No. 02-2044

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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PROENGLISH, *et al.*,

Plaintinff-Appellants

v.

GEORGE W. BUSH, *et al.*,

Defendants-Appellees

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

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# APPELLEE BRIEF FOR THE FEDERAL DEFENDANTS

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## JURISDICTIONAL STATEMENT

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 court's dismissal of the plaintiffs' complaint on ripeness grounds, however, constitutes a final, appealable order. Accordingly, this Court has jurisdiction to review that decision pursuant to 28 U.S.C. 1291.

## STATEMENT OF THE ISSUES

1. Whether the district court applied the correct legal standard when

dismissing the case for lack of subject matter jurisdiction.

2. Whether the plaintiffs' claims challenging Executive Order 13,166 and agency policy guidance documents that clarify longstanding interpretation of Title VI and implementing regulations are ripe for judicial 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-funded] program." 28 C.F.R. 42.203(e); see also 45 C.F.R. 80.3(b)(2). For over 25 years, this regulatory language has been construed as requiring meaningful access to

federally-funded 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 (July 18, 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." ); see also 28 C.F.R. 42.405(d)(1) (current regulation describing circumstances in which recipients of federal financial assistance must provide written language assistance to LEP persons).

2. The Department of Justice (DOJ) has three distinct roles with respect to Title VI. The President has delegated to DOJ the responsibility of coordinating federal Title VI implementation and enforcement. See Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980); 28 C.F.R. 42.412. In this role, DOJ issues

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

guidance to federal agencies on regulatory and policy matters to harmonize federal enforcement efforts. In addition, DOJ is a grant agency that extends federal financial assistance, and in this capacity, monitors its own recipients' compliance with Title VI and may bring enforcement actions against those recipients. Finally, upon referral from another federal agency, DOJ may file suit in federal court to enforce Title VI against one of the referring agency's recipients. See 42 U.S.C. 2000d-1(b) ("Compliance * * * may be effected * * * by any other means authorized by law."). However, DOJ may not initiate an enforcement action against a recipient until after the referring agency has sought and failed to achieve voluntary compliance. *Ibid.*; 28 C.F.R. 50.3.

The Department of Health and Human Services (HHS), through its Office for Civil Rights (OCR), is responsible for the administrative enforcement of Title VI with regard to recipients of HHS financial assistance. Under HHS regulations, OCR must first seek to achieve Title VI compliance through voluntary or informal means, 45 C.F.R. 80.8(a), (d), and may not initiate enforcement proceedings unless voluntary compliance fails. 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

legislative 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 stakeholders, to develop guidance that will help ensure that persons with limited English proficiency have meaningful access to federally-funded services. See 65 Fed. Reg. 50,121 (Aug. 11, 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. *Id.* at 50,121.

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, 50,123 (Aug. 16 2000). It also stated that while the guidance may help agencies shape overall standards, the specific application of Title VI regulations will 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.

To fulfill its obligations as a grant agency subject to Executive Order 13,166, DOJ also issued its own agency-specific guidance to DOJ grant recipients. See 66 Fed. Reg. 3,834 (Jan. 16, 2001). That guidance document was republished for public comment on January 18, 2002, and April 18, 2002, and issued in final form on June 18, 2002. See 67 Fed. Reg. 2,671, 19,237, 41,455 (June 18, 2002).[2] Unlike the DOJ General Policy Guidance, the DOJ Recipient Guidance is not addressed to federal agencies, but only to recipients of DOJ financial assistance, primarily State and local law enforcement agencies and departments of corrections. See 67 Fed. Reg. at 41,459.

Pursuant to the Executive Order, HHS published its own guidance document to recipients of HHS financial assistance on August 30, 2000, and then again on February 1, 2002, for public comment. See 65 Fed. Reg. 52,762 (Aug. 30, 2000); 67 Fed. Reg. 4,968 (Feb. 1, 2002). HHS is currently reviewing these

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[2] The final DOJ Recipient Guidance issued on June 18, 2002, was omitted from the Appendix but has been included in the addendum to this brief.

comments and will republish the guidance as a final draft for further comment. Based on those comments, it will consider whether revisions are necessary before issuing the guidance document in final form. In its current form, the HHS Recipient Guidance clarifies that HHS's Title VI regulations, codified at 45 C.F.R. Part 80, require that recipients provide appropriate language assistance to LEP persons, "[w]here the failure to accommodate language differences discriminates on the basis of national origin." 67 Fed. Reg. at 4,970. The guidance document merely reiterates longstanding federal policy and regulatory interpretation. See, *e.g.*, 44 Fed. Reg. 17,162, 17,163 (Mar. 21, 1979) (former HEW guideline clarifying that the inability of many national origin minorities to speak and understand English well may not be used as a basis for denying admission to vocational education programs).

The Executive Order and DOJ and HHS agency guidance documents clarify the federal government's longstanding view that, in certain circumstances, regulations implementing Title VI require recipients of federal financial assistance to provide language assistance to LEP persons in order to avoid potential discrimination on the basis of national origin. The policies also reflect the unfortunate reality that, absent efforts to eliminate linguistic barriers, LEP persons frequently are denied meaningful access to federally-funded programs and

services. See, *e.g.*, 67 Fed. Reg. at 4,969 ("OCR has found that [LEP persons] frequently are unable to obtain basic knowledge of how to access various benefits and services for which they are eligible, such as [Medicaid benefits], clinical research programs, or basic health care and social services.").

**B.** ***Procedural Posture***

The plaintiffs instituted this action for declaratory judgment and injunctive relief on March 12, 2002, in the Eastern District of Virginia against federal Defendants President George W. Bush, Attorney General John D. Ashcroft, and HHS Secretary Tommy G. Thompson (App. 6-7). The plaintiffs are ProEnglish, ProEnglish's executive director, K.C. McAlpin, and several physicians. According to the complaint, ProEnglish is a non-profit advocacy organization that supports the adoption of English as the official language of the States and the federal government. ProEnglish and its executive director seek to further these broad policy goals through litigation and advocacy in favor of the adoption of "official English" laws. Neither ProEnglish nor Mr. McAlpin receives federal financial assistance. The remaining plaintiffs, Drs. Anthony Bull, Clifford Colwell, Joseph Daugherty, and Donald Kundel, are physicians who receive federal financial assistance and are therefore subject to Title VI (App. 6-11). Although the physicians do not identify the source of their federal financial

assistance, the federal defendants presumed in the proceedings below that they receive Medicaid monies from HHS (App. 189).[3] None of the plaintiffs receives financial assistance from DOJ.

The four-count complaint challenges Executive Order 13,166 and DOJ General Policy Guidance, DOJ Recipient Guidance, and HHS Recipient Guidance (App. 13-20).[4] The physicians contend that the challenged policies "create a federally-enforced obligation to provide extensive language services upon demand by even one person, with the cost to be borne solely by the provider;" as a result, they allege that they "will face additional costs, difficulties in providing legally-required services, and additional exposure to liability for malpractice or discrimination claims" (App. 20). ProEnglish and its executive director claim that the policies have a "significant effect" on them because they "will be less able to

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[3] This funding is made available to physicians who participate in state medical assistance programs under the Social Security Act, 42 U.S.C. 1396.

[4] Count One alleges that the defendants' policies violated the First Amendment on the grounds that they were vague and overbroad and infringed upon the plaintiffs' right to freedom of speech (App. 20-22). Count Two alleges that the policies violated the First, Ninth, and Tenth Amendments because the defendants lacked statutory authority to adopt them (App. 22). Count Three alleges that the adoption of the LEP policies violated the notice-and-comment requirements of the Administrative Procedure Act (APA) (App. 22-23). Finally, Count Four asserts claims under the Paperwork Reduction Act, the Small Business Regulatory Enforcement Fairness Act of 1996, the Regulatory Flexibility Act, and the Fifth Amendment's Due Process Clause (App. 23).

accomplish their shared mission, especially since some of the 'policy guidance' attacks the core of ProEnglish's efforts: legislation to declare English the official language of federal and state governments" (App. 20).

On May 20, 2002, the defendants filed a motion to dismiss the complaint for lack of subject matter jurisdiction, improper venue, and failure to state a claim upon which relief can be granted (App. 97-126). Oral argument was held on the motion before the district court on August 16, 2002 (App. 179).

### C. *The Decision Below*

The district court dismissed the complaint on the ground that the plaintiffs' claims were not yet ripe for review (App. 197). The court defined "the critical issue" as "whether or not there is actually in place a regulation that can be imminently imposed upon these plaintiffs, * * * some imminent injury or harm to these plaintiffs" (App. 186). The court concluded that there was "no evidence either in the complaint as it's pled or in what [counsel for the plaintiffs] brought before [the court] that any of the specific plaintiffs in this lawsuit have actually been threatened with any kind of immediate action by HHS" (App. 191). Moreover, the court explained that there was "no legal basis" for challenging the Executive Order, and that the DOJ guidance documents addressed respectively to federal agencies and recipients of DOJ financial assistance were inapplicable to

the plaintiffs and therefore not properly at issue in this case (App. 192). The court concluded that the plaintiffs "have nothing to do with DOJ. Their complaint is at most with HHS" (App. 192). Although the court dismissed the complaint on ripeness grounds, the court also opined that Mr. McAlpin lacked standing. The court explained that "a government policy or a government regulation [that] makes one's job more difficult is not * * * a sufficiently high problem to give one standing" and that the "labeling effect" allegedly suffered by Mr. McAlpin was "too tenuous" (App. 197-198).

The plaintiffs, except Dr. Anthony Bull, filed a timely notice of appeal on September 9, 2002.

## SUMMARY OF ARGUMENT

1. The district court applied the correct legal standard when dismissing the complaint for lack of subject matter jurisdiction. The court properly looked to the plaintiffs, who bore the burden of proof, for evidence supporting their allegations of harm. Because the defendants did not dispute any of the facts pled in the complaint, the district court regarded those facts as true, and the plaintiffs did not submit additional evidence. Properly basing its decision on the facts alleged in the complaint, the court concluded that the plaintiffs failed to establish a justiciable "case or controversy" under Article III and dismissed the case as unripe. As a

result, the plaintiffs were not entitled to present evidence on their underlying constitutional and statutory challenge to the Executive Order and policy guidance documents.

2. The plaintiffs' claims challenging Executive Order 13,166 and the DOJ and HHS policy guidance documents that clarify longstanding interpretation of Title VI and its implementing regulations are not ripe for judicial review.

a. The plaintiffs have not demonstrated that delayed review in this case will cause them significant hardship. Their allegations that the guidance documents are causing them to suffer "financial" and "constitutional" harm are unsupported by the facts alleged in the complaint as well as the law. Nothing in the record indicates that the physicians are currently spending money to hire translators in order to comply with the guidance documents, or that the guidance documents now impose that legal obligation. To the contrary, the guidance documents do not *require* the physicians to do anything beyond what is already required under Title VI and its implementing regulations, but merely remind and clarify for recipients that Title VI requires them to take reasonable steps to ensure meaningful access to their programs and services by LEP persons. The guidance documents clearly state that the obligation to provide language assistance will vary on a case-by-case basis, depending on the totality of the circumstances. There are no bright-line

rules for what is required, and the guidance documents do not force recipients to modify their behavior or face immediate criminal or civil sanctions. Similarly, nothing in the record or the law demonstrates that the Executive Order and guidance documents have harmed ProEnglish or its executive director. The documents simply do not address or limit "English-only" advocacy efforts, and Mr. McAlpin's bare assertion that his "job is on the line" is unfounded and unattributable to the challenged agency action. Because the plaintiffs have failed to demonstrate that the Executive Order and guidance documents are currently inflicting imminent harm upon their interests, they are unable to demonstrate that they will suffer hardship if judicial review is delayed.

b. Nor are the issues fit for judicial resolution. Indeed, because the HHS Recipient Guidance is not yet final, judicial interference in this case would hinder that agency's efforts to revise and finalize its policy. Additionally, because a recipient's obligation to provide language assistance to LEP persons pursuant to Title VI is assessed in the totality of the circumstances on a case-by-case basis, judicial review should be withheld until an enforcement action is initiated against these particular plaintiffs and concrete agency application of Title VI is established.

## ARGUMENT

"Article III of the Constitution limits the federal courts' jurisdiction to 'cases and controversies.'" *Mobil Oil Corp.* v. *Attorney Gen. of Va.*, 940 F.2d 73, 75 (4th Cir. 1991). The doctrine of ripeness derives from both Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction. *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733 n.7 (1997). Thus, the doctrine of ripeness, like the doctrines of standing and mootness, is "simply [a] subset[] of Article III's command that the courts resolve disputes, rather than emit random advice." *Bryant* v. *Cheney*, 924 F.2d 525, 529 (4th Cir. 1991). More specifically, "the ripeness requirement is designed 'to prevent the courts, through avoidance of premature adjudication, 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.'" *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 733-732 (1998) (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148-149 (1967)).

This Court has warned that "[t]he courts should be especially mindful of this limited role when they are asked to award prospective equitable relief instead of damages for a concrete past harm[.]" *Bryant*, 924 F.2d at 529. The decision

whether to exercise jurisdiction in a declaratory judgment case is within the sound discretion of the district court. *Charter Fed. Sav. Bank* v. *Office of Thrift Supervision*, 976 F.2d 203, 208 (4th Cir. 1992) (citing 28 U.S.C. 2201), cert. denied, 507 U.S. 1004 (1993). This Court reviews such decisions *de novo*. *Ibid.*

## I. THE DISTRICT COURT APPLIED THE CORRECT STANDARD WHEN DISMISSING THE COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

The plaintiffs' primary argument in support of reversal is that the district court applied an erroneous legal standard to resolve the defendants' motion to dismiss the complaint. This argument is entirely without merit.

A controversy that is not ripe for judicial resolution may be dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). This Court has explained that there are "two critically different ways" in which to present a motion under Rule 12(b)(1):

> First, it may be contended that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based. In that event, all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration. Second, it may be contended that the jurisdictional allegations of the complaint were not true. A trial court may then go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations.

*Adams* v. *Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). In both instances, the

plaintiff bears the burden of proving that subject matter jurisdiction exists, and the district court is to regard the pleadings as mere evidence on the issue. *Evans* v. *B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999) (citations omitted). "The district court should grant the Rule 12(b)(1) motion to dismiss 'only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.'" *Ibid.* (citation omitted).

The plaintiffs contend that the district court improperly "refused to accept evidence demonstrating the effect of the agencies' new policies on the plaintiffs" (Br. 18). This assertion is false. In moving to dismiss the complaint, the federal defendants did not dispute any of the facts pled, but instead argued that those facts did not establish a justiciable "case or controversy." Thus, like a motion to dismiss for failure to state a claim upon which relief can be granted brought pursuant to Rule 12(b)(6), only the legal sufficiency of the complaint, and not the facts in support of it, was at issue. See *Eastern Shore Markets, Inc.* v. *J.D. Assocs., Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). Because the plaintiffs alleged insufficient facts supporting a justiciable "case or controversy," the defendants, as the moving party, were "entitled to prevail as a matter of law." *Evans*, 166 F.3d at 647.

Nevertheless, the burden of proving that subject matter jurisdiction existed

remained with the plaintiffs, *ibid.*, and the court did not preclude the plaintiffs from meeting their burden. In response to the defendants' motion, the plaintiffs could have amended their complaint or submitted additional evidence to the court to support their allegations of harm. Yet, their opposition to the defendants' motion to dismiss was submitted without attachments, and it also failed adequately to explain how the facts pled in the complaint established a justiciable "case or controversy." Indeed, with respect to the harm alleged by the executive director of ProEnglish, the court specifically asked counsel for the plaintiffs at the hearing to identify some specific injury beyond his claim that "his job is made more difficult" (App. 193), and counsel was unable to do so. Cf. *Meese* v. *Keene*, 481 U.S. 465, 473 (1987) (holding that the plaintiff had standing because he sufficiently alleged tangible harm to his reputation and supported that allegation with public opinion polls).

Thus, in concluding that the plaintiffs' claims were not ripe, the district court properly relied on the facts alleged in the complaint and noted the conspicuous absence of additional evidence of harm: "There is no evidence either in the complaint as it's pled or in what [was] brought before [the court] that any of the specific plaintiffs in this lawsuit have actually been threatened with any kind of immediate action by HHS" (App. 191). The court's decision to dismiss the

action under Rule 12(b)(1), therefore, was based on proper legal standards. *Gasner* v. *Board of Supervisors*, 103 F.3d 351, 361 (4th Cir. 1996) ("Dismissal for lack of ripeness is appropriate where nothing in the record shows that appellants have suffered any injury thus far and the future effect of the law relied upon remains wholly speculative.").

The plaintiffs nevertheless contend that the district court failed to assume the truth of the facts set forth in their complaint. For example, the plaintiffs argue that the court improperly rejected their allegation that the HHS Recipient Guidance constituted a final agency action, and contend that they should have been allowed to introduce evidence demonstrating that the guidance document was final because it was already in effect (Br. 23-26). The plaintiffs, however, improperly characterize this allegation as one of fact. On the contrary, the question whether the HHS guidance document constitutes "final agency action" is one of law. See, *e.g., Charter Fed. Sav. Bank* v. *Office of Thrift Supervision*, 976 F.2d 203, 209 (4th Cir. 1992) (analyzing as a matter of law whether the facts of that case constitute "final agency action"), cert. denied, 50 U.S. 1004 (1993). The court, therefore, rejected the plaintiffs' position and concluded that because the guidance document was still open for public comment, it remained "a document in flux" and that as a matter of law, any review of it would amount to an improper

advisory opinion under Article III (App. 191-192).[5] "While [the court] must take the facts [of the complaint] in the light most favorable to the plaintiff, [it] need not accept the legal conclusions drawn from the facts. Similarly, [it] need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Eastern Shore Markets*, 213 F.3d at 180. As such, the court was not bound to accept the plaintiffs' position regarding the finality of the HHS guidance document, nor any other legal argument couched as a factual allegation.

Finally, the plaintiffs argue that their complaint satisfied the "notice pleading" standard of Federal Rule 8(a) of Civil Procedure and that, as a result, the district court should have allowed them to introduce evidence to prove their constitutional and statutory claims challenging the Executive Order and DOJ and HHS policy guidance documents (Br. 19-23). This argument reflects a serious misunderstanding of the proceeding below. The district court dismissed this case on ripeness grounds under Rule 12(b)(1), not under Rule 12(b)(6) for failure to

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[5] The court's finding that the HHS Recipient Guidance was still "a document in flux" was not the exclusive basis for concluding that the plaintiffs' claims were not ripe. Rather, as explained below, see Part II.A, *infra*, the "critical issue" was whether there was "some imminent injury or harm to these plaintiffs" (App. 186). In dismissing the complaint, the court emphasized the lack of evidence supporting the plaintiffs' allegations of harm and noted that although the guidance document indicated that it was effective, it was not yet affecting these plaintiffs (App. 191-192).

state a claim upon which relief can be granted (App. 197). Accordingly, the primary case cited by the plaintiffs in support of their argument, *Swierkiewicz* v. *Sorema*, 534 U.S. 506 (2002), is inapposite because that case considered the proper pleading standard for stating an employment discrimination claim under Title VII, not whether the plaintiff had satisfied his burden of proving that subject matter jurisdiction existed under Article III. Whether the complaint in this case satisfied the pleading requirements clarified in *Swierkiewicz* under Rule 8(a)(2), therefore, is irrelevant, as the plaintiffs failed to satisfy their threshold burden of establishing sufficient jurisdictional facts. As a result, they were not entitled to any consideration of their case on the merits. See, *e.g.*, *Friends of the Earth, Inc.* v. *Gaston Copper Recycling Corp.*, 204 F.3d 149, 164 (4th Cir. 2000) (noting that the ripeness doctrine bars the courthouse door to litigants unable to establish a justiciable "case or controversy").

In sum, the district court applied the correct legal standard to resolve the defendants' motion to dismiss pursuant to Rule 12(b)(1).

## II. THE PLAINTIFFS' CLAIMS CHALLENGING EXECUTIVE ORDER 13,166 AND AGENCY POLICY GUIDANCE DOCUMENTS THAT CLARIFY LONGSTANDING INTERPRETATION OF TITLE VI AND IMPLEMENTING REGULATIONS ARE NOT RIPE FOR JUDICIAL REVIEW

This Court uses the two-prong test articulated by the Supreme Court in

*Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967), for determining whether a controversy is ripe for judicial review: (1) "whether hardship will fall to the petitioning party on withholding court consideration," and (2) "whether the issues are fit for judicial decision." *Charter Fed. Sav. Bank* v. *Office of Thrift Supervision*, 976 F.2d 203, 208 (4th Cir. 1992). As explained below, these considerations very clearly foreclose judicial review of the plaintiffs' claims challenging the Executive Order and DOJ and HHS guidance documents regarding the provision of federally-funded services to persons with limited understanding of English. Accordingly, this Court should affirm the district court's proper dismissal of the plaintiffs' complaint for lack of subject matter jurisdiction.

### A. *The 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. The plaintiffs, however, argue that, in the absence of immediate judicial review, the plaintiff-physicians will suffer "financial hardship" because they "are spending money on translators," and that the plaintiff-advocates will suffer "constitutional hardship" because "[the] policies are being used against [their] promotion of English as the official language" (Br. 31-32). Both groups of plaintiffs concede that neither

alleged harm is the result of any direct agency action, but instead assert that they have suffered "indirect" injuries (Br. 32). Yet they 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.'" *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 (1993) (quoting *Abbott Labs.*, 387 U.S. at 149)). Thus, in order to prevail, the plaintiffs must demonstrate that the challenged agency action "now inflicts significant practical harm upon their interests." *Ohio Forestry Ass'n, Inc.* v. *Sierra Club*, 523 U.S. 726, 733 (1998). In considering the defendants' motion to dismiss, the district court properly defined the "critical issue" as whether there was "some imminent injury or harm to these plaintiffs" (App. 186).

**1. The Physicians**

The physicians' argument that they have suffered legally cognizable harm because they are currently spending money on translators (Br. 32) is unsupported by the record as well as applicable law. The argument fails factually because, in the proceedings below, the physicians alleged only possible future economic harm. The complaint states that the physicians "*will* face additional costs, difficulties in providing legally-required services, and additional exposure to liability for malpractice or discrimination claims" (App. 20) (emphasis added). Dr. Colwell,

for example, alleges that "[u]nder the policies considered herein, [he] and his clinic *would have to provide* translators in any requested language, at their own cost, and *would incur* actual and potential liability for forced speech in languages other than English" (App. 9) (emphasis added). Drs. Daugherty and Kundel assert similar claims in the complaint (App. 9-10), and counsel for the plaintiffs spoke only of possible future harm at the hearing (App. 184-185).[6] Thus, there is no evidence in the record to support the plaintiffs' argument of present economic harm, and "[a]n allegation of a possible future injury does not satisfy the requirements of Article III of the Constitution." *Gasner* v. *Board of Supervisors*, 103 F.3d 351, 361 (4th Cir. 1996).

Even if the physicians were currently spending money, however, their claims of harm tied to these costs are without merit because the challenged policy documents do not mandate such expenditures. Indeed, the hardship prong of the

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[6] The plaintiffs attempt to support their allegation of present economic harm with the following uncorroborated statement made by their attorney at the hearing (Br. 9): "[D]octors are, in fact, buying these translation phones. They're hiring translators. They are taking funds they'd rather use for patients and for new equipment, and they're using it for translators" (App. 182). In so doing, the plaintiffs misrepresent the record. Read in context, it is clear that this statement was not referring to the physicians in this case, but rather, to doctors generally. This lawsuit is not a class action, and the individual plaintiff-physicians here failed to show that they are now spending additional money on translation services as a result of the challenged guidance documents.

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.*

For example, the Executive Order and agency guidance documents do not create any new legal rights or impose any new legal obligations, but rather clarify longstanding interpretation of Title VI and its implementing regulations. See 65 Fed. Reg. 50,121, 50,122 (Aug. 11, 2000) (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, 50,123 (Aug. 16, 2000) ("This [DOJ general] policy guidance does not create new obligations but, rather, clarifies existing Title VI responsibilities"); 67 Fed. Reg. 4,968, 4,969 (Feb. 1, 2002) ("This current [HHS] guidance clarifies for recipient/covered entities and the public, the legal requirements under Title VI that OCR has been enforcing for the past 30 years.").

Indeed, the Executive Order and DOJ General Policy Guidance are not even

addressed to recipients of financial assistance, and the challenged DOJ and HHS recipient guidance documents merely remind recipients of financial assistance from those agencies of their pre-existing legal obligations by clarifying that, "[i]n order to ensure compliance with Title VI, recipient/covered entities must take steps to ensure that LEP persons who are eligible for their programs or services have meaningful access to the health and social service benefits that they provide." 67 Fed. Reg. at 4,971 (HHS). Contrary to the plaintiffs' allegations, the guidance documents do not "create a federally-enforced obligation to provide extensive language services upon demand by even one person, with the cost to be borne solely by the provider" (App. 20). Instead, the guidance documents emphasize a "a flexible and fact-dependent standard" that begins with an "individualized assessment" by the recipient. 67 Fed. Reg. 41,455, 41,459 (June 18, 2002) (DOJ). Accordingly, "[t]he type of language assistance a recipient/covered entity provides to ensure meaningful access will depend on a variety of factors, including the size of the recipient/covered entity, the size of the eligible LEP population it serves, the nature of the program or service, the objectives of the program, the total resources available to the recipient/covered entity, the frequency with which particular languages are encountered, and the frequency with which LEP persons come into contact with the program." 67 Fed. Reg. at 4,971 (HHS).

As a result, "[t]here is no 'one size fits all' solution for Title VI compliance with respect to LEP persons." *Ibid.* Indeed, the HHS guidance document expressly states that recipients "will have considerable flexibility in determining precisely how to fulfill this obligation," and assessment of their responsibilities and compliance will be determined by the "totality of the circumstances" on a case-by-case basis. *Ibid.* This flexible, "totality of the circumstances" and "case-by-case basis" approach supports the conclusion that delaying judicial review will not cause significant hardship to the physicians. See, *e.g.*, *Pacific Gas & Elec.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983) (holding a constitutional challenge to a statutory provision requiring certification determinations to be made on a case-by-case basis to be premature, while concluding that a challenge to a different provision imposing a statewide moratorium on certifications was ripe for review); *Catholic Soc. Servs., Inc.*, 509 U.S. at 58-59 (rejecting on ripeness grounds a facial challenge to INS regulations that require case-by-case determinations of whether an alien has met all of the statutory conditions for lawful permanent residency, not merely those interpreted in the challenged regulations).

Moreover, the guidance documents do 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; see *Charter Fed. Sav. Bank*, 976 F.2d at 208-209 ("The hardship prong is measured by the immediacy of the threat and the burden imposed on the petitioner who would be compelled to act under threat of enforcement of the challenged law."). This case is 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., Inc.*, 509 U.S. at 57 (citations omitted). Here, there is no automatic penalty for a recipient's failure to follow the guidance documents. Indeed, the HHS guidance document explicitly provides that "failure to implement one or more of [the suggested] measures does not necessarily mean noncompliance with Title VI." 67 Fed. Reg. at 4,971. For example, recipients need not implement options suggested therein if there are other "equally effective alternatives for ensuring that LEP persons have meaningful access to programs and services" or if "implementation * * * would be [unduly] financially burdensome * * *." *Id.* at 4,971-4,972.

In addition, there are many steps between the initial assessment of a recipient's obligation under Title VI, and an agency's determination that a

recipient has violated the statute or its regulations by discriminating on the basis of national origin. Even then, there are no immediate sanctions. Under HHS regulations, for example, OCR must seek to achieve Title VI compliance through voluntary or informal means, 45 C.F.R. 80.8(a), (d), and may not initiate enforcement proceedings against a recipient unless attempts at voluntary compliance fail. 45 C.F.R. 80.8(d). Moreover, HHS must satisfy several procedural requirements before terminating federal funding. See 45 C.F.R. 80.8(c). Because "several contingencies separate [the plaintiffs] from a threat of final agency action in this case," their claims challenging the agency's LEP actions are premature. *Charter Fed. Sav. Bank*, 976 F.2d at 209 (citations omitted), cert. denied, 507 U.S. 1004 (1993); cf. *Abbott Labs.*, 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 physicians do not allege sufficient "imminent, practical harm" to demonstrate that delayed review will cause them significant hardship. In the complaint, they allege only possible future harm, and they failed to show anything more at the dismissal hearing. Moreover, the Executive Order and DOJ General Policy Guidance do not apply directly to the physicians, and the challenged recipient guidance documents do not create adverse legal effects, but rather clarify

the physicians' pre-existing legal obligations under Title VI and HHS's implementing regulations. The guidance documents set forth non-binding criteria that will be used to assess and inform individualized responsibilities and compliance under Title VI and the regulations; they create no absolute requirement that recipients of federal financial assistance apply these factors, nor impose any immediate sanction on recipients who fail to do so. The challenged guidance documents merely assist recipients in meeting obligations contained within regulations to which they are already bound.

**2. The Advocates**

ProEnglish and Mr. McAlpin's claims of hardship are legally non-existent. In the complaint, they allege that the challenged LEP policies "have harmed McAlpin's efforts as Executive Director of ProEnglish by making it far more difficult for him to accomplish his goals of protecting English as the common language of the United States and making English the official language of the U.S. government" (App. 10-11). Yet, these plaintiffs are not recipients of federal financial assistance. The recipient guidance documents, therefore, do not apply to them.

Moreover, neither the Executive Order nor the guidance documents address or limit in any way the advocates' right to lobby for "official English" legislation.

Nevertheless, these plaintiffs argue that the guidance documents undermine their advocacy efforts by chilling protected speech because they have the indirect effect of labeling them as "discriminators" (Br. 28; App. 193-196). However, the guidance documents do not equate the promotion of English language with discrimination. Clearly, no speech is "chilled." Accordingly, the district court properly found the advocates' allegation of harm insufficient to establish hardship, stating that the alleged "labeling effect" was "too tenuous" to create a justiciable case or controversy (App. 197-198).[7]

Indeed, the plaintiffs' lead case, *Meese* v. *Keene*, 481 U.S. 465 (1987), undermines their position that the advocates have sufficiently alleged a justiciable "case or controversy." In *Keene*, the Court considered a constitutional challenge to a statute that designated certain films as "political propaganda." *Id.* at 467-468. The Court held that if the plaintiff, a state senator who wanted to show a film

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[7] Although the court explicitly dismissed the complaint on ripeness grounds (App. 197), the court correctly opined that this alleged "labeling effect" was insufficient to establish that Mr. McAlpin had standing. Indeed, some allegation of "imminent harm" is not only necessary to establish hardship under the ripeness doctrine, but also to establish a legally cognizable injury-in-fact under the standing doctrine. *Steel Co.* v. *Citizens for a Better Environ.*, 523 U.S. 83, 103 (1998). Moreover, courts often merge discussion of standing and ripeness under the broad labels of "justiciability," "case or controversy," or simply "jurisdiction." See, *e.g.*, *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289 (1979); *Mobil Oil Corp.* v. *Attorney Gen. of Va.*, 940 F.2d 73 (4th Cir. 1991). To a certain extent, the district court appeared to do so here (App. 192).

about the Canadian environment, "had merely alleged that the appellation [of 'political propaganda'] deterred him by exercising a chilling effect on the exercise of his First Amendment rights, he would not have standing to seek its invalidation." *Id.* at 473. The Court concluded, however, that the plaintiff had standing because he was able to establish tangible harm to his reputation by pointing to opinion polls showing that voters would view negatively a candidate who showed films branded as "political propaganda." *Id.* at 473-474.

In this case, the advocates made no such tangible showing. Instead, they relied on *Keene* to argue at the hearing that their alleged harm was sufficient to establish Article III jurisdiction because "being labeled a discriminator in today's society is worse than being labeled someone who promotes Canadian propaganda" (App. 194). They asserted more specifically, without the support of concrete facts or evidence, that Mr. McAlpin's "job is on the line. He has to raise money, bring in members, promote the cause. If it's harder for him to do that, he's injured, and that's sufficient" (App. 194). They argued that ProEnglish was similarly harmed because "Americans are reasonable. * * * If the government tells them something is discriminatory or they're going to lose federal funds, they're going to avoid that, and they may not even hear the ProEnglish message" (App. 196). These bare assertions clearly do not allege the kind of "practical harm" needed to support a

justiciable "case or controversy." See, *e.g.*, *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976) (noting that "an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III"); *Maryland Highway Contractors Ass'n* v. *Maryland*, 933 F.2d 1246, 1251 (4th Cir.) ("[A]lthough the Association alleges that its broad purposes have been violated by the * * * statute, this type of injury is insufficient to support [Article III jurisdiction]."), cert. denied, 502 U.S. 939 (1991). In sum, the challenged policies do not hinder ProEnglish and Mr. McAlpin's advocacy efforts in any way.

Accordingly, none of the plaintiffs has established that delayed review of their claims would cause any of them significant hardship. As such, this Court should affirm the district court's dismissal of the complaint for lack of subject matter jurisdiction.

**B.** ***The Issues Are Not Fit For Judicial Review***

Although dismissal of this case on ripeness grounds can easily be affirmed based on the plaintiffs' inability to demonstrate significant hardship in the absence of judicial review, the district court's order can also be affirmed on the ground that the issues are unfit for judicial resolution. In the administrative context, legal issues are not fit for judicial review unless there has been some "final agency

action." *Charter Fed. Sav. Bank*, 976 F.2d at 208-209. Without such final action, judicial intervention may inappropriately interfere with further administrative procedure. *Ohio Forestry Ass'n*, 523 U.S. at 735. In dismissing this case, the district court concluded that the HHS Recipient Guidance is still a "a document in flux" and that "what is being asked of the Court at this point is * * * an advisory opinion as to something that is not yet in effect affecting these plaintiffs directly" (App. 191-192). Indeed, HHS is currently considering public comment from its last publication of the guidance document and will republish it again for further comment before issuing it in final form. Immediate judicial review directed at the validity of that document, therefore, "could hinder agency efforts to refine its policies." *Ohio Forestry Ass'n*, 523 U.S. at 735. "This type of review threatens the kind of 'abstract disagreements over administrative policies' that the ripeness doctrine seeks to avoid." *Id.* at 736 (quoting *Abbott Labs.*, 387 U.S. at 148). Accordingly, the district court's dismissal of the complaint on ripeness grounds was proper. See *id.* at 735 (holding challenge to federal land resource management plan unripe since judicial review could interfere with agency's further revision and application of the plan in response to site-specific action).

Legal issues are also unfit for judicial resolution where the facts necessary for effective adjudication of the claims have not yet occurred. *Ohio Forestry*

*Ass'n*, 523 U.S. at 736-737 ("[F]urther factual development would significantly advance our ability to deal with the legal issues presented and would aid us in their resolution" (internal quotation marks and citation omitted)). As discussed above, a recipient's obligation to provide language assistance to LEP persons is assessed by looking at the totality of the circumstances on a case-by-case basis. The plaintiffs in this case have failed to allege any facts relating to any of the factors used to assess a recipient's obligation to provide such assistance. Judicial review should therefore be withheld until those factors are applied to these particular plaintiffs. See, *e.g.*, *Pacific Gas & Elec.*, 461 U.S. at 203 (holding that judicial consideration of a challenge to a statute requiring determinations to be made on a case-by-case basis, where the statute had not yet been applied, should await further developments); see also *Truckers United for Safety* v. *Federal Highway Admin.*, 139 F.3d 934, 938 (D.C. Cir. 1998) ("To the extent that [the plaintiff] wishes to challenge the substance of the regulatory guidance, it must wait until the Administration actually applies it in a concrete factual situation; indeed, when and if the Administration does so, [the plaintiff] may find such application unobjectionable."). Thus, the plaintiffs' challenge to the agency guidance documents is premature at this time. The plaintiffs' claims should not be considered until, and unless, enforcement action is initiated against them. Only

then could a court determine whether the guidance documents, in application, violate any of the plaintiffs' rights or otherwise exceed statutory authority. As the district court observed, "the doctors down the road may very well have a ripe issue that would be more appropriately adjudicated in that context" (App. 192). That context, however, has not yet developed.

In sum, the issues are unfit for judicial review because judicial intervention would inappropriately interfere with HHS's efforts to revise and finalize its recipient guidance document and because plaintiffs' claims require further factual development. Accordingly, the district court properly dismissed the complaint as unripe.[8]

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[8] In their brief, the plaintiffs argue that they are entitled to judgment on the merits. However, the district court explicitly and narrowly dismissed this case on ripeness grounds (App. 197). As a result, the underlying constitutional and statutory challenges to the LEP policies are not currently before this Court, and the defendants do not address them here. See, *e.g.*, *Mobil Oil Corp.*, 940 F.2d at 77 (emphasizing that, in an appeal from a dismissal under Rule 12(b)(1), "the merits are wholly irrelevant"). At any rate, the defendants maintain their position before the district court that, in addition to failing to present a justiciable "case or controversy," the plaintiffs' complaint also fails to state a claim upon which relief can be granted (App. 97-126).

## CONCLUSION

For the reasons stated herein, this Court should affirm the order of the district court dismissing the plaintiffs' complaint.

Respectfully submitted,

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## STATEMENT REGARDING ORAL ARGUMENT

This is an appeal from a motion to dismiss the complaint for lack of subject matter jurisdiction. The factual and procedural history of the case is undisputed, and the district court's ruling is straightforward. Accordingly, the federal defendants do not believe that oral argument is necessary.

## CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Appellee Brief for the Federal Defendants were served by first class mail, postage prepaid, on this 25th day of November, 2002, to the following counsel of record:

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