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UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICOMUNICIPIO AUTONOMO DE PONCE,
et al.,

Plaintiffs,

v.

UNITED STATES OFFICE OF
MANAGEMENT AND BUDGET, et al,

Defendants.

Civil No. 14-1502 (JAF)

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OPINION AND ORDER7
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Plaintiffs Municipio Autónomo de Ponce (the municipality of Ponce, henceforth, “Ponce”), Centro Deambulantes Cristo Pobre, Inc., Lucha Contra el SIDA, Inc., Iniciativa Comunitaria, Inc., Itcia Hernández-Laboy, Jorge Ortiz-Torres, José Alvarez-Medina, and Hogar Crea Posada La Esperanza (collectively “Plaintiffs”) are suing Defendants U.S. Office of Management and Budget (“OMB”); Brian Deese, Acting Director of OMB; U.S. Department of Health and Human Services (“HHS”); Sylvia Mathews Burnwell, Secretary of HHS; U.S. Health Resources and Services Administration (“HRSA”); and Mary Wakefield, Administrator of HRSA (collectively “Defendants”).15
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The action arises out of the Public Health Service Act (PHSA), 42 U.S.C. § 300ff-11 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (Docket No. 1 at 5.) Plaintiffs invoke jurisdiction under 28 U.S.C. §§ 1331, 1361, 2201, and 2202. (Docket No. 1 at 5.) They state that: “Defendants HHS/HRSA’s use of the wrongly delineated Ponce metropolitan statistical area (MSA) by OMB lead HHS/HRSA to

1 conclude that the Ponce [transitional grant area or “TGA”] does not qualify with the Ryan
2 White Legislation’s Part A TGA eligibility criteria.” (Docket No. 29 at 1.)¹

3 This litigation exemplifies the difficult cases that District Court judges constantly
4 face. The nature, essence, and value of evidence and the presentation of legal arguments
5 from both parties leave enormous lagoons. Yet, delaying resolution of this case will
6 affect a disadvantaged population. In the end, we have carefully sifted through the
7 available record and had to unravel the mishmash as best we could. We understand that
8 this case will proceed before the Court of Appeals, and three other jurists will examine
9 the issue. We invite the First Circuit to recognize the faux pas of the system and the
10 insufficiency in briefing while evaluating the case.

11 For the following reasons, we grant in part and deny in part Plaintiffs’ motions.
12 We deny Plaintiffs’ request for Fiscal Year 2014 funds. However, we grant Plaintiffs’
13 request for a declaration that the current boundaries are unlawful.

14 I.

15 Procedural History

16 On June 24, 2014, Plaintiffs filed a complaint against Defendants alleging that
17 under the Ryan White CARE (Comprehensive AIDS Resources Emergency) Act (Public
18 Law 101-381) (henceforth, “Ryan White legislation”), the Ponce boundaries were drawn
19 in an arbitrary and capricious manner. (Docket No. 1.) Plaintiffs ask that we “order

¹ The Ryan White legislation (Public Law 101-381) provides “emergency assistance to localities that are disproportionately affected by the Human Immunodeficiency Virus epidemic.” 42 U.S.C. § 300ff. Part A of the legislation provides funding to eligible metropolitan areas (“EMAs”). 42 U.S.C. § 300ff -11. If a metropolitan area does not have enough cases to qualify as an EMA, it can qualify as a “transitional area” (also known as a transitional grant area, or “TGA”). The Office of Management and Budget draws boundary lines called Metropolitan Statistical Areas (“MSAs.”) (Docket No. 42-2 at 18.) These MSAs were largely used to draw the boundaries for the Ryan White legislation. (Docket No. 42-2 at 18.)

1 HHS/HRSA to immediately cease and desist to use the Ponce MSA as wrongly
2 delineated by OMB, consider the correctly delineated Ponce MSA instead, stay the
3 closing of the Ponce TGA, and secure and grant the funds necessary to continue the
4 operation of the Ponce TGA fiscal year 2014 budget period.” (Docket No. 1 at 5.)
5 Plaintiffs invoke the Public Health Service Act (PHSA), 42 U.S.C. § 300ff-11 *et seq.*, and
6 the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, as well as 28 U.S.C. §§ 1331,
7 1361, 2201, and 2202. (Docket No. 1 at 5.)

8 The same day, Plaintiffs filed a motion for a temporary restraining order pursuant
9 to Fed. R. Civ. P. 65(b), asking us to state that OMB and HHS/HRSA shall be
10 immediately enjoined to maintain the status quo and to allow the Ponce TGA to continue
11 operating pending this litigation. (Docket No. 2 at 15.) Plaintiffs also requested an
12 evidentiary hearing pursuant to Fed. R. Civ. P. 65(a). (Docket No. 2 at 15.) Plaintiffs
13 asked us to “Order OMB to correctly delineate the Ponce MSA to add the municipalities
14 of Adjuntas, Santa Isabel and Coamo”; to “Order HHS/HRSA to evaluate the
15 Municipality’s pending grant application taking into consideration the correctly
16 delineated Ponce MSA”; and to “Order HHS/HRSA to set aside the funds totaling
17 \$3,592,335.00 requested by the Municipality to operate the Ponce TGA under the Ryan
18 White Part A HIV Emergency Relief Grant Program for fiscal year 2014-2015 pending
19 this litigation.” (Docket No. 2 at 16.) Defendants opposed the Plaintiffs’ motion on
20 June 26, 2014. (Docket No. 11.)

21 On June 27, 2014, we held a Show Cause Hearing. Factual issues of the case were
22 discussed and the parties presented legal arguments. Defendants agreed to grant a second

1 non-cost extension until August 10, 2014, provided that Plaintiffs submit a proper
2 request. The parties agreed that the matter could be resolved on paper, and we accepted
3 the invitation to hold back on temporary disposition of the matter and give the parties a
4 formal decision. (Docket Nos. 12, 13.) In that sense, the parties obviated the
5 consolidation process under Fed. R. Civ. Pro. 65. The parties had “clear and
6 unambiguous notice” of our intent to fully decide this matter in controversy, and we
7 allowed the parties to proceed with sufficient time to “assemble and present their
8 evidence.” *See Aponte v. Calderón*, 284 F.3d 184, 190 (1st Cir. 2002) (internal citation
9 omitted). Neither party objected to this procedure. They voluntarily submitted the case
10 on paper. Plaintiffs asked to submit additional documents into the record, and the
11 Government had no objection. (Docket No. 12.) Plaintiffs then submitted voluminous
12 documents into evidence. (Docket Nos. 17-27.) Following Plaintiffs’ formal request,
13 Defendants granted the non-cost extension on July 2, 2014. (Docket No. 28.)

14 On July 4, 2014, Plaintiffs submitted a “Response in Opposition to Motion
15 Opposing Request for Temporary Restraining Order or Preliminary Injunctive Relief.”
16 (Docket No. 29.) Plaintiffs again state that: “Defendants HHS/HRSA’s use of the
17 wrongly delineated Ponce metropolitan statistical area (MSA) by OMB lead HHS/HRSA
18 to conclude that the Ponce TGA does not qualify with the Ryan White Legislation’s Part
19 A TGA eligibility criteria.” (Docket No. 29 at 1.) On July 11, 2014, Defendants
20 submitted a memorandum in opposition to injunctive relief. (Docket No. 32.) On July
21 31, 2014, we ordered HHS to immediately inform the court “the details of how the Ponce
22 geographical area was defined in 1994.” We were interested in the document,

1 documents, or memoranda that consigned, in 1994, the rational process behind that
2 geographical decision, and we noted in our order that HHS should have that information,
3 as CDC is a division of HHS. (Docket No. 41.) Defendants submitted a motion in
4 compliance with our order. (Docket No. 42.) However, no information and no basis,
5 rational or otherwise, was presented on the subject, and there was nothing to review
6 regarding the 1994 geographical decision.

7 II.

8 Factual History

9 Congress enacted the Ryan White legislation (Public Law 101-381) on August 18,
10 1990. It has since been amended and reauthorized four times. (Docket No. 1 at 14.) The
11 legislation provides “emergency assistance to localities that are disproportionately
12 affected by the Human Immunodeficiency Virus epidemic.” 42 U.S.C. § 300ff. Part A
13 of the Ryan White legislation provides funding directly to eligible metropolitan areas
14 (EMAs) who meet threshold levels of AIDS cases. 42 U.S.C. § 300ff -11.² A
15 metropolitan area with slightly fewer living cases can qualify as a “transitional area”
16 (also known as a transitional grant area, or “TGA”). To qualify as a TGA, the area must
17 be

18 a metropolitan area for which there has been reported to and
19 confirmed by the Director of the Centers for Disease Control
20 and Prevention a cumulative total of at least 1,000 but fewer
21 than 2,000 cases of AIDS during the most recent period of 5
22 calendar years for which such data are available.

² The statute differentiates between AIDS and HIV. AIDS is defined as “acquired immune deficiency syndrome.” Human immunodeficiency virus is defined as “the etiologic agent for AIDS.” Finally, the statute defines “HIV/AIDS” as a term that “means HIV, and includes AIDS and any condition arising from AIDS.” 42 U.S.C. § 300ff-88.

1
2 42 U.S.C. § 300ff-19(b). The TGA ceases to qualify as such when,

3 the metropolitan area fails, for three consecutive years -- (i) to
4 qualify under such subsection as a transitional area; and (ii)
5 subject to subparagraphs (B) and (C), to have a cumulative
6 total of 1,500 or more living cases of AIDS (reported to and
7 confirmed by the Director of the Centers for Disease Control
8 and Prevention) as of December 31 of the most recent
9 calendar year for which such data are available.

10
11 42 U.S.C. § 300ff-19(2)(A). The Ryan White program is administered by the Secretary
12 of HHS, acting through the Administrator of HRSA. 42 U.S.C. § 300ff-19(a).

13 In each of the fiscal years 1993 through 2006, Ponce qualified as an EMA and
14 received grant funding. In 2006, HHS reduced Ponce to TGA status. (Docket No. 1 at
15 18.) On June 24, 2008, HHS wrote to the Director of the Ponce region, stating that Ponce
16 failed to meet the statutory criteria for a TGA and that if it failed to meet the criteria for
17 two more consecutive fiscal years, it would lose eligibility for Part A funding. (Docket
18 No. 27-1.) On August 12, 2009, HHS wrote a similar letter. (Docket No. 27-2.) On
19 October 15, 2012, HHS wrote to the mayor of Ponce stating that the Ponce area “failed
20 for the third consecutive year to meet mandated eligibility criteria for receiving TGA
21 grant funds,” and, therefore, would no longer qualify for funding after Fiscal Year 2013.
22 (Docket No. 27-3 at 1.)

23 On December 18, 2012, the Resident Commissioner of Puerto Rico to the United
24 States Congress wrote to the Secretary of HHS expressing his concern about the decision
25 to terminate TGA funding for Ponce.³ The Resident Commissioner argued that HRSA

³ Rather than a voting member of Congress, Puerto Rico elects a non-voting Resident Commissioner of Puerto Rico to the United States Congress. 48 U.S.C. § 891.

1 incorrectly interpreted the Ryan White Act and that the loss of funding for the Ponce area
2 would have negative consequences for the HIV/AIDS treatment efforts in Puerto Rico.
3 (Docket No. 27-4.) The Secretary of HHS responded to the Resident Commissioner's
4 letter on February 12, 2013, affirming the prior determination. (Docket No. 27-5.) On
5 June 24, 2013, the Director of the Division of Metropolitan HIV/AIDS Programs wrote a
6 letter to the mayor of Ponce stating that Ponce was no longer an eligible grantee and
7 detailing closeout processes. (Docket No. 27-6.)

8 On September 27, 2013, the mayor of Ponce wrote to the Secretary of HHS and to
9 the Administrator of HRSA disagreeing with the cancellation of the Part A grant, and
10 arguing that the boundaries of the Ponce area were "erroneously comprised." In the
11 letter, the mayor requested reconsideration, an administrative hearing, and a stay on the
12 closing of the program. (Docket No. 27-7.) On or around October 1, 2013, the mayor of
13 Ponce travelled to Washington, D.C., to attend a meeting with the Director of the
14 HRSA's Division of Metropolitan HIV/AIDS Programs, but the Director cancelled their
15 scheduled meeting. (Docket No. 29 at 5.) The mayor wrote HHS another letter dated
16 November 18, 2013. (Docket No. 27-10.) On November 21, 2013, the Administrator of
17 HRSA wrote a response reaffirming the current boundaries and reiterating that the Ponce
18 area would lose Part A funding. (Docket No. 27-11.) The record shows that the
19 requested hearing was never held, and no administrative decision post-hearing has been
20 brought to our attention. According to Defendants, the Ryan White HIV/AIDS Program
21 does not establish an administrative procedure for review of eligibility determinations.
22 (Docket No. 32-3 at 5.)

1 On December 17 and 18, 2013, the mayor met with members of the U.S. Congress
2 and their staff. She also met with the Executive Director of the President’s Task Force on
3 Puerto Rico to discuss Part A funding. (Docket No. 29 at 5.) On January 7, 2014, the
4 mayor met with the Administrator of HRSA. (Docket No. 29 at 6.) On February 27,
5 2014, the Chairman of the Senate Health, Education, Labor and Pensions (HELP)
6 Committee wrote a letter to the Administrator of HRSA arguing that Ponce should not
7 lose Part A funding. (Docket No. 27-12.)

8 On June 24, 2014, Plaintiffs filed the current lawsuit. (Docket No. 1.)

9 **III.**

10 **The Drawing of Boundaries Under the Ryan White Care Act**

11 Throughout this case, it has been impossible to discover how the boundary lines
12 were originally drawn for these metropolitan areas. The Ryan White legislation was
13 enacted on August 18, 1990 (Public Law 101-381). (Docket No. 29 at 7.) Part A
14 authorizes grants to EMAs. The 2006 reauthorization establishes a separate grant
15 program for TGAs. 42 U.S.C. § 300ff-19(b). The 2006 reauthorization states that EMA
16 boundaries “shall be the boundaries that were in effect for such area for fiscal year 1994.”
17 42 U.S.C. § 300ff-11(c)(1). The 2006 reauthorization did not define the boundaries of a
18 TGA. For programmatic continuity, HRSA retained the historical boundaries for all
19 TGAs that had formerly been EMAs. (Docket No. 32 at 5.)

20 The Ryan White legislation defines a “metropolitan area” as “an area that is
21 referred to in the HIV/AIDS Surveillance Report of the Centers for Disease Control and
22 Prevention as a metropolitan area” over a threshold population. 42 U.S.C. § 300ff-17(2).

1 The CDC HIV/AIDS Surveillance Report issued July 1993, which set the historical
2 boundaries, states that:

3 The Office of Management and Budget announced new
4 Metropolitan Statistical Area (MSA) definitions [...] The
5 metropolitan area definitions are the MSAs for all areas
6 except the 6 New England states. *For these states, the New*
7 *England County Metropolitan Areas (NECMA) are used.*

8
9 (Docket No. 42-2 at 18)(emphasis supplied).

10 Defendants argue that “[n]on-statistical programs, such as the Ryan White
11 HIV/AIDS Program, are not legally obliged to utilize OMB’s delineations and are not
12 bound by said delineated statistical areas.” (Docket No. 11 at 2.) In fact, Defendants cite
13 to OMB Bulletin 13-01, in which OMB cautions that these “areas should not serve as a
14 general purpose geographic framework for nonstatistical activities;” and that if an agency
15 elects to use these delineations in nonstatistical programs, “it is the sponsoring agency’s
16 responsibility to ensure that the delineations are appropriate for such use.” (Docket No.
17 11 at 7-8.) OMB issued a Notice on June 28, 2010 which stated in italicized text that
18 “[t]hese areas are not designed to serve as a general-purpose geographic framework
19 applicable for nonstatistical activities or for use in program funding formulas.” (Docket
20 No. 26-2)(emphasis in original).

21 Defendants argue that they exercised discretion by applying the historical – rather
22 than the current -- OMB MSA boundaries to avoid funding disruptions to existing
23 grantees and their established HIV care systems. (Docket No. 11 at 15.) However,
24 Defendants make no argument as to why the original OMB MSA boundaries were

1 appropriate without modification for all areas other than New England.⁴ Therefore, we
2 ordered HHS to inform the court of “the details of how the Ponce geographical area was
3 defined in 1994.” We stated that we were interested in “the document, documents or
4 memoranda that consigned, in 1994, the rational process behind that geographical
5 definition. We are aware that HHS relied on CDC input, but CDC is part of HHS.”
6 (Docket No. 41.)

7 In its response, HHS wrote that “the historical data housed both at CDC and the
8 Health Resources and Services Administration is not accessible,” and that “[a]ll historical
9 documents that may pertain to the agency selection of the 1993 OMB bulletin have been
10 disposed of in compliance with the applicable records retention schedules.” (Docket
11 No. 42 at 3-4.)⁵

12 Plaintiffs have argued that the boundaries for Ponce were not well-drawn because
13 there is a very high level of social and economic integration between Ponce⁶ and the
14 municipalities of Adjuntas, Santa Isabel, and Coamo. (Docket No. 26-6 at 16.) Adjuntas
15 has a twenty-three percent commuting measure with Ponce; Santa Isabel has a nineteen
16 percent commuting measure with Ponce; and Coamo has an eleven percent commuting
17 measure. (Docket No. 26-6 at 16.) For the sake of reference, Plaintiffs include
18 commuting measures for nine municipalities in the San Juan EMA that have a ten percent
19 commuting measure or less. (Docket No. 26-6 at 4.) Plaintiffs also submitted data from

⁴ Contrary to Puerto Rico, the New England states have strong nationally-recognized political support from senators and congressmen.

⁵ Throughout its submission, Defendants speak of the 1993 OMB bulletin and the 1993 OMB delineations. (See Docket No. 42.) Therefore, we assume that the 1993 OMB delineations were the basis for the 1994 boundaries.

⁶ Ponce is the second-largest city in Puerto Rico, followed by Mayagüez. San Juan is the largest and capital city of the island territory.

1 the Puerto Rico Department of Health. The Puerto Rico Department of Health defines
2 the Ponce region as fifteen municipalities, including Adjuntas, Santa Isabel, and Coamo.
3 (Docket Nos. 27-13, 40-1.) This serves as evidence that in Puerto Rico, there is a logic as
4 to what constitutes the Ponce region. Drawn according to patterns of socio-economic
5 integration and local government delineations, the Ponce region has a much higher
6 population than the region that HHS recognizes.

7 Neither party argues that there was a demographic shift in Puerto Rico. HHS fails
8 to explain why only the New England states drew boundaries that were different from the
9 OMB MSAs.

10 IV.

11 Other Considerations

12 Defendants argue that Plaintiffs are not facing irreparable harm because two Part
13 C grants were awarded in the amounts of \$660,000 and \$440,000 for use in Ponce and
14 because there are still Part-A-funded clinics in the San Juan area. (Docket No. 11 at 17.)
15 However, if this year serves as a benchmark, the parties dispute a recurring grant of about
16 \$3,592,335 per year. (Docket No. 2 at 16.) The awarded Part C grants cover just under a
17 third of that amount. As for distance, from the farthest part of the Ponce MSA to San
18 Juan, the commute by car is two to three hours. There are no public transportation routes.
19 Driving Directions from Guánica to San Juan, PR, Google Maps, <http://maps.google.com>

1 (follow “Get Directions” hyperlink; then search “A” for “Guanica, Puerto Rico” and
2 search “B” for “San Juan, Puerto Rico”; then follow “Get Directions” hyperlink).⁷

3 Further, Plaintiffs submitted information regarding the scope of the epidemic in
4 Puerto Rico. As noted in their exhibits, “Puerto Rico has a particularly high HIV/AIDS
5 infection rate. Additionally, the HIV death rate is nearly four times higher than the U.S.
6 national rate.” (Docket No. 27-12.)

7 We bear in mind these additional considerations as we analyze whether HHS acted
8 in a way that was arbitrary and capricious.

9 V.

10 Mootness

11 Defendants submitted evidence from the Deputy Associate Administrator of
12 HRSA’s HIV/AIDS Bureau, stating that “[a]ll funds appropriated by Congress for Part A
13 grant awards in FY 2014 were awarded effective March 1, 2014.” (Docket No. 11-1 at
14 4). Therefore, Defendants argue that any claims based on Fiscal Year 2014 funding are
15 barred by the Appropriations Clause of the U.S. Constitution and the doctrine of
16 mootness. (Docket No. 11 at 4.) Plaintiffs state that money remains for Part A funds, but
17 do not provide any support for this proposition. (Docket No. 29 at 17.)

18 The First Circuit has not squarely addressed whether Plaintiffs can recover on
19 funding appropriations that have already been spent. However, the Second Circuit has
20 stated in the context of such Ryan White grants that “[w]here, as here, the congressional
21 appropriations relating to the funds sought by private litigants have been lawfully

⁷ Most members of the federal judiciary within the First Circuit are fully aware of the inconvenience of travelling from San Juan to the Ponce region and vice versa unless private privileged transportation is involved.

1 distributed – and therefore exhausted – by a federal agency, courts lack authority to grant
2 effectual relief in the context of an Article III case or controversy.” *County of Suffolk,*
3 *N.Y. v. Sebelius*, 605 F.3d 135, 138 (2nd Cir. 2010). The District of Columbia Circuit
4 likewise ruled that “when an appropriation has lapsed or has been fully obligated, federal
5 courts cannot order the expenditure of funds that were covered by that appropriation,”
6 and, thus, found the city’s claims for injunctive and monetary relief to be moot. *City of*
7 *Houston, Tex. v. Dep’t of Housing and Urban Development*, 24 F.3d 1421, 1424 (D.D.C.
8 1994).

9 We find these cases persuasive and hold that we lack jurisdiction over claims
10 related to Fiscal Year 2014 funding under the Ryan White legislation. However, this
11 does not moot the question of boundaries for future years.

12 VI.

13 Arbitrary and Capricious Review

14 When reviewing an agency’s construction of a statute, the court must first confront
15 two questions under the *Chevron* doctrine. We must first determine “whether Congress
16 has directly spoken to the precise question at issue. If the intent of Congress is clear, that
17 is the end of the matter; for the court, as well as the agency, must give effect to the
18 unambiguously expressed intent of Congress.” *City of Arlington, Tex. v. F.C.C.*, 133
19 S.Ct. 1863, 1868 (2013) (quoting *Chevron v. Natural Resources Defense Council, Inc.*,
20 467 U.S. 837, 842-43). However, “if the statute is silent or ambiguous with respect to
21 the specific issue, the question for the court is whether the agency’s answer is based on a
22 permissible construction of the statute.” *Id.* (quoting 467 U.S. at 843). *Chevron* provides

1 the background presumption that “[s]tatutory ambiguities shall be resolved, within the
2 bounds of reasonable interpretation, not by the courts but by the administering agency.”

3 *Id.* Neither party argues that there is ambiguity in the text of the Ryan White legislation.
4 The statute clearly gives CDC authority to draw boundaries, but does not lay out
5 guidelines in drawing those boundaries. *See* 42 U.S.C. § 300ff-17(2).

6 After resolving questions of statutory ambiguity, the Administrative Procedure
7 Act, 5 U.S.C. § 551 *et seq.* (the “APA”) provides the extent of judicial authority “to
8 review executive agency action for procedural correctness.” *F.C.C. v. Fox Television*
9 *Stations, Inc.*, 556 U.S. 502, 513 (2009). Under the APA, courts can hold unlawful and
10 set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise
11 not in accordance with law.” 5 U.S.C. § 706(2)(A). We must “give substantial deference
12 to an agency’s interpretation of its own regulations,” particularly where the regulation
13 concerns a complex and technical regulatory program. *Thomas Jefferson University v.*
14 *Shalala*, 512 U.S. 504, 512 (1994). We allow for “a certain amount of play in the joints”
15 when agencies exercise discretion. *Assoc. Fisheries of Maine, Inc. v. Daley*, 127 F.3d
16 104, 111 (1st Cir. 1997). However, courts can and should insist that an agency articulate
17 the reasons behind its decisions. *See Fox Television*, 556 U.S. at 513.

18 When a legal challenge “really centers on the wisdom of the agency’s policy [...]”
19 the challenge must fail,” but only if “the agency considered the matter in a detailed and
20 reasoned fashion, and the decision involves reconciling conflicting policies.” *Lovgren v.*
21 *Locke*, 701 F.3d 5, 31 (1st Cir. 2012)(internal citations omitted). Put another way, “what
22 matters is that the administrative judgment, right or wrong, derives from the record,

1 possesses a rational basis, and evinces no mistake of law.” *Lovgren*, 701 F.3d at 32
2 (internal citations omitted). An agency decision fails to pass the arbitrary and capricious
3 test if the administrative record shows that “the agency relied on improper factors, failed
4 to consider pertinent aspects of the problem, offered a rationale contradicting the
5 evidence before it, or reached a conclusion so implausible that it cannot be attributed to a
6 difference of opinion or the application of agency expertise.” *Atieh v. Riordan*, 727 F.3d
7 73, 76 (1st Cir. 2013)(internal citation omitted). Courts cannot “attempt to supply a
8 reasoned basis for the action that the agency itself has not given.” *Id.* (internal citation
9 omitted). Rather, the burden is on the agency itself to show “a rational exercise of
10 deliberative decisionmaking.” *Assoc. Fisheries*, 127 F.3d at 111.

11 Although agency action is typically upheld, courts should not “rubber-stamp
12 agency decisions under the guise of ‘arbitrary-and-capricious’ review.” *Com. Of Mass.,
13 Dept. of Public Welfare v. Secretary of Agriculture*, 984 F.2d 513, 526 (1st Cir. 1993).
14 Instructive in this regard is the case of *Puerto Rico Sun Oil Co. v. U.S. E.P.A.*, 8 F.3d 73
15 (1st Cir. 1993), which states that:

16 Agencies, after all, are normally entitled to substantial
17 deference [...] But in the end an agency decision must also be
18 rational – technically speaking, it must not be “arbitrary or
19 capricious,” Administrative Procedure Act, 5 U.S.C.
20 § 706(2)(A) – and that requirement exists even in technical
21 areas of regulation.

22
23 *Puerto Rico Sun Oil Co.*, 8 F.3d at 77. To earn judicial deference, an agency must show
24 that its decisionmaking process involved “discussion of relevant issues, consistency with

1 past practice, [and] avoidance of unexplained discrimination.” *Puerto Rico Sun Oil Co.*, 8
2 F.3d at 77.

3 Despite our specific order, HHS does not advance any reasons for drawing the
4 original boundaries in this manner, namely, for adopting OMB MSAs wholesale in all
5 areas other than the New England states. To survive arbitrary and capricious review, an
6 agency must avoid “unexplained discrimination.” *Puerto Rico Sun Oil Co.*, 8 F.3d at 77.
7 Plaintiffs argue that there is a high level of social and economic integration between
8 Ponce and the disputed municipalities – with nearly a quarter of the population in one
9 disputed municipality commuting to Ponce for work. (Docket No. 26-6 at 4.) Plaintiffs
10 also show that the local government considers the disputed municipalities to be a part of
11 the Ponce region. (Docket Nos. 27-13, 40-1.) Neither party submits evidence that the
12 population has shifted from the time when the original boundaries were drawn. More
13 worrisome, HHS supplies no explanation for allowing the New England states to draw
14 more appropriate boundaries, while shoehorning Puerto Rico into OMB boundaries that
15 arguably do not fit their demographics.

16 To survive judicial review, HHS must show that it considered “pertinent aspects of
17 the problem.” *Atieh*, 727 F.3d at 76 (internal citation omitted); *See also Puerto Rico Sun*
18 *Oil Co.*, 8 F.3d at 77 (agencies are required to show a “discussion of relevant issues”).
19 Plaintiffs submit evidence that “Puerto Rico has a particularly high HIV/AIDS infection
20 rate [and that] the HIV death rate is nearly four times higher than the U.S. national rate.”
21 Defendants elide a response by arguing that care is available hours away in San Juan and
22 that Ponce was recently awarded two significantly smaller grants. (Docket No. 11 at 17.)

1 Puerto Rico, because of its geographic remoteness to the mainland and its lack of
2 complete Congressional representation as a territory, is frequently the object of arbitrary
3 decisions based on lack of knowledge of local conditions. We cannot say it is intentional.
4 It is simply that Puerto Rico is not on the radar screen for bureaucratic agencies. The
5 lack of personal knowledge about Puerto Rico creates an absurd reality that San Juan as a
6 region can basically absorb Ponce. For those unfamiliar with Puerto Rico, a three-hour
7 drive under local traffic conditions is seen as a short distance, local boundary delineations
8 are ignored, and an HIV mortality rate four times higher than the national rate is never
9 addressed. This attitude continues because Puerto Rico is simply a distant, unfamiliar
10 spot to people with no first-hand knowledge of the island. No matter its innocent causes,
11 this failure to make rational, deliberative decisions regarding Puerto Rico is unjust and
12 unacceptable in a democracy, and it has grave consequences for the 3.6 million residents
13 of Puerto Rico.⁸

14 The Supreme Court surprisingly once wrote that Puerto Rico “was foreign to the
15 United States in a domestic sense.” *Downes v. Bidwell*, 182 U.S. 244, 341-342 (1901)
16 (White, J., concurring). Such a statement under today’s modern optic could constitute a
17 totally unacceptable statement of discriminatory proportions.⁹ Soon after, the Jones Act
18 of 1917 granted United States citizenship to the residents of Puerto Rico. 48 U.S.C. §
19 731 et seq.; Jones Act, ch. 145, 39 Stat. 951 (1917). A Resident Commissioner now

⁸ See *United States Census*, Population Estimates,
(<http://www.census.gov/popest/data/national/totals/2012/index.html>).

⁹ The *Insular Cases* decided by the Supreme Court of the United States at the beginning of the twentieth century are, in our view, discriminatory against territorial possessions. See Bartholomew H. Sparrow, *The Insular Cases and the Emergence of American Empire* (2006).

1 represents Puerto Rico as a non-voting member of Congress. 48 U.S.C. § 891. However,
2 as United States Circuit Judge Juan R. Torruella has written, there is still a

3 lack of *any* political power by Puerto Rico vis-à-vis the United States. The
4 United States citizens residing in Puerto Rico do not have the right to vote
5 for national offices. Even more importantly, they lack any voting
6 representation in Congress, the body that has plenary power over Puerto
7 Rico and its citizens, and whose enactments permeate every facet of Puerto
8 Rican society. Supreme legislative power therefore lies solely in an
9 institution that enacts laws without *any effective participation or consent*
10 from the U.S. citizens who are obligated to comply with them. Further, this
11 absolute vacuum or deficit of democratic entitlement carries over to the
12 administration of these congressionally imposed laws. Since the Executive
13 Branch of government is led by a President and Vice President for whom
14 the U.S. citizens of Puerto Rico cannot vote, they are deprived of any
15 influence as to how or by whom these laws will be administered.

16

17 Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 Yale L. & Pol'y
18 Rev. 57, 82 (2013) (emphasis in original).

19 This is a reality that still exists and permeates every level of society including all
20 types of geopolitical considerations such as the one treated here. We know that history
21 develops and that one has to be careful not to ascribe improper motives in retrospect;
22 however, the sad reality is that these considerations and the lack of adequate information
23 on the part of federal decisionmakers continue to affect not only programs such as Ryan
24 White, but also many other aspects of the life of territorial residents, irrespective of
25 whether they were born on the island or born in the continental United States.

1 HHS has an obligation to show “a rational exercise of deliberative
2 decisionmaking.” *Assoc. Fisheries*, 127 F.3d at 111. We find that HHS abdicated that
3 responsibility, and that the unexplained, unidentified, and unavailable definition of the
4 1994 boundaries cannot survive arbitrary and capricious review. Therefore, those
5 boundaries are unlawful and henceforth set aside in the Ponce region.

6 **VII.**

7 **Conclusion**

8 For the foregoing reasons, we **GRANT IN PART** and **DENY IN PART**
9 Plaintiffs’ request for relief. We **DENY** Plaintiffs’ request for Fiscal Year 2014 funds on
10 the grounds of mootness (*see* Part V *supra*). We **GRANT** Plaintiffs’ request for a
11 declaration that the boundaries of the Ponce TGA are unlawful as they now stand.

12 **IT IS SO ORDERED.**

13 San Juan, Puerto Rico, this 12th day of August, 2014.

14 S/José Antonio Fusté
15 JOSE ANTONIO FUSTE
16 U. S. DISTRICT JUDGE