No. 05-55450

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CLIFFORD W. COLWELL, JR., M.D., *et al.*,

Plaintiffs-Appellants

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants-Appellees

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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# BRIEF FOR THE FEDERAL DEFENDANTS AS APPELLEES

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**RULE:**

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## JURISDICTION

This lawsuit failed to present a justiciable "case or controversy" under Article III of the United States Constitution. As a result, the district court lacked jurisdiction. The district court's order dismissing plaintiffs' complaint for lack of standing and ripeness, however, constitutes a final, appealable order. That order was entered March 7, 2005. Appellants' notice of appeal was timely filed March

23, 2005. Accordingly, this Court has jurisdiction to review that decision pursuant to 28 U.S.C. 1291.

## ISSUES PRESENTED

1. Whether plaintiffs lacked standing to maintain this action.

2. Whether plaintiffs' claims were ripe for review.

## STATEMENT OF THE CASE

### *A. Statutory And Regulatory Scheme*

1. Title VI of the Civil Rights Act of 1964 states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. 2000d. Title VI requires each federal grant agency to implement this principle of non-discrimination "by issuing rules, regulations, or orders of general applicability." 42 U.S.C. 2000d-1.

Regulations implementing Title VI uniformly prohibit recipients of federal financial assistance from employing "methods of administration which have the effect of subjecting individuals to discrimination" or "defeating or substantially impairing accomplishment of the objectives of the [federally-assisted] program." 45 C.F.R. 80.3(b)(2); see also 28 C.F.R. 42.203(e). For over 35 years, this

regulatory language has been construed as requiring meaningful access to federally-assisted programs by individuals with limited English proficiency (LEP) – that is, individuals who have a limited ability to read, write, speak, or understand English because their native language is not English – in order to avoid potential discrimination on the basis of national origin. See, *e.g.*, 35 Fed. Reg. 11,595 (1970) (former Department of Health, Education, and Welfare (HEW)[1] guideline clarifying that Title VI and the regulations require school districts to "take affirmative steps to rectify the language deficiency in order to open its instructional program to [LEP] students" where the "inability to speak and understand the English language excludes national origin-minority group children from effective participation in the [school district's] educational program").[2]

2. The Department of Health and Human Services (HHS), through its Office for Civil Rights (OCR), is responsible for the administrative enforcement of Title

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[1] HEW is the predecessor to the current Departments of Health and Human Services and Education.

[2] The President has delegated to DOJ the responsibility of coordinating federal Title VI implementation and enforcement. See 45 Fed. Reg. 72,995 (1980); 28 C.F.R. 42.412. In this role, DOJ issues guidance to federal agencies on regulatory and policy matters to harmonize federal enforcement efforts. See also 28 C.F.R. 42.405(d)(1) (current Department of Justice (DOJ) regulation describing circumstances in which recipients of federal financial assistance must provide written language assistance to LEP persons).

VI with regard to recipients of HHS financial assistance. Under HHS regulations, OCR must first seek to achieve compliance with Title VI through voluntary or informal means, 45 C.F.R. 80.8(a), (d), and may not initiate enforcement proceedings unless attempts to achieve voluntary compliance fail. 45 C.F.R. 80.8(d). In addition, HHS must satisfy several procedural requirements before terminating federal funding, including, *inter alia*, providing an administrative hearing, receiving approval from the Secretary to terminate funding, and filing a report with the House and Senate committees having jurisdiction over the programs involved. 45 C.F.R. 80.8(c). A recipient may seek judicial review of a final decision by HHS to terminate federal aid. 42 U.S.C. 2000d-2; 45 C.F.R. 80.11.

3. On August 11, 2000, President Clinton issued Executive Order 13,166. That Order directed federal agencies, after consulting with appropriate program and activity participants, to develop guidance that would help ensure that persons with limited English proficiency have meaningful access to federally-assisted services. See 65 Fed. Reg. 50,121 (2000). To assist agencies in developing LEP guidance, the Executive Order incorporated by reference the contemporaneously issued DOJ General Policy Guidance and instructed each agency to issue LEP guidance consistent with that policy document. *Ibid*.

The DOJ General Policy Guidance stated that it was intended to clarify pre-existing Title VI responsibilities, not to create new obligations beyond those already established by the statute or prior implementing regulations. 65 Fed. Reg. 50,123. It also stated that, while the guidance might help agencies shape overall standards, the specific application of Title VI regulations would vary on a case-by-case basis:

> Title VI and its regulations require recipients to take reasonable steps to ensure "meaningful" access to the information and services they provide. What constitutes reasonable steps to ensure meaningful access will be contingent on a number of factors * * * [including] the number or proportion of LEP persons in the eligible service population, the frequency with which LEP individuals come in contact with the program, the importance of the service provided by the program, and the resources available to the recipient.

*Id.* at 50,124.

In accordance with the Executive Order, HHS published its own Guidance to recipients of HHS financial assistance on August 30, 2000. See 65 Fed. Reg. 52,762 (2000). Then, in accordance with a 2001 directive from DOJ, HHS republished for public comment on February 1, 2002. See 67 Fed. Reg. 4,968 (2002). After receipt of comments, HHS revised the Guidance and, following the DOJ review and approval, republished it on August 8, 2003. 68 Fed. Reg. 47,311 (2003). In its current form, the HHS Recipient Guidance states that "the failure of

a recipient of Federal financial assistance from HHS to take reasonable steps to provide LEP persons with meaningful opportunity to participate in HHS-funded programs may constitute a violation of Title VI and HHS's implementing regulations." *Id.* at 47,313. The purpose of the Guidance "is to assist recipients in fulfilling their responsibilities to provide meaningful access to LEP persons under existing law" and to "clarif[y] existing legal requirements for LEP persons by providing a description of the factors recipients should consider in fulfilling their responsibilities to LEP persons." *Ibid.* Thus, the "policy guidance is not a regulation but rather a guide. * * * This guidance provides an analytical framework that recipients may use to determine how best to comply with statutory and regulatory obligations to provide meaningful access to the benefits, services, information, and other important portions of their programs and activities for individuals who are limited English proficient." *Id.* at 47,313, n.2.

The HHS Guidance includes factors that help recipients of federal financial assistance understand their existing obligation under Title VI and its implementing regulations to take reasonable steps to provide meaningful access to their programs and services for LEP persons. These factors include: (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program, activity, or service provided by the recipient; (2) the frequency with which LEP

individuals come into contact with the recipient's program, activity, or service; (3) the nature and importance of the recipient's program, activity, or service; and (4) the resources available to the recipient and costs. See 68 Fed. Reg. 47,322. "[T]he intent of this guidance is to suggest a balance that ensures meaningful access by LEP persons to critical services while not imposing undue burdens on small business, small local governments, or small nonprofits." *Id.* at 47,314.

*B. Procedural History*

1. Plaintiffs are individual physicians and two nonprofit organizations, ProEnglish, and The Association of American Physicians & Surgeons (AAPS), who initiated this action with the filing of their complaint on August 30, 2004. E.R. V. I at 1-89.[3] Defendants are the Department of Health and Human Services and the Secretary of Health and Human Services, in his official capacity. E.R. V. I at 1.[4] Plaintiffs contended (1) that HHS had violated the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. 706, when it issued the Guidance, E.R. V. I at 13-14; (2) that HHS had exceeded its authority under Title

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[3] Citations to "E.R. V. I at __" refer to documents in the Excerpt of Record by Volume number and page. Citations to "R. __" refer to documents in the Record, by docket number.

[4] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Michael O. Leavitt, currently Secretary of Health and Human Services, has been substituted for Tommy G. Thompson.

VI when it issued the Guidance, in violation of the Administrative Procedure Act, E.R. V. I at 14-15; and (3) that the Guidance violates their rights under the First Amendment, E.R. V. I at 15-17. Plaintiffs sought a declaratory judgment and an injunction barring HHS from enforcing the Guidance. E.R. V. I at 17-18.

Plaintiffs filed a motion for preliminary injunction, R. 4, which was opposed by defendants, R. 16. Defendants filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. R. 18.

2. On March 7, 2005, the district court granted the motion to dismiss and denied plaintiffs' motion for preliminary injunction as moot, ruling that the plaintiffs lacked standing to bring this action, and that the dispute was not ripe for review. E.R. V. II at 299-315.[5]

a. To establish standing under Article III of the Constitution, the district court wrote, plaintiffs have the burden of establishing three elements: "(1) plaintiff must have suffered an injury in fact; (2) the injury must be fairly traceable to the challenged action by the defendant; and (3) it must be likely that the injury will be redressed by a favorable court decision." E.R. V. II at 302 (citing *Lujan* v.

[5] Because it found it lacked jurisdiction, the court did not rule on defendants' motion to dismiss for failure to state a claim. E.R. V. II at 315 n.16.

*Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). In this case, the district court found, none of the plaintiffs had satisfied any of the three requirements. E.R. V. II at 302-311.

First, the district court found that the individual plaintiffs had "failed to specifically allege a concrete and particularized injury in fact that is actual or imminent." E.R. V. II at 303. The individual plaintiffs, the district court wrote, contended that the Guidance would require them to hire interpreters and that HHS would enforce this requirement against them; that the requirement "creates an undue economic burden, interferes with the doctor-patient relationship, hinders their professional reputations, and violates the First Amendment as a form of compelled speech." E.R. V. II at 303. The district court found, however, that the individual plaintiffs had "not shown that the Guidance Document actually obligates any of them to provide interpretive services in the first place." E.R. V. II at 303. As the district court explained, the Guidance sets forth factors to help determine what type of language assistance, "*if any*," a recipient should provide. E.R. V. II at 303. The Guidance, the court found, "does not impose an absolute, mandatory rule that HHS recipients must provide interpretive services to any group of LEP persons." E.R. V. II at 303-304. Because neither the individual plaintiffs nor HHS had used the factors to determine whether their programs provided

meaningful access, "there is no present injury in fact nor a likely future harm that the Physician Plaintiffs will have to provide and pay for interpretive services for an unspecified group of LEP patients or risk imminent sanction." E.R. V. II at 304 (citing *Black Faculty Ass'n of Mesa Coll.* v. *San Diego Cmty. Coll. Dist.*, 664 F.2d 1153, 1155 (9th Cir. 1981)). Even if the Guidance did create a specific obligation to provide interpretive services, the court found, the individual plaintiffs had failed to allege any actual or threatened injury resulting from such an obligation. They had not alleged that they had paid additional money to hire interpreters or had incurred any other additional costs. E.R. V. II at 304-305. They had "not pled a concrete or particularized harm to their professional reputations." E.R. V. II at 305. Nor had the individual plaintiffs pled "a real and immediate injury to their First Amendment rights." E.R. V. II at 306. Finally, the individual plaintiffs had not alleged that HHS had initiated any kind of enforcement action or investigation, or that such a proceeding was imminent. E.R. V. II at 307 (citing *Citizens for Honesty and Integrity in Regional Planning* v. *County of San Diego*, 399 F.3d 1067 (9th Cir. 2005)). "At best," the court concluded, "[t]he Physician Plaintiffs' allegations are generalized, conjectural and hypothetical." E.R. V. II at 307 (citing *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983)).

The district court next concluded that the organizational plaintiffs also failed to satisfy the injury-in-fact prong. E.R. V. II at 308-310. An association, the district court explained, "has standing to sue in its own right based on an injury to the organization itself." E.R. V. II at 308 (citing *Black Faculty Ass'n*, 664 F.2d at 1156). In addition, an association may have "representational standing" based upon injury to its members, "where the members would have standing to sue in their own right." E.R. V. II at 308-309 (citing *Sierra Club* v. *Morton*, 405 U.S. 727, 739 (1972)). Here, the district court concluded, the organizations could not premise representational standing upon membership by some of the individual plaintiffs since those individuals did not have standing themselves. E.R. V. II at 309. Nor did the organizations have standing in their own right, since neither had alleged a concrete injury in fact to the organization. E.R. V. II at 309-310. "The mere fact that the Guidance Document is not aligned with the organizations' advocacy and litigation goals does not constitute a concrete and particularized injury or create a[n] Article III case or controversy here." E.R. V. II at 309-310 (citing *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975); *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974); *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)).

The district court also concluded that the plaintiffs had failed to satisfy the causation and redressability prongs required for Article III standing. E.R. V. II at

310-311. Recipients' obligation to avoid discriminating against LEP persons on the basis of national origin, the court explained, was derived from Title VI, its implementing regulations, and Executive Order 13,166. E.R. V. II at 310. But the plaintiffs challenged only the Guidance, which "does not create a mandatory rule or otherwise supplement the existing non-discriminatory obligation under Title VI and its implementing regulations." E.R. V. II at 310-311. Thus, even if plaintiffs had pled an injury in fact, they had failed to show either that there was a causal connection between that injury and the Guidance, or that an injunction barring enforcement of the Guidance would redress the injury. "The underlying Title VI nondiscriminatory obligation would remain intact and HHS would still be required to enforce it (and the corresponding regulations) against HHS Recipients with or without the aid of the Guidance Document's four factor balancing test." E.R. V. II at 311.

b. The district court also found that the dispute the plaintiffs sought to bring before it was not ripe for review. E.R. V. II at 311-315. "The basic purpose of the ripeness doctrine," the district court wrote, "is to prevent the courts . . . from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the

challenging parties." E.R. V. II at 311 (quoting *Association of American Med. Colls.* v. *United States*, 217 F.3d 770, 779 (9th Cir. 2000)). In addressing the question of ripeness, the court explained, it would "evaluate the fitness of the issues for judicial decision and the hardship to the parties." E.R. V. II at 312 (citing *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967)).

The district court distinguished this case from *Abbott*, where the challenged regulations had "'a direct effect on the day-to-day business of all prescription drug companies' and * * * carried 'serious criminal and civil penalties.'" E.R. V. II at 312 (quoting *Abbott Laboratories*, 387 U.S. at 152-153). Here, in contrast, plaintiffs' claims were based upon "the speculative presumption that, at some point in the future, HHS may determine that Plaintiffs have a Title VI obligation to provide linguistic assistance to LEP persons pursuant to the Guidance Document, investigate and conclude that Plaintiffs are not in compliance with that obligation, and then initiate enforcement proceedings against them." E.R. V. II at 313 (citing *Franklin* v. *Massachusetts*, 505 U.S. 788, 797 (1992)). The court noted that, even though the newest version of the Guidance had been in effect for more than a year, there were no allegations that any plaintiff had incurred any costs to comply with the Guidance; that any of the plaintiffs had even determined that they had an obligation to provide language assistance service under the four-factor test set out

in the Guidance; or that HHS had determined that plaintiffs had such an obligation, let alone initiated an enforcement proceeding of any kind. E.R. V. II at 313-314. As the court explained, any HHS enforcement action would follow a specific procedure set forth in the statute and the agency's regulations, beginning with an investigation, followed, if a violation was found, by informal efforts to seek voluntary compliance, and, if such efforts failed, by an administrative hearing, an administrative appeal, and judicial review. E.R. V. II at 314 (citing 45 C.F.R. 80.8(a), (c), (d), 80.9, 80.10). Thus, the court concluded, "even the *threat* of enforcement is far off and no hardship exists sufficient to compel immediate review." E.R. V. II at 314.

3. Both of the organizations and three of the individual plaintiffs, Clifford W. Colwell, Jr., M.D., John Brofman, M.D., and Lynn, I. DeMarco, M.D., filed a timely notice of appeal from the district court's judgment. E.R. V. II at 317-318.

## SUMMARY OF ARGUMENT

The district court's judgment dismissing this action for lack of subject matter jurisdiction should be affirmed.

1. Plaintiffs lack standing to maintain this action. Neither the individual plaintiffs nor the organizations have alleged facts sufficient to demonstrate any of the three requirements for standing. They have not alleged injury in fact that is

concrete and particularized, actual and imminent. The Guidance that plaintiffs seek to challenge sets forth factors to guide recipients of federal financial assistance in determining their obligations under Title VI and its implementing regulations with respect to provision of services to persons of limited English proficiency. None of the plaintiffs have alleged that they have applied these factors to their own programs to determine what, if any, obligations they have to provide language assistance to LEP persons. Nor have they alleged that HHS has made any such determination or has initiated any type of Title VI enforcement proceeding against any of them, or that any such proceeding is imminent. While plaintiffs make general assertions about the potential costs of compliance and other problems with the Guidance, they have not alleged with sufficient particularity that they have incurred any costs or other adverse consequences as a result of the Guidance. The organization plaintiffs have not alleged any injury to themselves as a result of the Guidance. Mere disagreement with the goals and methods set forth in the Guidance does not constitute a concrete and particularized injury to the organizations. Nor can the organizations proceed as representatives of their members, since the individuals have failed to demonstrate injury in fact.

Plaintiffs also fail to satisfy the causation and redressability elements of standing. They failed to plead facts sufficient to establish a causal connection

between the injury and the conduct complained of or to show that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

Plaintiffs claim that their alleged injury is the result of the measures required by the Policy Guidance. However, any obligation to which recipients of federal financial assistance may be subject regarding the provision of services to LEP persons, comes, not from the Guidance itself, but from Title VI and its implementing regulations. Therefore, to the extent there is any injury, it is caused, not by the Guidance, but by the underlying statute and regulations, which are not challenged in this action. Similarly, the relief they seek – a declaratory judgment and injunction invalidating the Guidance – would not relieve them of the obligations they have under Title VI and the regulations.

2. Similarly, the dispute plaintiffs seek to bring before the court is not ripe for review because the issues are not fit for judicial resolution and plaintiffs will not suffer significant hardship if judicial review is deferred. Agency action is fit for judicial review if the issues presented are purely legal and if the challenged action is final agency action. But plaintiffs' claims involve factual, as well as legal, questions. And the Guidance does not constitute final agency action because it does not impose an obligation or fix a legal relationship. Moreover, because

application of the Guidance is fact-intensive, judicial review is likely to stand on a firmer footing in the context of a challenge to a specific application of the Guidance, where the facts can be developed.

Nor will plaintiffs suffer significant hardship if judicial review is deferred. They have not alleged that they have been injured by the Guidance or that any injury is imminent. In any event, any injury they might suffer as a result of their obligation to provide language services is derived from the statute and its implementing regulations, not from the Guidance, which merely serves to assist recipients in assessing their existing legal obligations. Finally, if plaintiffs are required to provide services, and if they fail to do so, HHS must engage in an administrative procedure before it takes any final action against them. And plaintiffs will have full opportunity for judicial review at the close of that process.

## ARGUMENT

## I

## PLAINTIFFS LACK STANDING TO MAINTAIN THIS ACTION

To establish standing, "the irreducible constitutional minimum" requires plaintiffs to establish three elements: "First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.'

Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (citations omitted). The district court correctly concluded that plaintiffs in this case established none of these three factors. Standing is a question of law reviewed *de novo*. *Ellis* v. *City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993).

*A. Plaintiffs Failed To Establish Injury In Fact*

Central to the case or controversy requirement in Article III of the Constitution is the rule that standing is limited to those who have personally suffered or imminently will suffer an injury. "[T]he injury must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 561 n.1. "The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983). Plaintiffs who seek declaratory and injunctive relief face an additional burden to establish standing. In

such cases, it is not sufficient to present a claim of past injury. Plaintiffs seeking such relief must also show that they are likely to suffer future injury. *Id.* at 106. Plaintiffs have failed to make this showing.

An organization may assert standing in its own right or on behalf of its members. To establish standing in its own right, the organization must allege facts sufficient to demonstrate that it has suffered injury in fact as a result of the challenged action or policy. See *Sierra Club* v. *Morton*, 405 U.S. 727, 740 (1972). "[A] mere 'interest in a problem,' * * * is not sufficient" to demonstrate such an injury. *Id.* at 739. To establish standing on behalf of its members, the organization must show that: (1) at least one of its members possesses standing to sue in his or her own right; (2) the interests the suit seeks to vindicate are germane to the association's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *United States* v. *City and County of San Francisco*, 979 F.2d 169, 171 (9th Cir. 1992).

Neither the individual plaintiffs nor the organizational plaintiffs have pled facts sufficient to establish injury in fact.

1. As explained above (pp. 6-7, *supra*), the HHS Guidance sets forth factors that recipients should consider in determining the scope of their existing obligation under Title VI and its implementing regulations to take reasonable steps to provide

meaningful access to federally-assisted programs to LEP persons. None of the individual plaintiffs have alleged that they have applied these factors to their own programs to determine what, if any, obligations they have to provide language assistance to LEP persons. Plaintiffs have not alleged that HHS has made any such determination or has initiated any type of Title VI enforcement proceeding against any of them, or that any such proceeding is imminent. Likewise, plaintiffs have not alleged that they have lost any of their federal funding, or that such a loss is imminent. Thus, they have failed to allege facts sufficient to establish injury in fact. Cf. *Citizens For Honesty And Integrity In Regional Planning* v. *County of San Diego*, 399 F.3d 1067 (9th Cir. 2005) ("Mere possibility of future local regulatory action challenged as unconstitutional or in conflict with federal law is not sufficient for declaratory judgment jurisdiction.").

Plaintiffs do assert generalized allegations regarding what they see as the demerits of the Guidance. But none of these assertions allege an injury that is concrete and particularized and actual or imminent, not conjectural or hypothetical. See *Lujan*, 504 U.S. at 560.

For example, plaintiffs' allegations do not support their claims about the costs of compliance with the alleged requirements of the Policy Guidance. Plaintiffs claim (Br. 39) that they have "shown that financial * * * hardship will

befall them if review is withheld." But no plaintiff has alleged with particularity that he has spent any amount of money complying with any alleged requirements of the Guidance, or that such expenses are imminent. To the contrary, plaintiffs have only conjectured about whether and how they may be required to provide interpreters at their own cost. Dr. Colwell asserted that: "[T]he translation requirement is extremely onerous and the cost will be prohibitive," E.R. V. I at 3; "The medical community will have to 'eat' those costs," E.R. V. II at 292; and "We'll all have to protect ourselves by spending whatever it takes to provide these services at any level requested," E.R. V. II at 293. While Dr. Brofman estimates the potential cost of an interpreter, he does not allege that he has been or imminently will be required to spend this amount. See E.R. V. I at 3-4. Similarly, Dr. DeMarco complains of the costs stemming from "time * * * spent waiting for translators." E.R. Vol. II at 276. But he states that the hospital in which he works provides interpreters in several languages; he does not allege that he himself has provided interpreters. E.R. Vol. II at 276. These claims fail to allege a concrete and particularized injury *to the plaintiffs*. Rather, the allegations amount to generalized grievances and do not satisfy the requirement for an injury in fact. See *Carroll* v. *Nakatani*, 342 F.3d 934, 940 (9th Cir. 2003) ("[C]ourts should refrain from 'adjudicating abstract questions of wide public significance which amount to

generalized grievances.'") (quoting *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982).

Plaintiffs also allege that they will suffer injury in that they will be forced to communicate with their patients in a less desirable fashion, thus causing them to provide a lower quality of service. In particular, plaintiffs allege that the Guidance prohibits the use of patient-selected family members or friends as interpreters. See, *e.g.*, E.R. Vol. II at 276.[6] This claim simply misstates the Guidance, which provides that "the recipient should * * * respect an LEP person's desire to use an interpreter of his or her own choosing (whether a professional interpreter, family member, or friend)." 68 Fed. Reg. 47,317. The Guidance does state that "a recipient may not require an LEP person to use a family member or friend as an interpreter," and cautions that "[i]n some circumstances, family members (especially children) or friends may not be competent to provide quality and accurate interpretations." 68 Fed Reg. 47,317-47,318. The Guidance also states that "issues of confidentiality, privacy, or conflict of interest may arise" so as to make it inappropriate to use family or friends as interpreters. *Id.* at 47,318. But

[6] Dr. DeMarco erroneously claims that the Guidance prohibited him from using a patient's daughter as interpreter even though she "was fluent in English and could have easily translated what her mother was saying to me." E.R. Vol. II at 276.

none of the plaintiffs allege that they have encountered any of these circumstances and thus have been unable to use family members as interpreters for that reason.

Plaintiffs further allege that the Policy Guidance exposes them to increased liability, thereby increasing their insurance costs. See E.R. V. I at 6. However, neither the possibility of litigation nor the alleged potential increase in insurance costs constitutes a concrete and particularized injury. The possibility of litigation is at most speculative, and plaintiffs would have an adequate legal remedy by way of defense in any proceeding that might eventually be brought. See *O'Shea* v. *Littleton*, 414 U.S. 488, 502 (1974) (if plaintiffs are prosecuted and improperly sentenced in the future, they would have adequate remedies to challenge any unlawful conduct at that time). Further, plaintiffs' alleged increased insurance costs are not only speculative, but are based upon their previous speculation about the possibility of litigation. Not a single plaintiff alleges that his insurance costs have risen due to the Guidance. Plaintiffs simply speculate that if they are sued, their insurance premiums will rise. See, *e.g.*, E.R. V. I at 3, V. II at 293.

Finally, plaintiffs claim that the Guidance infringes upon their First Amendment rights because it forces them to speak in a manner not of their choosing. In addition to being an inaccurate statement of the Guidance, no plaintiff has alleged that he has actually spoken in a manner other than the manner

of his choosing when providing medical services, or that he will in the imminent future. Accordingly, plaintiffs' allegations do not support a claim that a First Amendment injury has occurred, or is imminently likely to occur. Again, to the extent that plaintiffs may be required to disseminate information in a different language, that requirement arises out of Title VI, not the Guidance. Finally, even if Title VI were shown to require plaintiffs to obtain the services of an interpreter, it would not raise First Amendment concerns because it does not affect the content of what is communicated. Title VI would only require reasonable steps to ensure that whatever the provider communicates is understood by the LEP individual.

Plaintiffs' failure to plead concrete injury is particularly significant since the current version of the Guidance had been in effect for well over a year when they filed their complaint, and the previous Guidance, which also provided technical assistance to recipients of federal financial assistance about their obligations under Title VI and its implementing regulations with respect to persons with limited English proficiency, had been in effect since August 2000. Accordingly, plaintiffs' allegations do not support a claim that they have suffered actual injury or are likely imminently to face future injury related to the Policy Guidance. On that ground alone, the district court's ruling that they lack standing to maintain this action should be affirmed.

2. The organizations similarly failed to plead facts sufficient to establish injury in fact, either in their own behalf or on behalf of their members.

Both organizations assert standing in their own right. See E.R. V. I at 6-7. ProEnglish contends that the HHS Guidance "undermines or nullifies the English language goals and programs" that it conducts, and that "[t]he adoption and enforcement of [the] Guidance will make ProEnglish's activities far more difficult, if not impossible, to attain." E.R. V. I at 6. While AAPS claims to bring this action on its own behalf, it does not allege any injury to itself. It does contend that it is "dedicated to preserving freedom in the practice of ethical medicine and opposes government interference in the one-on-one patient-physician relationship." E.R. V. I at 7. But it does not assert that the Guidance causes any concrete injury to that function. The organizations' allegations are insufficient to demonstrate any particularized injury to their interests. Neither organization has been forced to abandon its advocacy functions. Nor does it appear that either organization intends to do so. As the district court correctly concluded, "[t]he mere fact that the Guidance Document is not aligned with the organizations' advocacy and litigation goals does not constitute a concrete and particularized injury or create an Article III case or controversy here." E.R. V. II at 309.

Thus, this case is unlike *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 379 (1982), which held that a fair housing organization had standing to challenge discriminatory real estate steering practices that had "perceptibly impaired [the organization's] ability to provide counseling and referral services for low- and moderate-income homeseekers." As the Supreme Court explained, "[s]uch concrete and demonstrable injury to the organization's activities – with the consequent drain on the organization's resources – constitutes far more than simply a setback to the organization's abstract social interests." *Ibid.* In the instant case, the organizations have alleged no such "concrete and demonstrable injury" to their activities, and therefore have failed to allege injury in fact.

Nor do the organizations have standing to represent their members. The doctrine of representational standing does not eliminate the constitutional requirement of a live case or controversy between the parties. Rather, it recognizes that injury to an organization's members may satisfy the requirements of Article III and allow the organization to litigate in federal court on their behalf. See *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975). Both organizations claim representational standing because some of the individual plaintiffs are members. As described above, however, the individual plaintiffs all failed to satisfy the injury in fact requirement and, therefore, do not have standing in their own right. The

organizations cannot, therefore, premise standing on the injuries suffered by their members. See *Black Faculty Ass'n of Mesa Coll.* v. *San Diego Cmty. Coll. Dist.,* 664 F.2d 1153, 1157 (9th Cir. 1981).

Plaintiffs ProEnglish and AAPS have failed to establish injury in fact. For this reason alone, the district court ruling that they lack standing to maintain this action should be affirmed.

*B. Plaintiffs Lack Standing Because Their Alleged Injury Is Not Caused By The Guidance, And Is Not Likely To Be Redressed by A Favorable Decision*

Plaintiffs also fail to satisfy the causation and redressability elements of standing. They failed to plead facts sufficient to establish a causal connection between the injury and the conduct complained of or to show that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-561.

Plaintiffs claim that their alleged injury is the result of the measures required by the Guidance. However, any obligation to which recipients of federal financial assistance may be subject regarding the provision of services to LEP persons comes not from the Guidance itself, but from Title VI and its implementing regulations. Therefore, to the extent that there is any injury, it is caused, not by the

Guidance, but by the underlying statute and regulations, which are not challenged in this action.

Similarly, the relief that plaintiffs seek will not redress the alleged injuries. Those plaintiffs who are recipients of federal financial assistance will remain subject to Title VI and its implementing regulations whether or not the Guidance is enjoined. Accordingly, their obligation to make their programs and services available in a manner that does not result in discrimination based on national origin will remain as well. This includes, when necessary to avoid discrimination based on national origin, the obligation to take reasonable steps to ensure meaningful access to their programs and services by LEP persons.

Because plaintiffs have failed to demonstrate causation or redressability, they lack standing to maintain this action.

## II

## PLAINTIFFS' CLAIMS ARE NOT RIPE FOR REVIEW

Plaintiffs have also failed to meet their burden of establishing the ripeness of their claims. As the Supreme Court has explained, "[t]he ripeness doctrine is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" *Nat'l Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 808 (2003) (quoting *Reno* v. *Catholic*

*Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)). The purpose of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Association of Amer. Med. Colls.* v. *United States*, 217 F.3d 770, 779 (9th Cir. 2000) (citing *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967)); see also *Ohio Forestry Ass'n*. v. *Sierra Club*, 523 U.S. 726, 732 (1998). This Court reviews ripeness questions *de novo*. *Municipality of Anchorage* v. *United States*, 980 F.2d 1320, 1322-1323 (1992).

To determine whether a claim is ripe, courts examine the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Ohio Forestry Ass'n*, 523 U.S. at 733 (quoting *Abbott Laboratories*, 523 U.S. at 149). Plaintiffs' claims fail both prongs of this test.

*A. Plaintiffs' Claims Are Not Fit For Judicial Resolution*

As this Court has explained, "[g]enerally, agency action is fit for review if the issues presented are purely legal and the regulation at issue is a final agency action." *Municipality of Anchorage*, 980 F.2d at 1323. Plaintiffs erroneously contend (Br. 38) that their claims are fit for judicial resolution because there are no

factual issues and because the Guidance constitutes final agency action. Those contentions are without merit.

*First*, plaintiffs' claims do not raise purely legal issues. Only their first claim, that the Guidance was not issued pursuant to the notice and comment procedures, is a legal question. To resolve this issue, the Court will need only look at this Circuit's tests for interpretive rules and general statements of policy to determine that the Policy Guidance is exempt from the notice and comment procedures of the APA. See *Erringer* v. *Thompson*, 371 F.3d 625 (9th Cir. 2004); *Mada-Luna* v. *Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987). Their second claim, that HHS has exceeded its delegated authority under Title VI in issuing the Guidance, raises both legal and factual issues, as plaintiffs' complaint itself acknowledges. See E.R. V. I at 15 ("The ability to speak English and national origin are obviously distinct qualities and the equation of language and national origin is unsupported *in law or fact.*") (emphasis added). Plaintiffs' third contention, that the Guidance violates their First Amendment rights, is similarly fact-dependent. Plaintiffs' complaint, for example, alleges that the Guidance "forces them to speak in a manner in which they do not want to speak, imposing liability on them for such forced speech, costing them money, exposing them to substantial liabilities,

chilling their own speech, and otherwise infringing on their rights." E.R. V. I at 16. These contentions may only be established by proof of facts.

*Second*, the Guidance does not constitute final agency action. "[T]he imposition of an obligation or the fixing of a legal relationship" is the hallmark of final agency action. *Mt. Adams Veneer Co.* v. *United States*, 896 F.2d 339, 343 (9th Cir. 1990); see also *Getty Oil Co*., v. *Andrus*, 607 F.2d 253, 256 (9th Cir. 1979). As discussed above (p. 5, *supra*), a recipient's obligation to provide language assistance to LEP persons derives, not from the Guidance, but from Title VI and its implementing regulations.[7] The Guidance merely "synthesizes the legal requirements that [HHS's Office of Civil Rights] has been enforcing for over three decades," 68 Fed. Reg. 47,322, and is intended "to assist recipients in fulfilling their responsibilities to provide meaningful access to LEP persons under existing law." *Id.* at 47,313. As the Guidance itself emphasizes, "[t]he policy guidance is

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[7] See 68 Fed. Reg. 47,313 ("[I]n certain circumstances, the failure to ensure that LEP persons can effectively participate in, or benefit from, federally-assisted programs and activities may violate the prohibition under Title VI * * * and the Title VI regulations against national origin discrimination."); see also 65 Fed. Reg. 50,122 (The Executive Order "is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers or employees or any person."); 65 Fed. Reg. 50,123 ("This [DOJ general] policy guidance does not create new obligations, but rather, clarifies existing Title VI responsibilities.").

not a regulation but rather a guide [that] * * * provides an analytical framework that recipients may use to determine how best to comply with statutory and regulatory obligations." *Id.* at 47,313 n.2. Thus, while the Guidance is "final" in the sense that it is effective now, it does not constitute "final agency action." *Mt. Adams Veneer Co.*, *supra*. Because the Policy Guidance is only a guide and does not impose an obligation or the fixing of a legal relationship, it does not constitute a final agency action. Further, as the district court correctly concluded (E.R. V. II at 314), no agency action has been taken against the plaintiffs, and there are many steps that HHS would be required to take (investigation, efforts to obtain voluntary compliance, administrative hearing, administrative appeal, notice to Congress) before any final action could be taken. At that time, plaintiffs would be entitled to judicial review of the agency's action. E.R. V. II at 313-314; see p. 14, *supra*. As the Court explained in *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990), a plaintiff "must direct its attack against some particular 'agency action' that causes it harm." Additionally, absent a specific statutory provision providing for immediate judicial review, even "a regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the [Administrative Procedure Act] until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action

applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Ibid.*

*B. Plaintiffs' Alleged Harm Is Insufficient To Demonstrate That Delayed Review Will Cause Them Significant Hardship*

Delayed review of the plaintiffs' claims challenging the government's LEP policy documents will not cause them significant hardship. Plaintiffs seek declaratory and injunctive relief, which the courts are reluctant to grant "unless the effects of the administrative action challenged have been 'felt in a concrete way by the challenging parties.'" *Catholic Soc. Servs., Inc.*, 509 U.S. at 57 (quoting *Abbott Laboratories*, 387 U.S. at 149)). Thus, to prevail, the plaintiffs must demonstrate that the challenged agency action "now inflicts significant practical harm upon the[ir] interests." *Ohio Forestry Ass'n,*, 523 U.S. at 733. For the alleged hardship to be cognizable, it must usually be direct and immediate. *Municipality of Anchorage*, 980 F.2d at 1325-1326. While the threat of criminal penalty may be considered hardship, the threat of a civil enforcement action is not. *Lee* v. *Oregon*, 107 F.3d 1382, 1391-1392 (9th Cir. 1997).

There is no indication that plaintiffs will experience any hardship should the court withhold determination until plaintiffs present a properly justiciable claim. As explained above in Argument I, plaintiffs have not alleged any injury in fact,

even though the current version of the Policy Guidance had been in effect for over a year when they filed their complaint. Nor have they alleged that HHS has recently changed, or will imminently change, based upon the Guidance, the way in which it evaluates the compliance of recipients of federal financial assistance with their obligation under Title VI and its implementing regulations. Plaintiffs, therefore, fail to present a claim that they will incur any hardship should the court wait to adjudicate this claim until it is sufficiently ripe.

Plaintiffs contend (Br. 39) that they will suffer harm because the Guidance "mandates that they provide free translation services to LEP patients" and because they "are bound by [the] HHS four-part model for determining compliance." But, as set forth above (pp. 20-22, *supra*), the individual plaintiffs have not alleged that they were actually providing such services. Even if the physicians had alleged that they were currently spending money to provide language services to LEP persons, it is not the challenged Guidance that would require such expenditures. Any obligation to provide services comes from the statute and regulations, not from the Guidance itself. The hardship prong of the ripeness doctrine is not satisfied unless the challenged agency action "create[s] adverse effects of a strictly legal kind." *Ohio Forestry Ass'n*, 523 U.S. at 733. Here, the Guidance documents "do not command anyone to do anything or to refrain from doing anything; they do not

grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; [and] they create no legal rights or obligations." *Ibid.*

Moreover, the Guidance does not force the physicians "to modify [their] behavior in order to avoid future adverse consequences, as, for example, agency regulations can sometimes force immediate compliance through fear of future sanctions." *Ohio Forestry Ass'n*, 523 U.S. at 734. This case is thus distinct from those in which "challenged regulations [or other agency action] presented plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation." *Catholic Soc. Servs.,* 509 U.S. at 57. Here, there is no automatic penalty for a recipient's failure to follow the Guidance. The Guidance does not impose any obligations. It describes one way to assess and determine a recipient's obligation under Title IV. There is no suggestion that failure to follow the Guidance is necessarily a Title VI violation. Even if HHS were to enforce Title VI and the implementing regulation, as set forth above (p. 4, *supra*), there are many steps between the initial assessment of a recipient's obligation under Title VI, and the agency's final determination that a recipient has violated the statute or its regulations by discriminating on the basis of national origin. Cf. *Abbott Laboratories*, 387 U.S. at 152-153 (finding

challenge to regulation ripe where plaintiffs were required to either comply at once and incur substantial economic costs or risk facing criminal and civil penalties).

In sum, the plaintiffs did not allege sufficient "imminent, practical harm" to demonstrate that delayed review will cause them significant hardship.

## CONCLUSION

The judgment of the district court should be affirmed.[8]

Respectfully submitted,

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[8] Appellants ask this Court to rule on the merits of this action and to invalidate the Guidance. See Br. 40-59. But the district court expressly declined to reach the merits once it concluded that it lacked subject matter jurisdiction. Indeed, defendants have not even answered the plaintiffs' complaint. See E.R. V. II at 344. Thus, the proper action, should this Court determine that the plaintiffs have standing and that the dispute is ripe for review, would be to remand for further proceedings.

## STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for the federal appellees states that there are no related cases pending in this Court.

## CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7(C) and Ninth Circuit Rule 32-1, the attached BRIEF FOR THE FEDERAL DEFENDANTS AS APPELLEES is proportionately spaced, has a typeface of 14 points and contains 8,063 words.

_____

DENNIS J. DIMSEY
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Date: August 22, 2005

## CERTIFICATE OF SERVICE

I certify that, on August 22, 2005, two copies of the BRIEF FOR THE FEDERAL DEFENDANTS AS APPELLEES were served by first-class mail, postage prepaid on the following counsel of record:

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