[ORAL ARGUMENT NOT SCHEDULED]

Nos. 18-5218, 18-5219

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PLANNED PARENTHOOD OF WISCONSIN, INC., ET AL.,

Plaintiffs-Appellants,

v.

ALEX M. AZAR II, in his official capacity as
U.S. Secretary of Health and Human Services, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

UNITED STATES' OPPOSITION TO APPELLANTS' MOTION FOR INJUNCTION PENDING APPEAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The plaintiffs-appellants are Planned Parenthood of Wisconsin, Inc., Planned Parenthood of Greater Ohio, Planned Parenthood Association of Utah, and National Family Planning and Reproductive Health Association.

The defendants-appellees are Secretary Alex M. Azar II in his official capacity as the Secretary of Health and Human Services and Diane Foley in her official capacity as Deputy Assistant Secretary for the Office of Population Affairs. The following States have filed a notice of intention to participate as amici in this Court: California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia. The following cities have filed a motion to participate as amici in this Court: Cities of Columbus, OH; Cincinnati, OH; Dayton, OH; Seattle, WA; Austin, TX; St. Paul, MN; Duluth, MN; Albany, NY; and Philadelphia, PA.

B. Rulings Under Review

The ruling under review is the district court's ruling granting the government's motion for summary judgment on July 16, 2018 (McFadden, J.). That order has not yet been published but is available at 2018 WL 3432718.

In addition, a transcript of the district court's oral ruling on July 25, 2018 denying plaintiff's request for an injunction pending appeal has been submitted as a supplemental appendix to plaintiffs' motion for injunction pending appeal.

C. Related Cases

This case has not previously come before this Court or any other court. There are currently no related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

s/ Jaynie Lilley
Jaynie Lilley

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INTRODUCTION

Plaintiffs, organizations that received grants to provide family planning services under Title X of the Public Health Service Act, challenge the criteria by which the Department of Health and Human Services will evaluate Title X grant applications for this fiscal year. Plaintiffs applied for grants for FY 2018, and the agency announced on the date of this filing the names of the intended grant recipients. All current grantees who applied for grants under the challenged criteria will receive grant funds.[1] Plaintiffs nevertheless insist that their grants (set to expire on August 30, 2018) be continued during the pendency of this appeal, preventing the agency from awarding any competitive grants and precluding any of the other organizations selected by the agency from receiving those grants. Indeed, plaintiffs insist that the expiring grants for *all* current recipients under the program (even those who are not plaintiffs here) continue while this litigation proceeds.

This Court should deny plaintiffs' motion for an injunction pending appeal. Plaintiffs cannot meet this Court's heavy standard for an injunction pending appeal, much less a mandatory injunction that alters the status quo. First, plaintiffs cannot show a likelihood of success on appeal. The district court correctly held

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[1] *See HHS announces grantees for Title X family planning program services* (Aug. 2, 2018), at https://www.hhs.gov/ash/about-ash/news/2018/hhs-announces-grantees-title-x-family-planning-program.html. The list of selected recipients is available at https://www.hhs.gov/opa/grants-and-funding/recent-grant-awards/index.html.

that the publication of the challenged scoring criteria is merely an intermediate step in the grant-making process and thus was not reviewable final agency action. The district court also correctly held that the criteria are consistent with Title X and are neither arbitrary nor capricious, and that notice-and-comment rulemaking was not required.

Nor have plaintiffs suffered irreparable harm. Because the agency has announced that plaintiffs will receive grant funds this year (although the amounts have yet to be determined), any claim of economic harm is speculative at best. And plaintiffs' assertions of reputational harm fail to meet the high standard for irreparable injury. For similar reasons, the balance of the equities favors the government, not plaintiffs. As the district court explained, "[a]t bottom, the harm to the Title X program that the plaintiffs posit is based on the assumption that plaintiffs are better situated to serve the public than any competitor who may win." Tr. 20. [2]

[2] We refer to the Exhibits attached to Plaintiffs' Motion for Injunction Pending Appeal as "Ex. _". We cite to the transcript of the district court's oral ruling denying the motion for injunction pending appeal as "Tr. _" and the district court's order granting the government summary judgment as "Op. _".

BACKGROUND

A. Statutory Background

Under Title X of the Public Health Service Act, 42 U.S.C. § 300 *et seq.*, the Secretary of HHS is authorized "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." 42 U.S.C. § 300(a). The statute provides that "[i]n making grants and contracts . . . the Secretary [of HHS] shall take into account the number of patients to be served, the extent to which family planning services are needed locally, the relative need of the applicant, and its capacity to make rapid and effective use of such assistance." *Id.* § 300(b).

Agency regulations provide that the Secretary "may award grants" that "tak[e] into account:

> (1) The number of patients, and, in particular, the number of low-income patients to be served;
>
> (2) The extent to which family planning services are needed locally;
>
> (3) The relative need of the applicant;
>
> (4) The capacity of the applicant to make rapid and effective use of the federal assistance;
>
> (5) The adequacy of the applicant's facilities and staff;
>
> (6) The relative availability of non-federal resources within the community to be served and the degree to which those resources are committed to the project; and

> (7) The degree to which the project plan adequately provides for the requirements set forth in these regulations.

42 C.F.R. § 59.7(a).

The annual Title X grant application process begins with a Funding Announcement (FOA). *See* 45 C.F.R. § 75.203. The Funding Announcement sets out procedural requirements and substantive criteria for applications and describes the process by which the applications will be reviewed. Funding Announcements also describe HHS's Title X Program Priorities, Key Issues, and other policy prerogatives for the upcoming year.

HHS has made these grant decisions using a three-step process for at least the past fourteen years. In the first step, HHS reviews the application packages for compliance with application requirements. Ex. I (2018 FOA) at 16-17. HHS checks that the applications contain the necessary information for evaluation on the merits and assures compliance with procedural requirements, such as page limits and the method of submission. *Id.* Applications that fail this step do not proceed to merits consideration. *Id.*

In the second step, independent review panels, composed of outside experts, score the applications using the criteria in the annual Funding Announcement. *Id.* at 43-44. Over the years, the scoring criteria have largely tracked the seven factors required by the regulations, with some exceptions. For instance, the descriptions of the criteria in the Funding Announcements have regularly expanded on the

regulatory language. *See, e.g.*, Ex. E (2017 FOA) at 41 (expanding the regulatory consideration of the "adequacy of the applicant's facilities and staff" to require applicants to show "evidence of an infrastructure that is sustainable in ensuring continued access to services for the target population"). At times, HHS has also reallocated points among criteria without going through rulemaking.

The independent review panels' scores, however, have never determined funding. *E.g.*, Ex. I (2018 FOA) at 44. Rather, the Deputy Assistant Secretary for Population Affairs (or her designee) "make[s] final award selections." *Id.* The Deputy Assistant makes an independent determination regarding where to direct grant funds, including which Title X grant applications to fund and the amount of each grant. *Id.*

B. The 2018 Funding Announcement

HHS issued its 2018 Funding Announcement on February 23, 2018, with an application deadline of May 24, 2018. Ex. I (2018 FOA) at 1, 60. HHS's sixteen Program Priorities and Key Issues in the 2018 Funding Announcement include, among other agency prerogatives, statements regarding the availability of natural family planning methods, emphasizing the benefits of avoiding sexual risks especially for adolescents, and cooperating with community- and faith-based organizations. *Id.* at 9-11. In particular, Key Issue #5 highlights

> [a] meaningful emphasis on education and counseling that communicates the social science research and practical application of

> topics related to healthy relationships, to committed, safe, stable, healthy marriages, and the benefits of avoiding sexual risk or returning to a sexually risk-free status, especially (but not only) when communicating with adolescents.

Id.; *see also id.* (Key Issue #6) (concerning adolescents). Program Priority #4 emphasizes

> [p]romoting provision of comprehensive primary health care services to make it easier for individuals to receive both primary health care and family planning services preferably in the same location, or through nearby referral providers, and increase incentive for those individuals in need of care choosing a Title X provider.

Id.

Funding Announcements since at least 2003 have included similar emphases. *See* Op. 6-7, 32, 34 (discussing prior Funding Announcements). For this Funding Announcement, HHS assigned points to all the scoring criteria required by regulation and also assigned points to an additional criterion: "[t]he degree to which the project plan adequately provides for the effective and efficient implementation of requirements set forth in the priorities and key issues outlined" in the Funding Announcement. Ex. I (2018 FOA) at 44. The Announcement emphasized that projects should "provide core family planning services" and sought "projects [that] offer a broad range of family planning . . . services that are tailored to the unique needs of the individual." *Id.* at 9.

The 2018 Funding Announcement also provides that the Deputy Assistant Secretary "will take into consideration the following additional factor(s)":

> The geographic distribution of services within the identified service area;
>
> The extent to which funds requested for a project maximize access for the population in need within the entire service area . . .;
>
> Whether the project, including subrecipients and documented partners, provides the area to be served with a variety and breadth of effective family planning methods that are readily available and best serve individuals in need throughout the area to be served; and
>
> The extent to which projects best promote the purposes of Section [300], within the limits of funds available for such projects.

Id. at 44-45.

C. District Court Proceedings

Plaintiffs allege that the 2018 Funding Announcement violated the Administrative Procedure Act (APA) because changes made to the independent review panels' scoring criteria (1) are contrary to law, (2) are arbitrary and capricious, and (3) could be accomplished, if at all, only through notice-and-comment rulemaking. Of the sixteen total program priorities and key issues that are tied to 35 out of 100 total points in the scoring process, plaintiffs objected to only a small subset of criteria relating to counseling on sexual risk avoidance, the provision of primary care services, encouraging family participation, and partnership with community and faith-based partners. Plaintiffs contend that the agency may only consider criteria explicitly enumerated in the Title X statute and implementing regulations and that the Funding Announcement contradicts specific programmatic requirements for Title X and undermines the statute's purpose.

The district court granted summary judgment to the government. The court held that publishing intermediate review criteria in the Funding Announcement is not a reviewable final agency action because the criteria did not impose legal obligations on grant applicants or the final agency decision maker. Op. 11-19. It further held that changes to the scoring criteria altered procedural rules governing how grant applicants presented their proposals to the agency and thus did not require notice-and-comment rulemaking. Op. 19-26. The court also held that the Funding Announcement was fully consistent with Title X and not arbitrary and capricious. In particular, the court concluded that the Funding Announcement's emphasis on counseling on sexual risk was consistent with the statute's text and purposes and that, properly read, the emphasis on primary care did not favor on-site primary care providers and was consistent with the statute. Op. 27-37.

The district court thereafter denied plaintiffs' motion for an injunction pending appeal. The court first concluded that they had not raised a likelihood of success on the merits of their substantive APA claims. Tr. 8. There was no "substantial question" that the Funding Announcement was not a final agency action: "[a]lthough practically consequential, the announcement describes how an agency decision will be made, and is not a final agency action." *Id.* In fact, no grants have been issued under the Funding Announcement; grant applicants are not legally required to do anything under the Announcement; and the Announcement

only governs an intermediate stage in the review process. *Id.* Moreover, even if reviewable, the district court held that plaintiffs' challenges to the Funding Announcement would fail because the Funding Announcement is "fully consistent" with Title X and not arbitrary and capricious. *Id.* at 11. The court also "doubt[ed]" that plaintiffs could show a likelihood of success on their claim that notice-and-comment was required for changes to the intermediate review criteria for the grants, but, out of caution, the court assumed that plaintiffs had raised a serious legal question. *Id.*

Nevertheless, the court concluded that even if plaintiffs had made a showing of success on the merits, it was "canceled out" by the other prongs of the test. Tr. 23. In particular, plaintiffs could not show irreparable harm. Their purported injuries were "theoretical and speculative" because plaintiffs may still be awarded grants under the new Funding Announcement. *Id.* at 12. Any harms associated with failing to secure awards under the new criteria result from voluntarily participating in a competitive process and cannot be the basis for court intervention in the normal grant-making process. *See id.* at 17 ("[T]he plaintiffs fear not an overall cut in Title X funding, but a diversion of those funds to competitors.").

Their claims of reputational harm if they win grants are undermined because plaintiffs failed to show that the Funding Announcement directly conflicts with their organizational mission. To the contrary, plaintiffs have already "voluntarily

incorporated the changes they protest." Tr. 16-19 (citing plaintiffs' declarations that they partner with faith-based organizations, discuss abstinence with their patients, and facilitate access to primary care).

The court concluded that the public interest and balance of the equities supported denying the injunction. Plaintiffs' speculative injuries were outweighed by the harms to other grant applicants who would be shut out of the grant awards by the proposed injunction. Tr. 14. The agency's ability to administer the Title X program would be irreparably harmed by plaintiffs' attempt to displace agency's grant-decision making with their own. Tr. 20. And, the court determined that the public interest favors the continued provision of Title X services through orderly grant-making.

ARGUMENT

PLAINTIFFS HAVE NOT SHOWN THAT THEY ARE ENTITLED TO AN INJUNCTION.

Plaintiffs ask this Court to grant them extraordinary injunctive relief—well beyond the maintenance of the status quo—by upending the agency's normal grant-making process, restraining the issuance of awards to meritorious grant recipients, and giving plaintiffs (and other current recipients) additional grant monies to which they have no legal entitlement. The relief plaintiffs seek extends well beyond the injunction halting a grant competition that this Court reversed in *Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011), to require the agency to

affirmatively fund plaintiffs' projects in the interim. Plaintiffs have failed to meet their burden of showing that they are entitled to any such injunction.

I. Plaintiffs Are Not Likely to Succeed on the Merits.

Plaintiffs have not shown a likelihood of prevailing on the merits of either their substantive or procedural APA claims. The district court correctly rejected plaintiffs' claims under established law, and there is no significant legal question for this Court. [3]

A. Plaintiffs' substantive claims are not justiciable because the Funding Announcement is not final agency action.

Plaintiffs cannot show a likelihood of success on their substantive APA claims because they are not justiciable. The implementation of intermediate scoring criteria during the grant process is not final agency action. Agency action is not "final" for purposes of judicial review unless it is both "the consummation of the agency's decisionmaking process" and a decision by which "rights or

[3] Before the district court, plaintiffs invoked an older test for an injunction pending appeal turning on whether the movant has raised "serious legal questions." The Court may have abrogated this approach. *See Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014). Like the district court, this Court need not decide the question, however, because the serious-legal-questions standard, if it even applies, is only triggered when "each of the other three factors 'clearly favors' granting the injunction." *Davis v. PBGC*, 571 F.3d 1288, 1292 (D.C. Cir. 2009). Here, none of the factors favors plaintiffs, and the Court should deny their request under either standard. *See* Tr. 7 (district court's ruling "would be the same under either standard").

obligations have been determined" or from which "legal consequences will flow." *National Mining Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014).

As the district court explained, the Funding Announcement does not represent the agency's final decision and "the challenged criteria do not legally bind Title X grant applicants." Op. 17. No grants have issued under the Funding Announcement,[4] and the grant applicants are not legally required to do anything in response to the Announcement's criteria. The challenged criteria "only govern an intermediate stage in the review process, with results that do not bind the Deputy Assistant Secretary for Population Affairs, who makes the final award decision." Tr. 8-9; *see* Op. 17.

Plaintiffs contend that the criteria are legally binding because a successful Title X applicant will be obligated to administer the project as presented in the application. But that possibility does not convert the scoring criteria into final agency action. As the district court recognized, a Funding Announcement is "simply a solicitation of offers, kicking off an application process that will result in legally binding contracts only after offers are accepted and grants are awarded." Op. 17; *see Rust v. Sullivan*, 500 U.S. 173, 177-78 (1991). Plaintiffs are not

[4] Nor does the recent announcement of grant recipients for FY18 consitute final agency action, since no awards have issued. Moreover, even when awards are issued, that will not make the interim criteria final agency action (even if the awards themselves are final).

legally obligated to apply for Title X grants, nor are they obligated in their proposals to promise to provide every service included in the scoring criteria. And while plaintiffs point out that the scoring plays a role in HHS's decision-making, that unsurprising fact does not convert an intermediate recommendation into a final decision. *See* Op. 15.

B. Even if justiciable, the agency's evaluation criteria are not arbitrary and capricious or otherwise contrary to law.

Even if plaintiffs were correct that the Funding Announcement was a final agency action subject to review, they could not demonstrate a likelihood of success on the claim that the agency acted arbitrarily and capriciously. In this Court, plaintiffs challenge two elements of the scoring criteria: the consideration of "sexual risk avoidance" and the provision encouraging grantees to offer health care services onsite or through nearby referral providers. Both of these criteria are consistent with Title X and the implementing regulations and not otherwise arbitrary and capricious. As the district court observed, the challenged criteria are "at once tamer than the draconian policies the [p]laintiffs conjure, and reasonable under Title X's charter and the standards of arbitrary and capricious review." Op. 29.

1. The Funding Announcement's inclusion of counseling sexual risk avoidance especially, but not only, to adolescents is lawful. Section 300(a) calls for a "broad range" of family planning methods and services, and the agency's

consideration of sexual risk avoidance (principally for adolescents) in the grant process fits squarely within that statutory mandate. Indeed, nearly ten years' worth of Funding Announcements mention sexual risk avoidance preferences. *See, e.g.*, Op. 32 (noting discussion of abstinence counseling in Funding Announcements in 2003 and 2011).

As the district court explained, this emphasis is fully consistent with the statute and part of a "well-reasoned approach to Title X programs." Op. 32. Title X expressly mentions one form of selective abstinence, "natural family planning methods," 42 U.S.C. § 300(a), and the Funding Announcement, "[f]airly read," explains that the "agency wants providers to *convey* the social science research on these topics, and expects grant recipients to discuss 'healthy relationships' and the 'benefits of avoiding sexual risk . . . especially (but not only) when communicating with adolescents.'" Op. 31 (quoting 2018 FOA).

HHS also reasonably included sexual risk avoidance counseling in a manner that may extend to adults. HHS explained that "[r]eturning to a sexually risk-free status" means "avoiding sexual activities that put an individual at risk for unwanted pregnancy, sexually transmitted infections or other associated risks." Op. 31. Sexual risk avoidance is thus one of many options for family planning methods, including contraception. Indeed, the Funding Announcement links to a guide from the Centers for Disease Control and Prevention that discusses

counseling abstinence for any patients concerned with sexually transmitted infections as part of a "[s]exual health assessment." Ex. I (2018 FOA), at 5-6.

Moreover, contrary to plaintiffs' suggestions, nothing in the Funding Announcement would require an applicant to provide sexual risk avoidance counseling if it is not voluntary, appropriate, or offered as part of a broad range of family planning methods. In the Program Priorities, HHS explains that the applicant should, at a minimum, provide "core family planning services" and assure that "projects offer a broad range of family planning and related health services that are tailored to the unique needs of the individual." Ex. I (2018 FOA) at 9. The Program Priorities explain that all clients should be provided "voluntary, client-centered and non-coercive" care, *id.* at 10, and Key Issue 7 states that the applicant should have an "[e]mphasis on the *voluntary nature* of family planning services," *id.* at 11 (emphasis added). HHS also explains that Title X projects "must be in compliance with the Title X statute, as well as the program regulations and legislative mandates," which require providing contraception. *See id.* at 4, 6-7, 9, 20, 24, 48.

2. Plaintiffs' contention that the scoring criteria improperly gives an advantage to primary care providers rests on a misreading of the provision they challenge. The Funding Announcement encourages grantees to offer primary health care services onsite "or through nearby referral providers." Ex. I (2018

FOA) at 10. Nothing in this language gives preference to primary care providers. The language gives preference to applicants who offer primary care either (1) onsite *or* (2) "through nearby referral providers." *See* Op. 34 (noting the "agency's avowed intention to favor both on-site and referral options equally"); Tr. 19 (rejecting "the notion that the FOA has prioritized applicants that are primary care providers over applicants with relationships with primary care providers"). Emphasizing grantees' ability to connect patients with broader health care options is not new, *see* Op. 34 (noting this "longstanding agency commitment" and citing prior Funding Announcements), and is fully consistent with Title X's purposes. Op. 34.

C. The agency's intermediate evaluation criteria for grants do not require notice-and-comment rulemaking.

Plaintiffs' contention that the Funding Announcement is a legislative rule that requires notice-and-comment is unfounded. The Funding Announcement did not make significant substantive changes to the agency's grant-making process. These criteria are neither new nor substantive. The agency has incorporated similar criteria in Funding Announcements throughout the history of Title X grant-making without notice-and-comment rulemaking. *See* pp. 5-6 *infra* (discussing the history of the grants); Op. 4.

The Funding Announcement exhibits the "'critical feature[s]' of a procedural rule," which is an action "that do[es] not [itself] alter the rights or

interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." *National Mining Ass'n*, 758 F.3d at 250; Op. 23. And, as explained, the Funding Announcement criteria do not bind the final agency decision-maker: the Funding Announcement "language imposes no rights or obligations, and has left the Deputy Assistant Secretary free to exercise discretion about who ultimately wins Title X grants." Op. 21.

II. Plaintiffs Fail to Show Irreparable Harm.

Plaintiffs also fail to satisfy this Court's "high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). The absence of demonstrable irreparable harm is an independent basis on which to deny plaintiffs' motion. *See id.*

To warrant an injunction pending appeal, their injury must be "both certain and great," "actual and not theoretical," "beyond remediation," and also "of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.*; *see also In re Navy Chaplaincy*, 534 F.3d 756, 766 (D.C. Cir. 2008). Plaintiffs cannot meet these exacting standards.

1. Plaintiffs' principal purported injury—losing some or all of their funding—is not "certain," but is instead "theoretical." Plaintiffs applied for funding under the new Funding Announcement, and the agency announced that they will receive funds under the Announcement. At best, any claim of economic

injury must be based on the possibility of receiving less money than requested. But it is unduly speculative to suggest plaintiffs will lose grant money, and, if so, for what reason. Tr. 13.

Moreover, plaintiffs have not established that any losses would constitute irreparable injury to their organizations. "[M]onetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). As the district court explained, plaintiffs have not established that the very existence of their operations is threatened. Even if it lost all Title X funds, plaintiff Planned Parenthood of Greater Ohio would lose only 19% of its budget, while plaintiff Planned Parenthood of Utah would lose only 18% of its budget. Tr. 16-17.

2. Plaintiffs' assertion of reputational injury from complying with the scoring criteria fares no better. Plaintiffs can have little reputational injury where "there is significant evidence that they are taking on these changes voluntarily, or have indeed long incorporated them." Tr. 18. The district court explained that plaintiffs discuss abstinence with patients and facilitate access to primary care consistent with the Funding Announcement's emphasis. Tr. 19. Because the Funding Announcement's criteria are lawful, any harms associated with increasing those activities or resources plaintiffs spent to adjust their grant applications or

services cannot support enjoining the grant-making process. Tr. 20 (citing *Sherley*, 644 F.3d at 398).

III. The Public Interest and the Equities Weigh Against an Injunction.

The balance of equities and the public interest, which merge when relief is sought against the federal government, *see Nken v. Holder*, 556 U.S. 418, 435 (2009), strongly weigh against extraordinary relief. Plaintiffs ask the Court to seize control of the Title X program, stop HHS from awarding Title X grants under a lawful Funding Announcement, and instead divert those funds to plaintiffs for the indefinite duration of the appeal. Such an order would significantly impair HHS's ability to administer the Title X program in the public interest.

Plaintiffs incorrectly assume that the public interest lies in receipt by them—and them alone—of Title X funds. As the district court explained, the public interest is in preserving the agency's ability to make orderly and detailed decisions about whether the plaintiffs or some other grant applicants are best situated to use Title X funds. Tr. 20. Plaintiffs ask this Court to substitute *their* judgment for that of the federal agency responsible for administering Title X. That result would be contrary to the public interest.

Plaintiffs' request ignores the harms to the public, the agency and the other grant applicants. If this Court were to enjoin the agency from issuing awards under the current Funding Announcement, the order would risk uncertainty and disarray

throughout the Title X program. Final appellate review may not be complete for months. In the unlikely event that this Court reverses the district court's decision, awarding Title X funds under a new public competition in a new Funding Announcement could take months to accomplish.

Implicitly acknowledging the costs to the agency from their request for new continuation awards, plaintiffs have expanded their request for injunctive relief before this Court. Plaintiffs asked the district court to order the agency to "maintain [the agency's] use of continuation funding for current grantees" for the duration of appellate review. Mot. 13 (Dkt. 41). The process for issuing new continuation awards is time-consuming and unlikely to be completed by September 1, 2018, when the present grants expire.[5] *See* 42 C.F.R. § 59.8 (regulatory requirement for an application and resulting process for continuation awards). Plaintiffs now ask this Court to circumvent the process for continuation awards and extend the grants indefinitely. *See* Mot. 22. (requesting that this Court "exten[d] the project period and funding for existing grantees").

Plaintiffs further seek to maintain an incumbent advantage for themselves, which would deprive new grantees of funds. *See* Press Release, *supra* n.1 (announcing that grants will be given to new grantees). This is contrary to

[5] Earlier this year, HHS voluntarily extended current Title X grantees' awards, a process that required approximately four months to complete.

established law. For example, in *Sherley*, 644 F.3d at 398, scientists who used only adult stem cells in their research sued to enjoin HHS from funding research using embryonic stem cells. The district court granted preliminary injunctive relief, but this Court reversed, reasoning that the hardship of an injunction would fall heavily on non-party embryonic stem cell researchers who had the right to compete with the plaintiff-scientists for federal funds. *Id.* at 398. Moreover, an injunction "would preclude [HHS] from funding new [embryonic stem cell] projects it has or would have deemed meritorious, thereby inevitably denying other scientists funds they would have received." *Id.* at 398-99.

The dominant concerns underpinning *Sherley* apply here. First, the agency has announced that plaintiffs will receive Title X funds. Second, other qualified reproductive health care providers have successfully competed for Title X funds and the agency intends to make awards to them. Indefinitely funding plaintiffs, merely because they received the last set of grants awarded by HHS, would deprive competing providers of that opportunity, just as the injunction in *Sherley* would have. Third, the public's interests are harmed by precluding HHS—the agency tasked by Congress with administering Title X—from "funding new [Title X] projects it has or would have deemed meritorious," *Sherley*, 644 F.3d at 398-99.

Finally, we note that the sweeping nature of the injunction plaintiffs request is inappropriate. Plaintiffs' claims arise under the APA and challenge the

lawfulness of the Funding Announcement. If plaintiffs were to prevail on those claims, the only appropriate relief would be remand to the agency. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Plaintiffs have no right to Title X funding beyond their existing awards, and the Court has no authority to compel HHS to fund grants after their expiration dates. As sovereign, the United States is immune from suit absent consent as expressed by Congress, *see FDIC v. Meyer*, 510 U.S. 471, 475 (1994), and no consent exists for any form of continuation funding. Plaintiffs cite no source of law for such relief.

Plaintiffs provide no basis for an injunction that would apply to grantees who are not parties to this litigation. Nor have they explained why circumventing the usual process for continuation awards is appropriate in these circumstances. Finally, plaintiffs have not shown that their request—not presented to the district court—for an order to hold appropriated funds beyond the end of the fiscal year when the appropriation lapses is one of "the rare circumstance where the extension will serve the interests of justice and the ends Congress sought to bring about." *Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 184 (D.C. Cir. 1992). [6]

[6] Given the extraordinary nature of plaintiffs' request for continued funding at the expense of other grant applicants, any injunction issued should require plaintiffs to post a bond to ensure that the other competing grant recipients can be made whole in the event the government prevails on appeal. Fed. R. App. P. 8(a)(2)(e); *cf. National Kidney Patients Ass'n v. Sullivan*, 958 F.2d 1127 (D.C. Cir. 1992).

Accordingly, the Court should deny plaintiffs' request for an injunction pending appeal. Absent an injunction, the FY2018 funds will be awarded on or around August 13, 2018, thus expedited briefing on the merits of the appeal will not be necessary. In the event that the Court were to grant an injunction, we join plaintiffs' request for expedited briefing.

CONCLUSION

For the foregoing reasons, plaintiffs' request for an injunction and expedited briefing should be denied. If the court grants the injunction, then the court should grant the request for expedited appeal.

Respectfully submitted,

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August 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,170 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Times New Roman 14-point font, a proportionally spaced typeface.

s/ Jaynie Lilley
Jaynie Lilley

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system and by delivering paper copies to the court. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system, except for the following, who will be served via U.S. Mail:

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