UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PLANNED PARENTHOOD OF WISCONSIN, INC., PLANNED PARENTHOOD ASSOCIATION OF UTAH, PLANNED PARENTHOOD OF GREATER OHIO and NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION,

Plaintiffs,

v.

ALEX M. AZAR II, in his official capacity as United States Secretary of Health and Human Services, and DIANE FOLEY, in her official capacity as Deputy Assistant Secretary for the Office of Population Affairs,

Defendants.

Case No. 18 Civ. 1035-TNM (con)

EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL AND FOR AN EXPEDITED RESPONSE BY THE GOVERNMENT

Plaintiffs Planned Parenthood of Wisconsin, Inc., Planned Parenthood Association of Utah, Planned Parenthood of Greater Ohio (collectively, the "Planned Parenthood Plaintiffs"), and the National Family Planning & Reproductive Health Association ("NFPRHA") move pursuant to Federal Rule of Civil Procedure 62(c) for an injunction pending appeal that (1) bars use of the challenged criteria in HHS's Fiscal Year 2018 Funding Opportunity Announcement ("FOA") to award Title X grants and (2) preserves the status quo by requiring HHS to maintain continuation funding to existing Title X grantees until the court of appeals can consider this case.[1]

[1] The Court has jurisdiction to consider this motion even though Plaintiffs have filed a notice of appeal. *See McCammon v. United States*, 588 F. Supp. 2d 43, 45 n.2 (D.D.C. 2008).

Plaintiffs also request that the time for any response to this motion by the government be shortened such that any response must be filed by Friday, July 20, at 3 PM. *See, e.g.*, Order, *Alcresta Therapeutics, Inc. v. Azar*, No. 1:18-cv-00243 (D.D.C. June 26, 2018) (Kelly, J.) (ordering one-day response period on motion for emergency relief pending appeal in litigation against HHS). If the Court is not inclined to grant Plaintiffs' requested relief, Plaintiffs respectfully request that the Court dispose of the instant motion expeditiously, so that Plaintiffs can pursue expedited relief in the D.C. Circuit. *See* Fed. R. App. P. 8(a)(1)(C) ("A party must ordinarily move first in the district court for … an order granting, … an injunction while an appeal is pending."). In light of the urgent need for relief, if the Court does not render a decision on this motion by the end of the day on July 23, 2018, Plaintiffs intend to seek emergency relief from the D.C. Circuit.

As Local Rule 7(m) requires, Plaintiffs have conferred with counsel for Defendants. The government has informed Plaintiffs that it opposes both the request for an injunction pending appeal and the request that they file a response, if any, by 3 PM on Friday.

THE FACTS THAT CREATE THE URGENCY OF THIS MOTION

As the Court is aware, HHS's consideration of Title X grant applications in a nationwide competition governed by the challenged FOA is well underway. Desilets Decl., Dkt. 28-1, ¶ 6 (review panel process began the week of June 4, 2018). Defendants have stipulated that mid-July is the critical juncture, after which HHS will need either to start the process for maintaining continuation funding to existing grantees beyond August 31, 2018 (when their current continuation funding runs out) or finalize Notices of Awards for new grants under the FOA for a term starting September 1, 2018. Stip. and Joint Mot., Dkt. 22, ¶ 6; FOA, Dkt. 1 Ex. A, at 12, 47. The relevant officer at HHS has represented to this Court that HHS "expects to issue new

Title X awards" under the FOA "on or about August 13, 2018," Kretschmaier Decl., Dkt. 25-2, ¶ 4. Without an injunction pending appeal, HHS will be free to award those new grants under the contested FOA at any time and can be expected to do so as quickly as it is able.[2]

If HHS is allowed to finalize new grants under this FOA before an appeal can be heard, the overall Title X provider network and its millions of patients will suffer immediate, irreparable disruption and diminished effectiveness at the start of those new grants. Plaintiffs will suffer irreparable harm, and because HHS will soon be poised to announce the grant awards and dispense funds under those awards, Plaintiffs' substantial legal challenges to the FOA criteria may be eclipsed before timely appellate review can take place if an injunction is not issued. To avoid that situation, the Court should enter an injunction preserving the status quo. An injunction pending appeal will allow the court of appeals the opportunity to consider whether this FOA violates essential limits on federal agency action and threatens an unwarranted disruption of the Title X program. Plaintiffs intend to ask the Court of Appeals to expedite briefing on their appeal.

ARGUMENT

An injunction pending appeal is a "protective" measure that is appropriate when, after a ruling by a district court on a substantial legal question, "the equities of the case suggest that the status quo should be maintained" to allow appellate review. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-845 (D.C. Cir. 1977). To determine whether to enter an injunction or stay pending appeal, courts consider (1) the likelihood the movant will prevail on the merits of the appeal; (2) the likelihood the movant will be irreparably harmed

[2] Moreover, as the government explained at oral argument, Oral Arg. Tr., Dkt. 34, at 74-75, it must obligate the FY 2018 funds at issue before September 31, 2018, to comply with congressional appropriations requirements.

absent the injunction; (3) whether other parties will be harmed by the injunction; and (4) the public interest. *Cuomo v. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985).

Although the standard for an injunction pending appeal is "essentially the same" as the standard for a preliminary injunction, courts in the injunction-pending-appeal context typically "recast the likelihood of success factor as requiring only that the movant demonstrate a serious legal question on appeal" when the balance of harms favors the request. *National Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 68, 71 n.1 (D.D.C. 2008). Accordingly, an injunction pending appeal is appropriate if "a 'serious legal question is presented, when little if any harm will befall other interested persons or the public, and when denial of the order would inflict irreparable injury on the movant.'" *Akiachak Native Community v. Jewell*, 995 F. Supp. 2d 7, 12-13 (D.D.C. 2014) (quoting, *inter alia*, *Washington Metro. Area Transit*, 559 F.2d at 844). That standard is satisfied in this case.

A. Plaintiffs Are Likely To Succeed On The Merits Or, At The Very Least, Present A Substantial Question For Appeal

Plaintiffs have raised strong arguments that the FOA's new application review criteria (1) are reviewable final agency action, (2) constitute legislative rules that must be considered through notice-and-comment rulemaking, and (3) are arbitrary, capricious, and otherwise contrary to law. *See* PI Br., Dkt. 18, at 16-32; PI Reply, Dkt. 28, at 12-32. Although this Court disagreed with Plaintiffs' positions, the Court's determinations about final agency action and legislative versus procedural rules, in particular, raise important questions for appeal that have implications well beyond this case. *See Center for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 240 F. Supp. 2d 21, 22 (D.D.C. 2003) (granting injunctive relief pending appeal because "although the Court ultimately did not agree" with the movants' merits arguments, they had made out a substantial case on a close question); *see also Washington Metro. Area Transit*,

559 F.2d at 844 ("Prior recourse to the initial decisionmaker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision.").

The questions presented in this case are highly significant for judicial review of agency action. The government's reasoning—and the Court's ultimate decision that an agency's adoption of "intermediate review criteria" is not reviewable, Op. 11-18—would immunize a broad swath of agency policymaking from review as long as substantive policymaking is nested within an FOA or similar mechanism. Whether the Administrative Procedure Act is so easily circumvented is an important legal question of broad application. An injunction pending appeal would enable appellate review of this novel position before the agency is able to use it to insulate its decisionmaking in this case and others. *Ctr. For Int'l Envtl.*, 240 F. Supp. 2d. at 22 (novel legal position at the center of the case supports injunction pending appeal).

Plaintiffs have a strong argument on appeal that the FOA's new grant-making criteria constitute final agency action. The new criteria introduced by the FY 2018 FOA are binding on applicants, review panels, and HHS, including the DASPA. *See* FOA at 43, 44. Given the legally significant consequences of the FOA for both applicants and the agency itself (even apart from the dispositive practical effects of the scoring process for grant applicants), the FOA is final action that is reviewable under the APA.

The Court's points to the contrary do not support its conclusion that no final agency action is present. *First*, the Court noted (at 12-13) that no grants have yet issued under the 2018 FOA, but that does not preclude a finding of finality. Agency action is final as long as it is one from which "legal consequences *will* flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (emphasis added); *see Nat'l Min. Ass'n v. Jackson*, 768 F. Supp. 2d 34, 44 (D.D.C. 2011) ("The

federal defendants' view of what amounts to finality is too narrow, as it is possible for an agency to take final agency actions during a permit assessment process prior to actually determining whether to grant or deny an application for a permit."); *Alabama v. Centers for Medicare & Medicaid Servs.*, 780 F. Supp. 2d 1219, 1227 (M.D. Ala. 2011) ("Agency action is not required to be specifically applied to an entity within the agency's purview before the action is considered final."). Plaintiffs are challenging the criteria that the agency has definitively said must be used to review grant applications, not a decision as to a particular Title X grant, and are attempting to stop the harmful impact the changed criteria will have on the program *because* of their binding effects on applicants and the agency.

Second, the criteria are not merely "intermediate." Op. 13. Once the FOA issued, the criteria were binding on review panels and all agency staff, including the DASPA. *See* FOA at 43 ("Federal staff … will assess all eligible applications according to the following [eight] criteria."); *id.* at 44 (DASPA "will take into consideration the following additional factors …" that add to *but do not replace* the primary criteria and come into play only after those criteria have been scored by expert objective reviewers). In case there were any doubt, the agency's own words, which are not discussed in the Court's opinion, make it plain that the entire agency is bound by the criteria it directs to be used to review grant applications: Those criteria are "the criteria HHS uses to determine which family planning projects to fund." Savitzky Decl., Dkt. 18-7, Ex. A (OPA Program Requirements) at 9. The fact that, under the FOA, the DASPA also considers four "additional factors" related to geographic distribution and the limits of available funds, FOA at 44-45, does not change the fact that the agency is bound by 42 C.F.R. § 59.7 and by the agency's own pronouncements. Nor does it allow the DASPA to ignore the results of the review panels that assess applicants' compliance with the regulatory criteria.

Third, and contrary to the Court's conclusion, the challenged criteria do legally bind Title X grant applicants, too. Not only does the FOA dictate the required contents of applications, but once funded, a Title X applicant is *obligated* to administer the project as it was presented in its application, *see* 45 C.F.R. § 75.308; FOA at 48-49. Indeed, some Plaintiffs restructured their Title X programs and networks to attempt to comply with the FOA's new criteria, even though they believed them to be unlawful and to undermine their mission. *E.g.*, Geoffray Decl., Dkt. 18-6, ¶¶ 28-31; Thomas Decl., Dkt. 18-5, ¶¶ 29, 45-48. If funded, those Plaintiffs will be bound to operate their projects as specified by the FOA. *See Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435-36 (D.C. Cir. 1986).

If these deliberately altered criteria were as meaningless as the Court's conclusions indicate, then there would have been no reason for HHS to add them as the FOA's new, dominant scoring consideration. To the contrary, the criteria's role in directing and binding Title X applicants and in constraining agency actors shows that the new criteria are meaningful, immediately consequential, and final changes. The significance of the criteria is highlighted by the fact that the government cannot cite a single instance in which the review panel score was not outcome-determinative in competitions for awarding a Title X service grant like the ones at issue in this FOA (as opposed to a few stray examples of special, limited-availability technology grants for existing grantees that required some adjustment for geographic spread, *see* Moskosky Decl., Dkt. 30-1, at 9-14). Plaintiffs have a substantial likelihood of persuading the court of appeals that those powerful, dispositive effects are not merely "practical" (though admittedly "practically consequential," Op. 12) and that the agency's actions are final and reviewable.

For much the same reasons, Plaintiffs have a substantial likelihood of persuading the court of appeals that notice-and-comment rulemaking was required before HHS could add

wholly new criteria to the set of application review criteria set forth in agency regulations—especially where there is no question that the new criteria will shift the direction of Title X funds and where (as just explained) they will bind and alter the interests of both Title X applicants and the agency itself. Significant substantive changes like those cannot be imposed by agencies without, at a minimum, notice-and-comment rulemaking that gives stakeholders, experts, and the general public the ability to explain the consequences of the changes for the Title X program and for public health generally. *See, e.g.*, *Mendoza v. Perez*, 754 F.3d 1002, 1024-25 (D.C. Cir. 2014); *NFPRHA v. Sullivan*, 979 F.2d 227, 231-32 (D.C. Cir. 1992); *see also, e.g.*, *Planned Parenthood Fed'n of Am. v. Sullivan*, No. 88 Civ. 5565, 1989 WL 149755, at *6 (E.D. Pa. Dec. 8, 1989) (new requirements on Title X grant applicants imposed by HHS through "requests for applications" (an earlier term for FOAs) were "substantive rules in interpretive clothing, and are subject to the notice and comment procedures of the APA").

The court of appeals should also have the opportunity to consider Plaintiffs' substantial arguments that the dramatic changes wrought by the new criteria in the FOA—such as the preference for primary care providers over reproductive health specialists and the new mandate to "emphasi[ze]" abstinence even for the sexually active adults who comprise the vast bulk of Title X patients—conflict with the Title X statute and regulations, or in any event lack support in the administrative record. *See, e.g.*, PI Reply at 20-30. The court of appeals should have the opportunity to consider all of these arguments before HHS can upend the long-successful Title X program, displace longstanding grantees, and diminish the effectiveness of Title X projects for the millions of low-income patients who depend on them every year.

B. Absent An Injunction Pending Appeal, Plaintiffs Will Be Irreparably Harmed

As the D.C. Circuit has recognized, non-profit, mission-driven entities suffer irreparable harm "if the actions taken by the defendant have perceptively impaired the organization's

programs" and interfered with accomplishing their aims. *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016) (brackets and internal quotations omitted); *see also Open Communities All. v. Carson*, 286 F. Supp. 3d 148, 178 (D.D.C. 2017) (improper regulatory action changed organizations' activities, frustrated effective engagement, and diverted time away from client services, constituting irreparable harm); *Nebraska Health Care Ass'n v. Dunning*, 578 F. Supp. 543, 545 (D. Neb. 1983) (irreparable harm where "a reduction of the quality of services to patients or an inability of the health care providers to continue to furnish the nature of services contemplated" was "likely to result"; no subsequent remedy could "dissolve the frustration or provide the services lost").

As explained above, HHS is currently reviewing applications using the altered review criteria, and it plans to issue awards in a few weeks. Unless an injunction pending appeal prevents HHS from issuing Title X grant awards under the challenged FOA, the Planned Parenthood Plaintiffs and NFPRHA's members, who comprise 84% of the current Title X grantees, will suffer two forms of irreparable harm immediately following those awards.

First, for those Plaintiffs who lose all Title X funding or have their funding slashed by HHS awards under the altered criteria, their ability to serve clients will be severely and irreparably harmed because the loss of funding means that patients cannot be served, services must be curtailed, and health centers will close. Coleman Decl., Dkt. 18-4, ¶¶ 96-104; Atkinson Decl., Dkt. 18-1, ¶¶ 44-60; Harvey Decl., Dkt. 18-2, ¶¶ 35-46; Galloway Decl., Dkt. 18-3, ¶¶ 45-54. Once the new grant period begins, as it will imminently, there can be "no do over" for these Plaintiff organizations' impaired efforts to help the clients who need Title X services. *League of Women Voters*, 838 F.3d at 9. Moreover, for the numerous current grantees that function solely as Title X administrators for a particular region, overseeing a large network of providers, loss of

Title X funding threatens their organizations' "very purpose" and continued existence. *See, e.g.*, Thomas Decl., Dkt. 18-5, ¶¶ 46, 50. *Second*, those Plaintiffs who have conformed their Title X project plans to the changed Title X requirements to be realistically competitive for an award, departing from longstanding relationships and long-established and successful practices in delivering Title X services, will now be locked into their altered project plans; their missions and client service will be irreparably impaired, too, as soon as the new grant period begins. *See, e.g.*, Coleman Decl. ¶¶ 91-97; Thomas Decl. ¶¶ 16-34, 45-48; Geoffray Decl., Dkt. 18-6, ¶¶ 13-32.[3]

All of those serious injuries from unlawful agency-imposed requirements constitute irreparable injury justifying an injunction pending appeal. *See League of Women Voters*, 838 F.3d at 9; *see also, e.g.*, *Planned Parenthood Fed'n of America, Inc. v. Schweiker*, 559 F. Supp. 658, 667 (D.D.C. 1983). In addition, if HHS is allowed to obligate new grants under the FOA, Plaintiffs will lose the opportunity to compete fairly for those federal funds, a loss that has repeatedly been recognized as irreparable harm when it occurs in conjunction with other injuries, as here. *See, e.g.*, *Caddell Constr. Co. v. United States*, 111 Fed. Cl. 49, 114 (Fed. Cl. 2013) (granting injunction and collecting cases in which bidder suffers irreparable harm from being "deprived of the opportunity to compete fairly for a [government] contract"); *see also Planned Parenthood Fed'n*, 559 F. Supp. at 664 (although "plaintiffs have no right to a government contract, they are entitled to have grants dispensed lawfully"); *compare* Op. 17 (analogizing Title X grants to government contracts). And Plaintiffs, whether through the distortions to their Title X projects required under the new criteria or through loss of funding, will also suffer harms to

[3] Even if the Title X network of grantees were to stay exactly the same in these impending awards, the irreparable programmatic harms in this second category would occur. But because HHS explicitly sought new grantees in the FOA and many current grantees face new competition under the challenged new criteria, immediate and irreparable harms of both kinds are likely to occur if the FOA is not enjoined. *See, e.g.*, FOA at 7; Atkinson Decl. ¶ 7; Thomas Decl. ¶ 17; Coleman Decl. ¶ 98.

their reputations as leading providers of high-quality and effective reproductive health care—yet another basis for granting injunctive relief. *See, e.g.*, *Jones v. District of Columbia*, 177 F. Supp. 3d 542, 547 (D.D.C. 2016) ("injury to reputation and goodwill" constitutes a form of irreparable harm); Atkinson Decl. ¶¶ 50-57; Coleman Decl. ¶¶ 93-94. Before any of those multiple layers of irreparable harms befall the Plaintiff Title X grantees—organizations that have been the backbone of a uniquely successful public service program for many years—their substantial legal claims should receive appellate consideration.

To prevent those imminent harms, this Court should order continuation funding to keep vital Title X projects in operation during the pendency of Plaintiffs' appeal. Title X projects across the country are already running on continuation funding, but the current round of continuations is set to end on August 31. After that date, absent an order to maintain continuation funding, *all* current grantees will lose funding; as explained above, many will then be forced to begin winding down operations, closing centers, and turning away patients. Continuation funding to avoid that result and preserve the status quo—*i.e.*, the current Title X program now serving patients all across the country—should go hand in hand with a bar on the use of this FOA to make awards pending appellate review.

C. Granting An Injunction Will Not Significantly Harm Other Parties And Will Serve The Public's Interest

A short-term injunction pending appeal would simply maintain the successful Title X program as it has functioned for almost five decades while the legal questions about the FOA's changed criteria are being resolved. HHS will suffer no significant harm from such interim relief. HHS made clear in the FOA that its "anticipated" start date of September 1 for grants under the FOA was an "estimate" and that Notices of Grant Awards, and the start of any grant term under the FOA, could be later. FOA at 12, 47. Indeed, HHS itself delayed issuing the

FY2018 FOA and then appropriately ordered the current round of continuation funding to ensure that projects remained funded until the later, anticipated award date. Coleman Decl. ¶¶ 60-65. HHS clearly can accommodate the current status quo, including continuation funding, for a short while longer without any meaningful harm.

Nor will an injunction pending appeal impose any cognizable harm on any entities that have applied to become new grantees under the challenged Title X grant-making criteria. Applicants to become new Title X grantees do not have any extant Title X projects; thus, they will not have to turn away patients, lay off staff, or close centers based on funding decisions under the FOA. They can continue to await a decision about whether awards will occur under this FOA without harm.

Above all, the requested injunction will advance the public interest by protecting the Title X program and the four million patients served by the program annually from the significant interference and dislocation that the challenged aspects of the FOA would impose. When established family planning networks of health centers change, there are harmful gaps and delays in access to care, and trusted clinician-patient relationships are broken. Attempts to rebuild those fractured networks require years. *See, e.g.*, Geoffray Decl. ¶¶ 38-64; Atkinson Decl. ¶¶ 57-60. In addition, HHS's new rules will force Title X grantees to place meaningful emphasis on new directives that are not acceptable to and not effective for patients, contrary to Title X's core substantive requirements. Those new directives undermine rather than advance Congress's goal of equalizing access to clinical services for low-income individuals and enabling independent family planning. *See* PI Reply at 20-32; Coleman Decl. ¶¶ 14-25, 68-90; Thomas Decl. ¶¶ 16-34.

An injunction pending appeal will avoid such harm to individual members of the public and protect the public health overall. *See Texas Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 246 (D.D.C. 2014) (public interest in safeguarding access to health care for patients); *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482, 500-501 (M.D.N.C. 2011) (public interest in protecting access to Title X-funded reproductive health care); *see also* Brief of Amici States at 14-19 (urging the Court to enjoin use of the new FOA criteria to protect public health and public fiscs). Allowing HHS to award grants under the contested criteria would bring about immediate, disruptive change in the Title X program and impose far greater harms than any conceivable effects from a temporary injunction preserving the status quo—including a well-functioning Title X network—pending appeal. *Cf. Loving v. IRS*, 920 F. Supp. 2d 108, 112 (D.D.C. 2013) (enjoining new disruptive rules "effects far less a change in the landscape" than allowing the rules to take effect during an appeal).

CONCLUSION

The Court should order HHS, *first*, to file its response to this motion, if any, by Friday, July 20, at 3 PM, and s*econd*, (a) to refrain from finalizing grant awards under the FOA pending an appeal in this case and (b) to maintain HHS's use of continuation funding for current grantees under the Title X program until Plaintiffs' appeal can be heard and decided. Given the immediate irreparable harm that will occur if HHS makes awards under the FOA and because time is of the essence, Plaintiffs intend to seek an injunction from the court of appeals if this motion remains undecided at the close of business on Monday, July 23, 2018.

July 18, 2018

Respectfully Submitted,

By /s/ Paul R.Q. Wolfson

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CERTIFICATE OF SERVICE

I, Paul R.Q. Wolfson, hereby certify that on July 18, 2018, a true and correct copy of the foregoing EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL AND FOR AN EXPEDITED RESPONSE BY THE GOVERNMENT was filed electronically with the United States District Court for the District of Columbia. Notice of this filing has been sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's ECF system.

/s/ Paul R.Q. Wolfson _____
PAUL R.Q. WOLFSON