action under the APA, the Court will have the benefit of a "complete" administrative record, compiled by the agency, reflecting what the agency considered in making its decision and the agency's explanation for its final agency action. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("[T]he task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court."); *see also* 5 U.S.C. § 706 ("the court shall review the whole record"). This factor also weights against review presently. *See Oregonians for Floodplain Prot.*, 334 F. Supp. 3d 66, 73–74 (D.D.C. 2018) (dismissing on ripeness grounds in part to allow for more fact development); *Food & Water Watch v. EPA*, 5 F. Supp. 3d 62, 80–81 (D.D.C. 2013).

The outcome of the administrative process is unknown currently, and judicial intervention would impede this administrative process. Instead, dismissal is warranted. *See Oregonians for Floodplain Prot.*, 334 F. Supp. 3d at 73–74 (dismissing on ripeness grounds in part to not interfere with administrative process); *Food & Water Watch*, 5 F. Supp. 3d at 80–81 (same); *Finca Santa Elena, Inc. v. Army Corps of Eng'rs*, 873 F. Supp. 2d 363, 370–71 (D.D.C. 2012) (granting motion to dismiss based on lack of prudential ripeness). And any "theoretical possibility of future hardship arising from the Court's decision to withhold review until the agency's position is settled does not overcome the finding that the case is not yet 'fit' for judicial resolution." *Belmont Abbey Coll.*, 878 F. Supp. 2d at 41.

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As an additional matter, this Court must determine that it has jurisdiction before proceeding to the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). *abrogated on other grounds as stated in Riley v. Bondi*, No. 23-1270, 2025 WL 1758502, at *8 (U.S. June 26, 2025) ("Without jurisdiction the court cannot proceed at all in any cause.") (citation omitted); *see also Talal Al-Zahrani v. Rodriguez*, 669 F.3d 315, 318 (D.C. Cir. 2012) ("Because a federal court without jurisdiction cannot perform a law-declaring function in a controversy, 'the Supreme Court [has] held "that Article III jurisdiction is always an antecedent question" to be answered prior to any merits inquiry.'") (quoting *Pub. Citizen v. U.S. Dist. Court for the Dist. of Columbia*, 486 F.3d 1342, 1346 (D.C. Cir. 2007)); *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 674 (D.C. Cir. 2013) ("this Circuit treats prudential standing as a jurisdictional issue which cannot be waived or conceded" (citations and quotations omitted)). Defendants have argued in the first instance that no judicial review is available here, and the Court must first determine whether it has jurisdiction before proceeding to the other issues raised below.

II. Plaintiff's APA Claims Are Unreviewable and Fail on the Merits.

To the extent the Court determines that it has jurisdiction over this matter, Plaintiff's APA claims are subject to dismissal for several reasons. First, Plaintiff fails to seek judicial review of a final agency action. Second, there are adequate alternative remedies available thus precluding Plaintiff's APA challenges. Third, Defendants' actions are committed to agency discretion. Moreover, even if the withholding of the funds were reviewable under the APA, Plaintiff has not shown that HHS's actions were contrary to law or arbitrary and capricious.

A. Plaintiff Does Not Seek Review of Final Agency Action.

Plaintiff's claims have been brought under the APA, *see* Compl. ¶¶ 34–47, which limits review to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §

704 (emphasis added). Finality is a "threshold question" that determines whether judicial review is available under the APA. *See Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006). "An agency action is final only if it is *both* 'the consummation of the agency's decisionmaking process' and a decision by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)) (emphasis in original). Plaintiff's challenges fail, at minimum, at the first step—Plaintiff has not challenged the consummation of the Agency's decisionmaking process, as that process remains ongoing to this day.

"*Bennett* directs courts to look at finality from the agency's perspective (whether the action represents the culmination of the agency's decisionmaking) and from the regulated parties' perspective (whether rights or obligations have been determined, and legal consequences flow)." *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1271 (D.C. Cir. 2018). "Deficiency from either perspective is sufficient to dismiss a claim." *Id.* "Thus, there is no need to reach the second *Bennett* prong if the action does not mark the consummation of agency decisionmaking." *Id.*

"Context matters, especially when determining whether an action is the 'consummation' of a decision-making process." *Or. Health & Sci. Univ. v. Engels*, Civ. A. No. 24-2184 (RC), 2025 WL 1707630, at *7 (D.D.C. June 17, 2025). To mark the consummation of the agency's decisionmaking, the decision "must not be of a merely tentative or interlocutory nature." *Bennett*, 520 U.S. at 177–78. The Agency's decision must instead "represent[ ] the culmination of the agency's decisionmaking." *Soundboard*, 888 F.3d at 1271. Subsequent actions by an agency may prove that an interim event in question was precisely that—i.e., interim—and was not the culmination of the agency's decisionmaking process. *See, e.g.*, *Sw. Airlines Co. v. Dep't of*

Transp., 832 F.3d 270, 275 (D.C. Cir. 2016) ("In assessing whether a particular agency action qualifies as final for purposes of judicial review, this court and the Supreme Court have looked to the way in which the agency subsequently treats the challenged action."); *BenefitAlign, LLC v. Ctrs. for Medicare & Medicaid Servs.*, Civ. A. No. 24-2494 (JEB), 2024 WL 6080275, at *1 (D.D.C. Sept. 30, 2024) ("Here, given that CMS is currently conducting an audit that will determine Plaintiffs' final status, it is unclear why the interim suspension could stand as the consummation of the agency's decisionmaking process.").

Here, Plaintiff has not identified any final agency action, which is necessary to sustain any claims under the APA, and, if as here the challenged agency action is not "final," the claims must be dismissed.[3] Plaintiff contends that "the withholding of funds constitutes a final agency action subject to review." *See, e.g.*, Compl. ¶¶ 8, 94, 101, 106, 111. The March 31 Letters, however, can hardly be considered "final agency action." Contrary to Plaintiff's claims, and as made clear from the two March 31 Letters annexed to Plaintiff's Complaint, the Title X grants at issue in this matter have been *temporarily* withheld based on possible violations of the terms and conditions set forth in the respective notices of award. *See* AR 441–59. HHS requested that each grantee provide a response or documents, including, but not limited to, a statement of position, a copy of nondiscrimination policies, and a copy of any complaints or grievances alleging discrimination against a job applicant on the basis of race in order for HHS to determine compliance. *See id.* After receiving responses to the March 31 Letters, HHS reviewed the information provided by the entities and sent a subsequent letter, on June 25, 2025, to each entity either notifying the grantee that its grant was restored, *see* Ex. 2, or that additional information was necessary, *see* Ex. 3. On

[3] In *Trudeau v. FTC*, 456 F.3d 178, 184–85 (D.C. Cir. 2006), the D.C. Circuit made clear that, even though the APA's final agency action requirement was not jurisdictional, it was a necessary requirement in order for the plaintiff to state a cause of action under the APA.

July 23, 2025, additional entities were notified that their grants were restored. The only remaining entities are Planned Parenthood affiliates, which only provided a response on July 18, 2025, *see* Ex. 5. This back-and-forth between HHS and the grantees is the model example of actions that do not "represent[ ] the culmination of the agency's decisionmaking," *Soundboard*, 888 F.3d at 1271, and are instead actions of "a merely tentative or interlocutory nature." *Bennett*, 520 U.S. at 177–78. Thus, the March 31 Letters constitute a "preliminary" decision to *temporarily* withhold funds while HHS determines whether the entities are complying with a grant agreement's terms and conditions, which decision is "not directly reviewable." *See* 5 U.S.C. § 704. "It may be a step, which if erroneous will mature into a prejudicial result[.]" *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 112 (1948). But that does not make such preliminary steps the "consummation of the administrative process" as to the grants at issue. *Id*. at 113. As such, the March 31 Letters signal only the beginning of HHS's review process; they do not "mark the consummation of the agency's decisionmaking process." *See Bennett*, 520 U.S. at 177–178.

Eventually, if a decision is made to terminate Plaintiff's alleged members' grants once the entities provide records pursuant to 45 C.F.R. § 75.364 and HHS concludes its review, then Plaintiff's members will be presented a final agency decision, but that situation has not occurred. Thus, Plaintiff has failed to identify any action, including the March 31 Letters or the temporary withholding of funds, that constitutes a final agency action under *Bennett*, 520 U.S. at 177–78, and the Complaint therefore fails to state a claim on this ground alone.

Moreover, as Plaintiff has not identified a final agency action, Defendants should not be required to compile and produce an administrative record.[4] *See Brzezinksi v. Dep't of Homeland*

[4] Although Defendants do not believe an administrative record is warranted, Defendants produced an administrative record in compliance with the Court's July 15, 2025, Minute Entry. To the extent the Court determines that the withholding of funds is a "final agency action," Plaintiff's

Sec., Civ. A. No. 21-0376 (RC), 2021 WL 4191958, at *3 (D.D.C. Sept. 15, 2021). Indeed, the production of an administrative record at this stage is unnecessary, for Defendants seek dismissal not based on an administrative record but instead based on the facts alleged in the Complaint and the arguments described herein. *See Diakanua v. Rubio*, Civ. A. No. 24-1027 (TJK), 2025 WL 958271, at *11 n.10 (D.D.C. Mar. 31, 2025) ("[T]he Court will 'follow the general practice' and deny that motion because 'the administrative record is not necessary for the Court's decision.'" (citation modified; quoting *Arab v. Blinken*, 600 F. Supp. 3d 59, 65 n.2 (D.D.C. 2022))).

Moreover, consider what the administrative record would look like if the Court were to deem Plaintiff to have challenged a final agency action. Certainly, the administrative record could not include documents that postdate the March 31 Letters because actions that postdate them were not relied upon at the time the Letters were issued and, similarly, the administrative record could not include material postdating the Complaint because those actions are not part of the Complaint. *See Kendrick v. FBI*, No. 22-5271, 2023 WL 8101123, at *1 (D.C. Cir. Nov. 21, 2023) (summarily affirming; "[t]o the extent appellant argues that appellee's search was inadequate because it failed to produce documents related to a separate FOIA request he submitted, appellant's other FOIA request was not at issue in this litigation because he had not yet submitted that request when he filed his complaint in this case, and he never amended his complaint to add claims about it"); *West*

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members were notified of the withholdings on March 31 by letter. Thus, the administrative record is limited to what was before HHS at the time the March 31 Letters were issued. *See* 5 U.S.C. § 706(2)(F) (when reviewing agency actions under the APA, the Court's review is limited to the administrative record, either "the whole record or those parts of it cited by a party."); *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (it is "black-letter administrative law that in an [APA] case, a reviewing court should have before it neither more nor less information than did the agency when it made its decision"); *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) ("The administrative record includes all materials compiled by the agency that were before the agency at the time the decision was made." (citations and internal quotations omitted)).

v. Lynch, 845 F.3d 1228, 1235 n.8 (D.C. Cir. 2017) (explaining that any "assertions of injury" that "postdate[ ] West's complaint" "are chronologically problematic"). The "ever-changing" history of this action—i.e., some grants being restored, HHS conducting its review, and the back and forth between HHS and the entities—warrants a finding that Plaintiff has not challenged the culmination of the Agency's decisionmaking process. Again, "[i]n assessing whether a particular agency action qualifies as final for purposes of judicial review, [the D.C. Circuit] and the Supreme Court have looked to the way in which the agency subsequently treats the challenged action." *Sw. Airlines*, 832 F.3d at 275. A review of the record here demonstrates that HHS had not consummated its decisionmaking process when Plaintiff filed the Complaint.

B. There are Other Adequate Alternative Remedies Available.

The availability of adequate alternative remedies forecloses Plaintiff's APA claims. APA review is available only where "there is no other adequate remedy in a court." 5 U.S.C. § 704. The requirement that a party have "no other adequate remedy in court," *id*., reflects that "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action," *Bowen v. Massachusetts*, 487 U.S. 879, 903. As the D.C. Circuit has observed, "the alternative remedy need not provide relief identical to relief under the APA, so long as it offers relief of the 'same genre.'" *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009) (citation omitted). Further, a remedy may be adequate even if "the arguments that can be raised [in the alternative proceeding] are not identical to those available in an APA suit." *Elm 3DS Innovations LLC v. Lee*, Civ. A. No. 16-1036, 2016 WL 8732315, at *6 (E.D. Va. Dec. 2, 2016). If there exists an alternative adequate judicial remedy, a plaintiff lacks a cause of action under the APA. *Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 621 (D.C. Cir. 2017); *see Versata Dev. Corp. v. Rea*, 959 F. Supp. 2d 912, 927 (E.D. Va. 2013) (dismissing putative APA claim under Rule 12(b)(6) because decision at issue was not a final agency action, and an alternative adequate remedy existed by way

of appeal to the Federal Circuit). As already described above in § I(A), Plaintiff's challenges to the withholding of funds for certain grantees are contractual, and therefore the Court of Federal Claims provides an adequate alternative under the Tucker Act.

C. HHS's Actions are Committed to Agency Discretion by Law.

Plaintiff's challenges to the grant withholdings fail for a separate reason: such a decision concerning how to allocate and expend federal funding is "committed to agency discretion by law" and is thus not subject to APA review. 5 U.S.C. § 701(a)(2). In *Lincoln v. Vigil*, the Supreme Court underscored that the APA, by its own terms, "preclude[s] judicial review of certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion.'" 508 U.S. 182, 191 (1993) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 817 (1992)). *Lincoln* then held that an agency's "allocation of funds from a lump-sum appropriation" is one such "administrative decision traditionally regarded as committed to agency discretion," given that "the very point of a lump-sum appropriation 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." *Id.* at 192. The Court thus concluded that the agency's decision to discontinue a program that was (1) funded through the agency's yearly lump-sum appropriations from Congress (2) but not otherwise mandated or prescribed by statute was "committed to the [agency's] discretion" and thus "unreviewable" under the APA. *Id.* at 193–94.

That same principle squarely applies to HHS discretionary grant funding, and Plaintiff's APA claims fail because they seek to challenge decisions quintessentially "committed to agency discretion by law," for which the APA does not provide review. 5 U.S.C. § 701(a)(2). An agency's determination of how best to administer appropriated funds to fulfill its legal mandates is classic discretionary agency action. *See Lincoln*, 508 U.S. at 193. As *Lincoln* made clear, HHS's "allocation of funds" from those lump-sum appropriations to various programs and priorities

"requires 'a complicated balance of a number of factors,'" including whether agency "'resources are best spent' on one program or another," and "whether a particular program 'best fits the agency's overall policies.'" *Lincoln*, 508 U.S. at 193 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)). Decisions regarding HHS's administration of the grants, including investigations, interim steps and timing, are squarely committed to agency discretion. *See Lincoln*, 508 U.S. at 193–94; *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) ("A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit."). Defendants' funding administration decisions thus are "unreviewable under § 701(a)(2)" and cannot form the basis for Plaintiff's APA claims. *Lincoln*, 508 U.S. at 193.

D. The Withholding of Funds Was Not Arbitrary and Capricious or Contrary to Law.

The APA permits a reviewing court to set aside a final agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "[T]he scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v*, 463 U.S. at 43 .

Plaintiff bears the burden of showing that the actions are arbitrary and capricious. *City of Olmsted Falls v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002). Plaintiff comes nowhere close to meeting its pleading burden. "Judicial review under [the arbitrary and capricious] standard is deferential, and a court may not substitute its own policy judgment for that of the agency." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). Rather, the Court must ensure "that the agency has acted within a zone of reasonableness[.]" *Id.* "[T]he standard of review is highly deferential" in determining whether an action is arbitrary and capricious, *Littlefield v. Dep't of Interior*, 85 F.4th 635, 643 (1st Cir. 2023), and agency action to ensure that grantees are complying

with the terms and conditions of grant agreements, including compliance with Federal statues and executive orders, if reviewable at all, must be afforded highly deferential rational basis review, *cf. Lincoln*, 508 U.S. at 192 (noting that, absent a statutory directive to the contrary, an agency has unreviewable "capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way").

Here, the entities were notified that the "grants regulation for the Department of Health and Human Services, 45 C.F.R. §75.371(a), provides HHS may temporarily withhold cash payments pending correction of the deficiency by the grantee or more severe enforcement action." *See* AR 441–59. Also, in accordance with the regulatory directives set forth in 45 CFR § 75.364(a), HHS explained it is conducting a compliance review and requested documentation from the entities. HHS "must have the right of access to any documents, papers, or other records of the [grantee] which are pertinent to the Federal award." 45 C.F.R. § 75.364(a).

For example, in terms of the remaining grantee (i.e., Planned Parenthood affiliates), in the March 31, 2025, Letter, HHS specifically notified Planned Parenthood, that according to the terms of the grant agreement, it "must administer [its] project in compliance with federal civil rights laws that prohibit discrimination on the basis of race, color, [and] national origin," and "[r]eview of public materials posted by numerous Planned Parenthood affiliates, . . . suggests that Planned Parenthood may be engaged in conduct that violates Title VI and Title VII of the Civil Rights Act." *See* AR 456–59. HHS identified several examples of why Planned Parenthood was likely in violation of the terms of each respective grant. *See id.* 457–59. HHS's withholdings decisions were both "reasonable and reasonably explained," *Prometheus Radio*, 592 U.S. at 423, and HHS gave "a satisfactory explanation" for each withholding. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. As such, HHS's actions—withholding funds while it confirms compliance with the terms and

conditions of the grant agreement—were not arbitrary and capricious, contrary to law, in excess of statutory authority, or ultra vires.

Further, even if this Court were to conclude that HHS's actions violate the APA, the "appropriate course is simply to identify a legal error and then remand to the agency, because the role of the district court in such situations is to act as an appellate tribunal." *N. Air Cargo v. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012); *see Fla. Power & Light*, 470 U.S. at 744 ("the proper course . . . is to remand to the agency for additional . . . explanation," not any type of injunction).

III. Plaintiff Fails to Sufficiently Plead an *Ultra Vires* Claim (Count V).

Plaintiff fails to state an *ultra vires* claim. The leading decision on *ultra vires* review is *Leedom v. Kyne*, 358 U.S. 184 (1958). That case arose from an improper certification of a collective-bargaining unit—an interlocutory order excluded from the judicial-review provision of the National Labor Relations Act. *See id.* at 185, 187. The Supreme Court held that district-court review was available, however, because the order was "made in excess of [the agency's] delegated powers and contrary to a specific prohibition" in the National Labor Relations Act. *Id.* at 188–89. Time and again, courts have stressed that *ultra vires* review has "extremely limited scope." *Griffith v. FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988); *see Bd. of Governors of Fed. Rsrv. Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991) (*Kyne* does not "authoriz[e] judicial review of any agency action that is alleged to have exceeded the agency's statutory authority"); *Boire v. Greyhound Corp.*, 376 U.S. 473, 479–80 (1964) (*Kyne* was "characterized by extraordinary circumstances"). And the *Kyne* exception does not apply simply because an agency arguably has reached "a conclusion which does not comport with the law." *Nuclear Regul. Comm'n v. Texas*, 145 S. Ct. 1762, 1776 (2025) (citation omitted). Rather, "it applies only when an agency has taken action entirely in excess of its delegated powers and contrary to a *specific prohibition* in a statute." *Id.* (emphasis in original). The D.C. Circuit has described a *Kyne* exception as "essentially a Hail Mary pass—and

in court as in football, the attempt rarely succeeds." *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009).

To sufficiently allege an *ultra vires* claim, the plaintiff must aver: "(i) the statutory preclusion of review is implied rather than express; (ii) there is no alternative procedure for review of the statutory claim; and (iii) the agency plainly acts in excess of its delegated powers and contrary to a specific prohibition in the statute that is clear and mandatory." *DCH Reg'l Med. Ctr. v. Azar*, 925 F.3d 503, 509 (D.C. Cir. 2019) (cleaned up). The third requirement is especially demanding. *FedEx v. Dep't of Comm.*, 39 F.4th 756, 764 (D.C. Cir. 2022) ("Only error that is patently a misconstruction of the" pertinent statute, "that disregards a specific and unambiguous statutory directive, or that violates some specific command of a statute will support relief." (cleaned up)); *see also DCH Reg'l Med. Ctr.*, 925 F.3d at 509 ("The third requirement covers only "extreme" agency error, not merely garden-variety errors of law or fact." (internal quotation marks and citations omitted)). In other words, an agency violates a "clear and mandatory" statutory command only when the error is "so extreme that one may view it as jurisdictional or nearly so." *Griffith*, 842 F.2d at 493. Plaintiff fails to meet that demanding standard.

To begin, Plaintiff's asserted *ultra vires* cause of action is foreclosed because there are other channels for review of Plaintiff's claims. Namely, to the extent Plaintiff's claims are justiciable, those claims should be before the Court of Federal Claims. *Supra* at 7–12. Also, Plaintiff argues that the APA is applicable and, even on Plaintiff's own view of this matter, the *ultra vires* claim is not the only one available option to Plaintiff. Therefore, *ultra vires* review is inappropriate—no federal statute has precluded all judicial review of the agency's conduct. *See e.g., FedEx*, 39 F.4th at 764. Thus, Plaintiff has "an alternative review" for its claims, rendering

them unable to prevail on either the first or second prongs of the *ultra vires* test. *Id.*; *Nuclear Regul. Comm'n*, 145 S. Ct. at 1776.

Although the availability of a statutory remedy is alone sufficient to defeat Count V on the first two prongs of the *ultra vires* test, Plaintiff's claim also fails on the third prong, because Plaintiff has failed to sufficiently plead facts that "Defendants acted entirely in excess of their delegated powers and contrary to a specific prohibition in any appropriations statute." *Vera Inst.*, 2025 WL 1865160, at *17. Plaintiff's *ultra vires* claim asserts that HHS has withheld funds from Plaintiff's members in a manner that unlawfully disregards 42 U.S.C. § 2000d-1. *See* Compl. ¶¶ 123–26. Contrary to Plaintiff's allegations, however, there is nothing in the statute that prevents HHS from *temporarily* withholding funds to ensure that a grantee is complying with the terms and conditions set forth in the notice of award. Thus, Defendants have not violated any "clear and mandatory" statutory command. Accordingly, Plaintiff's *ultra vires* claim fails.

CONCLUSION

For these reasons, the Court should dismiss Plaintiff's complaint and enter judgment in favor of Defendants.

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Respectfully submitted,

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