UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, Plaintiff, v. ROBERT F. KENNEDY, JR., in his official capacity as United States Secretary of Health and Human Services, *et al.*, Defendants.	No. 1:25-cv-01265 (ACR)

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

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INTRODUCTION

In their Motion to Dismiss or for Summary Judgment (ECF No. 28) ("Defs.' Br."), Defendants do not seem to meaningfully dispute that they violated applicable law and regulations. In fact, Defendants repeatedly concede that they *did not make* and *have not made* any determination that any Affected Member violated the law or a grant term or condition, which is the first prerequisite to withholding grant funds under the relevant statute and regulations. *See, e.g.*, Defs.' Br. at 14 ("As the March 31, 2025, Letters, [sic] advised the grantees, there is a need for Defendants to determine whether the grantee violated the terms and conditions" of their awards); *id.* at 19 ("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").

Instead, in an effort to immunize their patently unlawful action from judicial review, Defendants proffer a series of scattershot arguments largely premised on a misconstruction of the sole agency action that Plaintiff is *actually* challenging here: the employment of a backwards "withhold now, investigate later" process to withhold Plaintiff's Affected Members' grants pursuant to the March 31, 2025 Letters in violation of both statutory and regulatory requirements. As detailed below, each of Defendants' arguments is without merit, and their motion should therefore be denied.

ARGUMENT[1]

I. This Court Has Jurisdiction Over Plaintiff's Claims.

A. Plaintiff's Claims Do Not Belong in the Court of Federal Claims.

[1] Defendants provide "statutory and regulatory" and "factual" backgrounds, *see* Defs.' Br. at 2–5, without specifying which facts they contend are undisputed and material for purposes of their summary judgment motion. Plaintiff does not dispute any facts regarding the contents of the March 31 Letters. Plaintiff cannot verify the veracity of any facts relating to Defendants' purported investigation into Plaintiff's Affected Members that post-date the issuance of the Letters. In any event, these facts are immaterial to Defendants' decision to withhold funds from the Affected Members on March 31, 2025, which is all that Plaintiff challenges here.

Defendants argue that this Court lacks jurisdiction to hear Plaintiff's claims because this case is in essence a contract case for money damages. Defs.' Br. at 7–12. But this argument misconstrues Plaintiff's requested relief—namely, equitable relief requiring Defendants to comply with the law—and it ignores binding D.C. Circuit and Supreme Court precedent, particularly *Bowen v. Massachusetts*, 487 U.S. 879 (1988). Defendants' argument should therefore be rejected.

To start, the question of whether a court has jurisdiction in a case like this is based on the "perceived conflict between the APA's broad waiver of sovereign immunity and the limited waiver afforded by the Tucker Act in actions based on government contracts." *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967 (D.C. Cir. 1982). The APA provides a waiver of sovereign immunity with limitations, including that it applies only to claimants "seeking relief other than money damages" and only if no "other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. The Tucker Act, on the other hand, waives the government's sovereign immunity in actions "founded . . . upon any express or implied contracts with the United States," 28 U.S.C. § 1491(a)(1), and grants the Court of Federal Claims exclusive jurisdiction over breach of contract claims against the United States seeking more than $10,000 in damages, *see Crowley Government Services, Inc. v. General Services Administration*, 38 F.4th 1099, 1106 (D.C. Cir. 2022). Notably, however, the Court of Federal Claims has no power to grant equitable relief. *Bowen*, 487 U.S. at 905. Against this backdrop, the D.C. Circuit has established a two-part test for courts to apply to resolve this jurisdictional question: "The classification of a particular action as one which is or is not 'at its essence' a contract action depends both on the source of the rights upon which the plaintiff bases its claims, and upon the type of relief sought . . . ." *Megapulse*, 672 F.2d at 968.

As to the first prong of the test—the source of the rights upon which the claims are based—courts must consider factors such as whether the plaintiff's asserted rights and the government's purported authority arise from statute and whether the plaintiff's rights exist prior to and apart from rights created under the contract. *Crowley*, 38 F.4th at 1106–07. Defendants argue that Plaintiff's claim is based on its members' grant awards. Defs.' Br. at 10. In making this argument, Defendants chiefly rely on *Department of Education v. California*, 145 S. Ct. 966 (2025), but that case sought an "order[] to enforce a contractual obligation to pay money." *Id.* at 968 (cleaned up). By contrast, Plaintiff challenges the cart-before-the-horse *administrative procedure* employed by Defendants to withhold funds now and investigate later, which is contrary to statute (42 U.S.C. § 2000d-1) and regulations (45 C.F.R. §§ 75.371, 80.8), and is arbitrary and capricious. Compl. ¶¶ 95–98, 107, 114–120, ECF No. 1. These are archetypal APA claims, and this Court is not deprived of jurisdiction simply because the requested relief should lead Defendants to release the grant funds, as discussed *infra*. Accordingly, the sources of the right alleged in Plaintiff's complaint are a federal statute and regulations—42 U.S.C. § 2000d-1; 45 C.F.R. § 75.371, and 45 C.F.R. § 80.8—and Plaintiff's claims "turn entirely on examining the federal statute[] and regulations," not the Affected Members' Notice of Award. *S. Educ. Found. v. U.S. Dep't of Educ.*, 2025 WL 1453047, at * 7 (D.D.C. May 21, 2025) (Friedman, J.). Indeed, a recent decision of the en banc D.C. Circuit in *Widakuswara v. Lake*, 2025 WL 1521355 (D.C. Cir. May 28, 2025), is particularly instructive on this issue. In that case, which post-dates and considers the *California* decision, the en banc court reversed a panel's stay of a preliminary injunction raising essentially the same question because—in the language of Judge Pillard's panel dissent, which was "substantially" adopted by the en banc court—"[i]f a plaintiff's claim depends on interpretations of statutes and regulations

rather than the terms of an agreement negotiated by the parties, the claim is not in essence contractual." *Widakuswara v. Lake*, 2025 WL 1288817, at *12 (D.C. Cir. May 3, 2025).[2]

Here, "it would be quite extraordinary to consider Plaintiff['s] claims to sound in breach of contract when they do not at all depend on whether the terms of particular awards were breached—they instead challenge whether the action here was unlawful, irrespective of any breach." *AIDS Vaccine Coal. v. U.S. Dep't of State*, 770 F. Supp. 3d 121, 137 (D.D.C. 2025) (Ali, J.), *appeal pending*, No. 25-5098 (D.C. Cir. filed Apr. 2, 2025). Indeed, *no party* has cited to the terms of grant agreements as source of rights in this case.[3] Defendants are therefore wrong in arguing that "deciding whether HHS breached those grant agreements by unlawfully withholding the funding points right back to the terms and conditions of each grant agreement." Defs.' Br. at 10–11.

Furthermore, Defendants' argument that 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," Defs.' Br. at 10, is a red herring. Plaintiff does not argue that Defendants *must* continue to provide Plaintiff's Affected Members with funding. Rather, HHS awarded Plaintiff's Affected Members a grant for a period of performance of up to five years, contingent upon an annual approval of a noncompetitive continuation grant application. *See* Decl. of Clare M. Coleman ¶¶ 15–20, Ex. 1 to Pl.'s Mot. for Partial Summ. J. (ECF No. 26-3) ("Coleman Decl."). Once HHS

[2] Contrary to Defendants' argument that *Widakuswara* "does not undermine Defendants' position here," Defs.' Br. at 12 n.2, the case is very instructive because the en banc court reversed the panel decision "substantially for the reasons explained by Judge Pillard" in her dissent from the panel's decision. *Widakuswara v. Lake*, 2025 WL 1521355, at *1.

[3] But even if the grant agreement were cited by a party, the D.C. Circuit has rejected the argument that "some reference to or incorporation of a contact" means that the claim necessarily falls within the Tucker Act. *Megapulse*, 672 at F.2d 967–968.

issued that award, HHS was required to follow the federal statutes and regulations governing that award, including requirements that HHS must follow before withholding grants.

As to the second prong of the jurisdictional test—the type of relief sought—courts look to whether the plaintiff seeks classic contract remedies such as money damages. *Crowley*, 38 F.4th at 1107; *Porwancher v. Nat'l Endowment for the Humans*., 2025 WL 2097740, at *4 (D.D.C. July 25, 2025) (Nichols, J.) ("[T]he 'crux' of this question [whether the claims are at essence contract claims] 'boils down to whether the plaintiff effectively seeks to attain monetary damages in the suit.'") (quoting *Crowley*, 38 F.4th at 1107). The Supreme Court in *Bowen v. Massachusetts* held that Massachusetts' claim that the federal government unlawfully withheld Medicaid reimbursements did not belong in the Court of Federal Claims because Massachusetts did not seek "money damages." 467 U.S. 879 (1988). The Court held that the lower court judgment "tell[ing] the United States that it may not disallow the [Medicaid] reimbursement," which would likely lead the federal government to reimburse Massachusetts the requested sum, did not transform the case into one for money damages. *Id*. at 910. As the Court explained, "money damages" are a specific remedy "intended to provide a victim with monetary compensation for an injury to his person, property, or reputation," and the mere "fact that judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Id*. at 893; *see also Md. Dep't of Hum. Res. v. Dep't of Health & Hum. Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985) (holding that any funds that would flow to the plaintiff as a result of the agency action being held unlawful under the APA were not money damages to compensate for suffered losses). Indeed, as the D.C. Circuit has made clear, simply because a plaintiff "hints at some interest in a monetary reward from the federal government or because success on the merits may

obligate the United States to pay the complainant" does not mean that exclusive jurisdiction lies in the Court of Federal Claims. *Crowley*, 38 F.4th at 1108.

Here, contrary to Defendants' contention, Plaintiff does not seek "money damages" and does not ask for "an order that the government keep paying money due under the agreements." Defs.' Br. at 11. Instead, Plaintiff seeks equitable relief—specifically, vacatur of the March 31 Letters, and a declaration that Defendants violated 45 C.F.R. § 75.371, 45 C.F.R. § 80.8, and 42 U.S.C. § 2000d-1. Compl. at 34 ("Prayer for Relief"); Pl.'s Mem. in Supp. of Mot. Partial Summ. J. at 16, ECF No. 26-1 (hereinafter "Pl.'s SJ Br."). This type of equitable relief is routinely granted under the APA and it is not a contract remedy. *See, e.g.*, *Porwancher*, 2025 WL 2097740, at *4 (holding that the Tucker Act does not apply to plaintiffs' claims for equitable relief); *AIDS Vaccine Advocacy Coal.*, 770 F. Supp. 3d at 136 (holding that Tucker Act did not apply because "Plaintiffs seek only invalidation of the policy, including the withholding of payment that flowed from it"); *Climate United Fund v. Citibank, N.A.*, 2025 WL 1131412, at *9–*12 (D.D.C. April 16, 2025) (Chutkan, J.) (finding that the Tucker Act did not apply to case seeking equitable relief that would reinstate the plaintiff's grant), *appeal pending*, No. 25-5122 (D.C. Cir. filed Apr. 16, 2025). And, importantly, the Court of Federal Claims has no power to grant such equitable relief. *Bowen*, 487 U.S. at 905.

In other words, just as in *Bowen*, "[t]he Secretary's novel submission that the entire action is barred . . . must be rejected because the doubtful and limited relief available in the Claims Court is not an adequate substitute for review in the District Court." *Id*. at 901. And, just in *Bowen*, the mere fact that granting Plaintiff's request for equitable relief should result in the restoration of the Affected Members' grants is insufficient to transform Plaintiff's request into one for monetary damages. *Id*. at 910; *AIDS Vaccine Advocacy Coal.*, 770 F. Supp. 3d at 135 ("It is, of course, true

that after a court sets aside agency action, a natural consequence may be the release of funds withheld pursuant to that action."); *see also S. Educ. Found.*, 2025 WL 1453047, at *7–8 (rejecting argument that Tucker Act applied because plaintiff requested only equitable relief and any money that flowed to the plaintiff "would not come from this court's exercise of jurisdiction, but from the structure of statutory and regulatory requirements" governing grants (quoting *Tootle v. Sec'y of Navy*, 446 F.3d 167, 175 (D.C. Cir. 2006)); *Widakuswara v. Lake*, 2025 WL 1166400 (D.D.C. Apr. 22, 2025) (Lamberth, J.) (same), *application for stay denied, Widakuswara v. Lake*, 2025 WL 1521355 (D.C. Cir. May 28, 2025) (en banc).

The cases in this District cited by Defendants, Defs.' Br. at 11–12, are outliers compared to the cases cited above, and, as one court has recognized, the Supreme Court's decision in *California* "has sown confusion" and "judges in this District have [not] been uniform in their application" of that case. *Vera Inst. of Just. v. U.S. Dep't of Just.*, 2025 WL 1865160, at *9 (D.D.C. July 7, 2025) (Mehta, J.). In any event, those cases are largely distinguishable. For example, Defendants rely on *United States Conference of Catholic Bishops v. United States Department of State*, 770 F. Supp. 3d 155 (D.D.C. 2025) (McFadden, J.), but the court in that case found that the relief requested at the preliminary injunction stage sounded in contract because the plaintiff had asked the court for an order enjoining the government from "implementing, enforcing, or otherwise giving effect to any rule . . . preventing the obligation or disbursement of appropriated funds . . . ." *Id*. at 161. Plaintiff does not make a similar demand here. *See supra* at 6. Defendants also rely on *Vera Institute of Justice*, which held that the plaintiffs' arbitrary and capricious claims were controlled by *California*, but only because they were the same type of claims brought in that case, and that the plaintiff's contrary to law claims were in essence contract claims because "[t]he regulation that Defendants allegedly violated require[d] that the basis for termination be spelled

out in the terms and conditions of the Federal award," and—as such—the court was forced to "look back to the awards themselves . . . [which] is a classic contract question." *Vera Inst. of Just.*, 2025 WL 1865160, at *13 (cleaned up). Similarly, in *American Library Association v. Sonderling*, 2025 WL 1615771 (D.D.C. June 6, 2025) (Leon, J.), the court found that the Tucker Act applied because the "focus on grants is woven into each of the claims for relief," *id*. at *8. The same is not true here, as discussed *supra*. Accordingly, Defendants' argument that this Court lacks jurisdiction to adjudicate Plaintiff's claims should be rejected.

B. Plaintiff's Claims Are Ripe for Review.

Defendants' argument that this Court lacks subject matter jurisdiction over Plaintiff's claims because they are not prudentially ripe for review, Defs.' Br. at 13, should also be rejected. When evaluating prudential ripeness, courts balance "(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 v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (citing *Abbot Lab'ys v. Gardner*, 387 U.S. 136, 149 (1967)). To this end, courts consider "(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 factual development of the issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998).

As to the first prong, claims satisfy the fitness requirement if they are "'essentially legal'" and "'sufficiently final.'" *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25, 38 (D.D.C. 2012) (quoting *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 783 F.2d 237, 249 (D.C. Cir. 1986)). Here, Defendants argue that Plaintiff's claims are not yet ripe because the withholdings were "merely the first stage of a process," and HHS is still deciding whether grantees violated the terms and conditions of their awards. Defs.' Br. at 14. But, as with

their Tucker Act arguments, Defendants mischaracterize Plaintiff's claims. Plaintiff does not challenge an intermediary step of an incomplete investigation. Rather, Plaintiff challenges Defendants' final decision to withhold funds pursuant to the March 31 Letters prior to, *inter alia*, making an actual determination that Plaintiff's Affected Members failed to comply with the law and an actual determination that compliance could not be secured by voluntary means. *See infra* 12–16. In Defendants' view, this action will never become ripe if they simply leave their "investigation" open indefinitely.[4]

Defendants' assertion that this Court would "benefit from further factual development of the issues presented in this case," Defs.' Br. at 15, is similarly unavailing. The law is clear that a case such as this, where a plaintiff challenges an agency's failure to follow its own procedures and regulations, raises a "pure legal question," and the claim is thus fit for judicial review. *Ciba-Geigy Corp. v. U.S. Env't Prot. Agency*, 801 F.2d 430, 435 (D.C. Cir. 1986) (finding that plaintiff raised "a pure legal question as to what procedures [the agency] was obliged to follow"); *see also Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005) (recognizing that the D.C. Circuit has "repeatedly held that claims that an agency's action is arbitrary and capricious or contrary to law present purely legal issues" (cleaned up)); *Am.*

[4] All of the cases cited by Defendants, Defs.' Br. at 15, are inapposite. In those cases, the challenged agency's action was not final, as it is here, *see infra* 12–16, and/or the plaintiffs suffered no injury or hardship, as they do here, *see* Coleman Decl. ¶¶ 36–45. *See Oregonians For Floodplan Prot. v. U.S. Dep't of Com.*, 334 F. Supp. 3d 66, 74 (D.D.C. 2018) (holding that the plaintiffs failed to demonstrate Article III injury and there was no final agency action); *Food & Water Watch v. U.S. Env't Prot. Agency*, 5 F. Supp. 3d 62, 80–81 (D.D.C. 2013) (finding that plaintiffs had no injury and suffered no hardship); *Belmont Abbey College v. Sebelius*, 878 F. Supp. 2d 25, 39 (D.D.C. 2012) (holding that plaintiff's lacked standing and its claim was not ripe because the agency had started to amend the challenged rule and plaintiff was protected by safe harbor provision in the interim); *Finca Santa Elena, Inc. v. U.S. Army Corps of Eng'rs*, 873 F. Supp. 2d 363, 370 (D.D.C. 2012) (holding that plaintiffs' claim was not ripe because multiple aspects of the challenged program may "never go forward").

Petroleum Inst. v. U.S. Env't Prot. Agency, 906 F.2d 729, 739 (D.C. Cir. 1990) (holding that a challenge to the agency exceeding statutory authority was ripe because whether an agency "has the statutory authority" to take an action "is a purely legal question, one that can be answered solely by consulting the text, legislative history and judicial interpretations" of the statute). Indeed, where, as here, the agency has already "'fail[ed] to comply with' [some procedural requirement]" or taken action that "violate[s] its own regulations" and "there no longer exists the possibility that further agency action will alter the claim in any fashion," the claim "'can never get riper.'" *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 51 (D.C. Cir. 1999) (quoting *Ohio Forestry Ass'n*, 523 U.S. at 737); *see also Nat'l Ass'n of Home Builders*, 417 F.3d at 1282 (holding that "no further factual development [wa]s necessary to evaluate" plaintiffs' claims because the agency's action "necessarily stands or falls on th[e] administrative record and its statutory . . . authority"); *Am. Tunaboat Ass'n v. Ross*, 391 F. Supp. 3d 98, 110 (D.D.C. 2019) (holding that "[n]o further factual development [wa]s necessary for the Court to review the Association's claims" that the agency violated its own regulations).

Defendants also argue that intervention by this Court would interfere with the ongoing administrative process of the investigations. Defs. Br. at 14–15. But, once again, Defendants conflate Plaintiff's claims challenging the Agency's failure to follow proper procedures—which was blatantly unlawful—with the investigations and any potential subsequent decisions the Agency may make. Plaintiff has never argued that Defendants are prohibited from conducting investigations or making findings thereafter. Plaintiff claims only that Defendants did not follow the proper procedure on March 31, 2025, when they withheld funds prior to making any determination of an actual violation or determination that any such actual violation could not be

cured by voluntary means, among other things required by applicable law and regulations. The ongoing investigations cannot cure that violation.

As to the second "hardship" prong, as noted above, courts examine whether postponing review would unduly harm the plaintiff. Here, Defendants seem to imply that Plaintiff's Affected Members only suffer "theoretical" harm that is insufficient to satisfy this requirement. Defs.' Br. at 15. To the contrary, it is clear that the unlawful withholding of millions of dollars in Title X funds has had and continues to have a "direct and immediate impact" on Plaintiff's Affected Members, their subrecipients, staff, and Title X patients, *see Nat'l Ass'n of Home Builders*, 417 F.3d at 1284 (cleaned up), and continues to affect their "legal rights [and] obligations," *see Ohio Forestry Ass'n*, 523 U.S. at 733; *see* Compl. ¶¶ 87–90; Coleman Decl. ¶¶ 36–45 (detailing the severe harm caused by Defendants' unlawful withholding of grant funds, including hindering patients' access to essential health care and forcing grantees to lay off staff and close health centers). That this harm flowed from Defendants' failure to follow proper procedures does not make the harm "theoretical." Accordingly, Defendants' ripeness arguments should be rejected.

II. Plaintiff's APA Claims Are Reviewable and Meritorious.

Having failed to undermine this Court's jurisdiction, Defendants turn to attacking Plaintiff's ability to proceed and succeed under the APA, asserting that (1) there is no final agency action, (2) alternative remedies preclude APA review; (3) their actions are committed to agency discretion; and (4) Plaintiff cannot succeed on the merits. *See* Defs.' Br. at 16–25. As detailed below, these arguments again ignore what this lawsuit is *actually* about. Accordingly, they are without merit, and Defendants' request to dismiss or for judgment in their favor on Plaintiff's APA claims should be denied.

A. Defendants' Withholding of Title X Funds Constitutes Final Agency Action for the Purposes of the APA.

As Defendants note, *Bennett v. Spear,* 520 U.S. 154 (1997), sets forth the applicable test for final agency action, and requires that for agency action to be considered "final"—and thus reviewable under the APA—it be both (1) "the consummation of the agency's decisionmaking process" and (2) a decision by which "rights or obligations have been determined" or from which "legal consequences will flow." *Id*. at 177–78 (cleaned up). Defendants only contest Plaintiff's ability to satisfy the first prong of the *Bennett* test.[5] Defs.' Br. at 17. They assert that there has been no "consummation" because the "process remains ongoing to this day" via the Agency's continued investigations into eight of Plaintiff's Affected Members, and that the Agency's "subsequent action[]" of releasing withheld funds to seven of the sixteen impacted grantees only "prove[s]" that the original March 31, 2025 withholding of funds was an "interim"—and thus unchallengeable—action. *Id.* at 17–21.

Not so. Here, Plaintiff challenges Defendants' withholding of funds absent *any* actual determination of non-compliance, and absent the provision of *any* advance notice of suspected non-compliance or *any* opportunity to voluntarily remedy an alleged issue. Compl. ¶¶ 4–6, 8, 12, 56, 62. This action marks the "consummation of the agency's decisionmaking process" as to both (1) the backwards, cart-before-the-horse process by which the Agency would withhold funds; and (2) which sixteen specific grantees to withhold funds from. *Id.*

[5] As to the second prong of the *Bennett* test, Plaintiff has alleged facts that are more than sufficient to show that Defendants' withholding of continuation grants pursuant to the March 31 Letters imposed immediate "legal consequences" on Plaintiff's Affected Members by depriving them funds that, in the normal course, would have been disbursed to them. Compl. ¶¶ 4, 8, 12, 55, 87–90; *see also* Pl.'s SJ Br. at 9–10.

The mere fact that the Agency designated the withholding as "temporary" in the March 31 Letters, or subsequently made *new* final decisions to release funds to seven of the sixteen withheld grantees, does not render the original decision to withhold funds "non-final." Indeed, the law is clear that "*final* does not mean *permanent*" and therefore "just because [the agency] maintains the ability to reverse [the withholdings] at some unidentified point in the future, that does not change the fact that"—when the March 31 Letters were issued—the agency had "made decisions, communicated them to their . . . grantees, and thereby altered their rights and obligations." *Widakuswara v. Lake*, 2025 WL 1166400, at *12 (D.D.C. Apr. 22, 2025) (Lamberth, J.), *appeal pending*, No. 25-5144, (D.C. Cir. filed Apr. 24, 2025); *see also Sackett v. Env't Prot. Agency*, 566 U.S. 120, 127 (2012) ("The mere possibility that an agency might reconsider . . . does not suffice to make an otherwise final agency action nonfinal."); *Nat'l Env't Dev. Assoc.'s Clean Air Project v. Env't Prot. Agency*, 752 F.3d 999, 1006 (D.C. Cir. 2014) ("An agency action may be final even if the agency's position is 'subject to change' in the future."); *Pacito v. Trump*, 768 F. Supp. 3d 1199, 1227–28 (W.D. Wash. 2025) ("[T]he fact that the challenged actions are ostensibly temporary"—because the EOs they were implementing provided for 90-day funding suspensions—"is immaterial" because "all agency actions are subject to future change."); *Nat'l Council of Nonprofits v. Off. of Mgmt. & Budget*, 763 F. Supp. 3d 36, 53–54 (D.D.C. 2025) (AliKahn, J.) (holding that order mandating temporary "pause" of all federal financial disbursement was final agency action); *New York v. Trump*, 769 F. Supp. 3d 119, 135 (D.R.I. 2025) (holding that "indefinite pause" of funding pending further review of OMB activities constituted final agency action, despite being framed as a "temporary pause").

A recent decision from this District in *Doctors for America v. Office of Personnel Management*, 766 F. Supp. 3d 39 (D.D.C. 2025) (Bates, J.), is particularly illustrative. There, the

court rejected the federal defendants' argument that their decision to remove certain health-related websites was not "final," for purposes of APA review, because they had "not affirmatively reported their intent to keep the removed webpages down permanently and ha[d] since restored some." *Id.* at 50. As the court explained, the fact "that an agency may restore the removed webpages in the future does not mean that the agency's prior removal decision was not the consummation of an agency's decisionmaking process." *Id.* at 51 (citing *Sackett*, 566 U.S. at 127 and *Nat'l Env't Dev. Assoc.'s Clean Air Project*, 752 F.3d at 1006). So too here. Simply because the Agency has since "restore[d]" *some* of the withheld grants to *some* of Plaintiff's Affected Members, "does not mean that the agency's prior . . . decision was not the consummation of [its] decisionmaking process" on the questions of whether, how, and from which grantees to withhold funds in March of 2025. *Id.*

Southwest Airlines Co. v. United States Department of Transportation, 832 F.3d 270, 275 (D.C. Cir. 2016), *see* Defs.' Br. at 17–18, 21, does not counsel otherwise. In *Southwest Airlines*, the airline plaintiff sought review of the substance of a "guidance" letter issued by the Department of Transportation ("DOT") to the city of Dallas, about what the city must do to comply with its obligation to accommodate certain airlines at its city-owned airport. 832 F.3d at 272. The D.C. Circuit held that the guidance letter did not mark the consummation of the agency's decision-making process as to the city's obligations because "the City took no action to implement DOT's guidance," *id*. at 274, the agency had made clear that the letter "only offered guidance, [and] was not intended to constitute a definitive resolution of the dispute," *id*. at 275–76, and the agency had initiated formal proceedings during which the City would "be afforded a full opportunity to raise arguments . . . on . . . any . . . relevant topic *including the guidance*," *id*. at 275 (cleaned up).

Plaintiff here, however, is not challenging a *guidance* document or an agency *opinion*, where there is "no indication that the agency ha[s] applied the guidance as if it bound regulated parties." *Id.* at 275 (describing *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014)). Rather, Plaintiff is challenging the Agency's fully realized and implemented *action* of pre-emptively withholding millions of dollars of grant funds from its members in a manner that violates the applicable statute and regulations—an action that, as explained above, is clearly "final" for purposes of APA review, notwithstanding any subsequent decisions to restore some funds.

Nor does *BenefitAlign, LLC v. Centers for Medicare & Medicaid Services*, 2024 WL 6080275 (D.D.C. Sept. 30, 2024) (Boasberg, C.J.), *see* Defs.' Br. at 18—an unpublished decision in the temporary restraining order context—help Defendants, as the district court's decision there was also based in large part on the fact that "the regulation guiding [the agency's] decision offer[ed] substantial discretion to the agency," permitting it to temporarily suspend access to the Affordable Care Act Marketplace Exchange upon discovery of "circumstances that pose unacceptable risk to the accuracy of the Exchange's eligibility determinations, Exchange operations, or Exchange information technology systems." *BenefitAlign,* 2024 WL 6080275, at *2 (citing 45 C.F.R. § 155.221(e)). Here, conversely, applicable law and regulations *forbid* the Agency from withholding funds (temporarily, or otherwise) absent it, among other things, having first made actual determinations both that the grantee in question is out of compliance and that compliance cannot be secured by voluntary means—determinations that the Agency indisputably did not make prior to withholding funds. *See* Pl.'s SJ Br. at 4–7, 10–15.

Moreover, following Defendants' argument to its logical conclusion would have devastating consequences for separation of powers and the rule of law. If an agency were always able to evade judicial review of its unlawful actions—including actions taken in *direct*

contravention of a governing statute and the Agency's own regulations—by simply designating those unlawful actions as "temporary" and pointing to some potential change down the line, the will of Congress and constraints imposed on executive power would be at serious risk of being subverted. This cannot be the case. Defendants' withholding pursuant to the March 31 Letters must therefore be viewed as what it is—final agency action that is reviewable under the APA.[6]

B. Plaintiff Does Not Have an Adequate Alternative Remedy.

Defendants contend that Plaintiff's APA claims are foreclosed because there is an "adequate alternative remed[y]" under the Tucker Act. Defs.' Br. at 21–22. But this fails for the same reasons discussed above: Plaintiff's claims are not, at their essence, contract claims, but rather classic APA claims challenging the unlawful *administrative process* employed by Defendants to withhold funds, and Plaintiff has requested equitable relief, not money damages. *See supra* 2–8. Accordingly, the Tucker Act—and the Federal Court of Claims—provides Plaintiff no recourse, and its claims are properly brought (and reviewed) under the APA. *Id.*

C. Defendants' Decision to Withhold Funds Pending Investigation Is Not Committed to Agency Discretion.

Defendants also argue that Plaintiff's challenge fails because the agency decision at issue is "committed to agency discretion by law." Defs.' Br. at 22–23. This, too, is premised on a

[6] Defendants' arguments about the administrative record, Defs.' Mot. 20–21, evince their repeated confusion about and misconstruction of what Plaintiff is *actually* challenging here—i.e., *only* the Agency's decision to withhold funds prior to making any finding of violation or inability to cure. It is therefore exactly right that the administrative record should contain only the documents and materials that the Agency directly or indirectly considered when making *that* decision. And the list of contents of the administrative record filed by Defendants, ECF No. 27-2—which shows that the materials before the Agency consisted only of the 2022 Notice of Funding Opportunity, the 2022 grant awards, and the March 31 Letters themselves—demonstrates that the Agency had conducted no investigation, made no findings, considered no alternatives, and made zero effort to take into account the reliance interests of the grantees or the devastating impact its action would have on them, their staff, their patients, and their communities, before taking the challenged action.

fundamental misconstruction of the case at hand. Unlike the plaintiffs in *Lincoln v. Vigil*, *see* Defs.' Br. at 23, Plaintiff here is not challenging the agency's "allocation of funds from a lump-sum appropriation," from which there arises a clear inference that "Congress . . . does not intend to impose legally binding restrictions" on agency decisions as to how to allocate the funds. 508 U.S. 182, 192 (1993). Indeed, Plaintiff is not challenging a decision as to "how to allocate and expend federal funding," Defs.' Br. at 22, *at all*. Rather, Plaintiff is challenging the Agency's action of withholding funds without observing the process that is required by clear statutory and regulatory provisions. *See* Compl. ¶¶ 93–126. In other words, far from committing the decision at hand to agency discretion, the *law* here—and the Agency's own "existing valid regulations," *see United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954)—"circumscribe agency discretion" by imposing certain responsibilities and restrictions on the Agency that it is "not free simply to disregard," *Lincoln*, 508 U.S. at 193; *see also Foster v. Mabus*, 895 F. Supp. 2d 135, 144 (D.D.C. 2012) (explaining that the "committed to agency discretion" exception to APA review applies only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'") (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 410 (1971)); *Anderson v. U.S. Dep't of Hous. & Urb. Dev.*, 731 F. Supp. 3d 19, 37 (D.D.C. 2024) (holding HUD's decision to grant local housing agency's application to convert public housing project into tenant-based assistance under Section 8 of the Housing Act was not unreviewable as "committed to agency discretion by law" where "ample law with clear requirements governs conversions"); *Homovich v. Chapman*, 191 F.2d 761, 764 (D.C. Cir. 1951) (rejecting agency's argument that "there can be no [APA] review where agency action 'involves' discretion or judgment" as stretching 5 U.S.C. § 701(a)(2)'s "prohibitory clause far beyond its

meaning" and noting that "[o]bviously the statute does not mean that" as "almost every agency action 'involves' an element of discretion or judgment.").

D. Plaintiff Has Sufficiently Pleaded APA Claims and Defendants Are Not Entitled to Judgment as a Matter of Law.

Finally, Defendants briefly argue that Plaintiff has failed to meet its pleading burden as to its APA claims. *See* Defs.' Br. at 23–25. Far from it.

To begin, Defendants' merits argument focuses almost entirely on Plaintiff's arbitrary and capricious claim and, in so doing, fails to meaningfully contend with Plaintiff's three other APA claims: that the Agency's withholding of funds is not in accordance with law, 5 U.S.C. § 706(2)(A); exceeds statutory authority, *id*. § 706(2)(C); and is without observance of procedure required by law, *id*. § 706(2)(D). Compl. ¶¶ 93–109. Indeed, in setting out the standard of review for APA claims, Defendants also focus almost entirely on the standard for arbitrary and capricious claims, neglecting to mention the standards applicable to Plaintiff's other APA claims. *See* Defs.' Br. at 6–7. Defendants set forth no basis for dismissing those three well-pleaded APA claims, nor do they seriously contend that they are entitled to judgment as a matter of law on the merits of those claims. To the contrary, Plaintiff is entitled to summary judgment on those claims. *See* Pl.'s SJ Br.[7]

As to the arbitrary and capricious claim, Plaintiff has more than adequately alleged facts demonstrating that the Agency's decision to withhold millions of dollars in Title X funds from Plaintiff's Affected Members pending investigation "is not reasonable" and cannot be "reasonably

[7] Defendants offer cherrypicked language from inapposite cases in an effort to convince the Court that, *even if* "HHS's actions violate the APA," the appropriate remedy is remand, not vacatur. Defs.' Br. at 25. But where, as here, the agency has flouted unambiguous, governing law and regulations and thus taken action that is clearly "unlawful, 'vacatur is the normal remedy.'" *Bridgeport Hosp. v. Becerra*, 108 F.4th 882, 890 (D.C. Cir. 2024) (quoting *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014)).

explained" because, *inter alia*, the Agency (1) failed to explain its sudden departure from prior policy, its own prior understanding of the law, and its own regulations, and ignored significant reliance interests; (2) used an irrational, cart-before-the-horse process for withholding that is contrary to both law and the Agency's own regulations, and (3) utterly failed to consider the obvious harms that such a decision would impose on Plaintiff's members, their staff, and Title X patients in multiple states across the country. *Ohio v. Env't Prot. Agency*, 603 U.S. 279, 292 (2024); *see* Compl. ¶¶ 110–112.[8] Indeed, Defendants' assertion that they provided a satisfactory explanation "for *each* withholding," Defs.' Br. at 24 (emphasis added), is flatly belied by the sole "example" they invoke: the affected Planned Parenthood grantees, *see id.* at 24–25. Notwithstanding that each affected Planned Parenthood member is a *separate entity*, and that Defendants have not identified *any* allegedly concerning "public materials posted" by five of the nine affected Planned Parenthood members, Defendants lumped all nine together in a single March 31 Letter and withheld funds from all of them in one fell swoop. *See* Letter from Defendant Amy Margolis to Planned Parenthood Entities, March 31, 2025, Administrative Record 456–459 (attached hereto as Exhibit 1); *see also* Defs.' Br. at 24 (referring to the distinct "Planned Parenthood affiliates" collectively as "the remaining grantee"); *id.* (referring to the Letter as having cited several examples of why "Planned Parenthood" was likely in violation of terms and conditions, making no distinction between the separate affected grantees). This, in and of itself,

[8] Defendants' claim that *any* agency action "to ensure that grantees are complying with the terms and conditions of grant agreements, including compliance with Federal statutes and executive orders, if reviewable at all, must be afforded highly deferential rational basis review." Defs.' Mot. 23–24 (citing as a *cf. Lincoln*, 508 U.S. at 192). But *Lincoln*—which, as noted above, is a case about agency discretion to spend a lump sum appropriation absent any statutory restrictions that circumscribe that discretion—stands for no such thing, and Defendants cite nothing else to support this proposition, especially where—as here—Plaintiff alleges the Agency has flatly defied applicable, binding law and regulations.

demonstrates the lack of any "rational connection between the facts found and the choice made" to withhold funds, *Ohio*, 603 U.S. at 292 (cleaned up), and negates Defendants' attempt to dismiss Plaintiff's arbitrary and capricious claim. Accordingly, Defendants cannot show that any of Plaintiff's APA claims should be dismissed, let alone that they are entitled to judgment as a matter of law on those claims.

III. Plaintiff Sufficiently Pleaded an *Ultra Vires* Claim.

Plaintiff's Complaint adequately pleaded a claim that Defendants' blatant disregard of the explicit statutory commands of 42 U.S.C. § 2000d-1 was an *ultra vires* act, and expressly made that claim "in the alternative" to its APA claims. *See* Compl. ¶ 13; *see also id.* ¶¶ 123–126; Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient."). Nevertheless, in attempt to dismiss Plaintiff's *ultra vires* claim, Defendants (1) re-advance their argument that Plaintiff must seek review in a court that has no jurisdiction to issue the requested relief and (2) tie themselves in knots contending that Plaintiff must otherwise seek review under the APA, notwithstanding their *simultaneous* contention that APA review is foreclosed. Defs.' Br. at 25–26. As detailed below, both arguments should be rejected.

As Defendants note, Defs.' Br. at 26, an *ultra vires* claim has three elements: "(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." *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009) (cleaned up).

Defendants make no real attempt to argue that Plaintiff cannot satisfy the first element on the basis that 42 U.S.C. § 2000d-1 *expressly* precludes review, nor could they, as the statute says nothing about review. Indeed, there is arguably nothing in the text of § 2000d-1 that suggests that Congress even intended to *impliedly* preclude review of agency action that runs afoul of the statute. *See* 42 U.S.C. § 2000d-1.

As to the second element, Defendants argue that Plaintiff has alternative pathways to seek review of Defendants' unlawful withholding: in the Court of Federal Claims under the Tucker Act, and under the APA. Defs.' Br. at 26–27. But Plaintiff has already explained why its claims for equitable relief cannot be brought in the Court of Federal Claims. *See supra* 2–8. And to the extent Defendants seek dismissal of Plaintiff's *ultra vires* claim because Plaintiff has viable alternative claims under the APA, Plaintiff agrees that this Court need not reach the *ultra vires* claim if it finds review of Defendants' actions to be appropriate under the APA. Defendants, however, simultaneously argue that Plaintiff *cannot* bring a challenge under the APA. *See* Defs.' Br. at 16–23. They cannot have it both ways. If this Court were to conclude that review of Plaintiff's claims is unavailable under the APA, then the only mechanism for challenging the Agency's violation of a clear and mandatory statutory command *is* an *ultra vires* claim. *See Jafarzadeh v. Duke*, 270 F. Supp. 3d 296, 311 (D.D.C. 2017) (relief predicated on an *ultra vires* claim is available when the plaintiff has no other means of obtaining review of the agency action); *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988) ("When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority.").

Finally, on the third element, Defendants argue that they have not violated a "clear and mandatory statutory command" because "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." Defs.' Br. at 27. But that argument flies in the face of the plain language of 42 U.S.C. § 2000d-1, which clearly applies not only to termination of awards but also to the "refusal to grant or to continue assistance" to a grantee and to effect compliance with Title VI "by any other means authorized by law":

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or *refusal to grant or to continue assistance* under such program or activity to any recipient as to whom there has been *an express finding on the record, after opportunity for hearing, of a failure to comply* with such requirement, *but such* termination or *refusal shall be limited to the particular* political entity, or part thereof, or other *recipient as to whom such a finding has been made* and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) *by any other means authorized* by law: *Provided, however*, *That no such action shall be taken until the* department or *agency* concerned *has advised the appropriate person* or persons *of the failure to comply* with the requirement and *has determined that compliance cannot be secured by voluntary means*. In the case of any action terminating, or *refusing to grant or continue*, assistance because of failure to comply with a requirement imposed pursuant to this section, *the head of the Federal department or agency shall file* with the committees of the House and Senate having legislative jurisdiction over the program or activity involved *a full written report of the circumstances and the grounds* for such action. *No such action shall become effective until thirty days have elapsed after the filing of such report*.

42 U.S.C. § 2000d-1 (emphasis added). Defendants' withholding of continuation grant funds from Plaintiff's Affected Members pending the investigation into non-compliance with Title VI is a "refusal to grant or to continue assistance," or, at the very least, an attempt to effect compliance with Title VI by "other means." Both avenues are subject to the same mandatory requirements of a *prior* finding of an actual *failure* to comply and the provision of advanced notice to the "recipient as to whom such a finding has been made" *before* funds can be withheld. It is indisputable that none of that happened here. And the statute contains still other mandates, making clear that (1) no action refusing to grant or continue assistance shall become effective until "thirty days have elapsed after the filing of [a] report [with Congress]," and (2) no action taken to effectuate compliance with Title VI "by any other means" shall become effective until the agency has

"determined that compliance cannot be secured by voluntary means." 42 U.S.C. § 2000d-1. Defendants do not suggest that any such report has been filed, or that they have determined compliance cannot be secured by voluntary means. It therefore is evident, and indeed factually indisputable, that Defendants have defied the clear command of Congress as to the process that must be taken for withholding grant funding based on an alleged failure to comply with Title VI.

Indeed, multiple courts have held that Section 2000d-1 *specifically* contains the exact type of "clear and mandatory" statutory command, *Fed. Express Corp. v. U.S. Dep't of Com.*, 39 F.4th 756, 763 (D.C. Cir. 2022), that may give rise to an *ultra vires* claim. *See, e.g.*, *Schlafly v. Volpe*, 495 F.2d 273, 279 (7th Cir. 1974) (holding that "plaintiffs have clearly alleged ultra vires conduct on the part of federal officials" because "the action taken by the defendants was beyond their statutory authority, since termination of federal assistance is not authorized by 42 U.S.C. § 2000d-1 unless the conditions precedent to such action have been satisfied"); *Mayor & City Council of Baltimore v. Mathews*, 562 F.2d 914, 922 (4th Cir. 1977) (agency's failure to adhere to the dictates of § 2000d-1 "renders its action to terminate financial assistance, taken to enforce Title VI vis a vis the State, ultra vires and without the force of law"). Thus, Plaintiff has properly pleaded an *ultra vires* claim, and—in the event this Court grants Defendants' motion to dismiss Plaintiff's APA claims—this Court should deny Defendants' motion to dismiss Plaintiff's fifth cause of action.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendants' Motion to Dismiss or for Summary Judgment.

August 4, 2025,

Respectfully submitted,

/s/ Brigitte Amiri
Brigitte Amiri

Meagan Burrows
Ryan Mendias
Nora Ellmann
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
T: (212) 549-2500
bamiri@aclu.org
mburrows@aclu.org
rmendias@aclu.org
nellmann@aclu.org

Arthur B. Spitzer (D.C. Bar No. 235960)
Aditi Shah (D.C. Bar No. 90033136)
American Civil Liberties Union
of the District of Columbia
529 14th Street, NW, Suite 722
Washington, D.C. 20045
T: (202) 601-4266
aspitzer@acludc.org
ashah@acludc.org

Robin Summers (D.C. Bar No. 219473)
National Family Planning & Reproductive Health Association
1025 Vermont Ave. NW, Suite 800
Washington, D.C. 20005
T: (202) 293-3114
rsummers@nfprha.org

Attorneys for Plaintiff