

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

DO NO HARM,

Plaintiff,

v.

HEALTH AFFAIRS and PROJECT HOPE,

Defendants.

Case No. 1:22-cv-02670-RDM

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. FACTUAL BACKGROUND.....	3
A. Project HOPE Empowers Healthcare Workers to Solve Public Health Challenges in Their Communities	3
B. Health Affairs Is The Leading Journal of Health Policy Thought and Research in The U.S.	4
C. HEFT Advances Health Affairs’ Mission to Achieve Racial Equity in Health Policy and Publishing.....	6
III. LEGAL STANDARD.....	7
IV. ARGUMENT	8
A. Plaintiff Cannot Show a Likelihood of Success on The Merits.....	8
1. The First Amendment Protects Project HOPE’s and Health Affairs’ right to seek racial equity in health policy publishing through HEFT.....	8
2. Title VI and Section 1557 of the ACA do not apply to Project HOPE and Health Affairs because they are not principally engaged in the business of providing health care and Health Affairs does not receive federal funding	10
3. The DHCRA does not apply because HEFT candidates and fellows are not employees or applicants for employment with Project HOPE or Health Affairs.....	13
B. Plaintiff Lacks Standing Because It Has Not Suffered an Injury and Is Not Under Threat of Suffering an Injury, and It Will Not Suffer Irreparable Harm	14
1. Plaintiff Lacks Associational Standing Because “Member A” Has Not Suffered an Injury.	14
2. Plaintiff Cannot Establish Irreparable Harm.....	16
C. The Harm to Project HOPE and Health Affairs and The Public Interest Weigh Heavily Against Granting Plaintiffs’ Requested Injunction.	18
V. CONCLUSION.....	19

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Abdullah v. Obama</i> , 753 F.3d 193 (D.C. Cir. 2014)	8
<i>Allen v. Wright</i> , 468 U.S. 737 (1984)	17
<i>Boy Scouts of America v. Dale</i> , 530 U.S. 640 (2000)	11
<i>Claybrooks v. American Broadcasting Companies</i> , 898 F. Supp. 2d 986 (M.D. Tenn. 2012)	10
<i>Doe v. Salvation Army in U.S.</i> , 685 F.3d 564 (6th Cir. 2012)	13
<i>First Nat’l Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978)	10
<i>Fraternal Ord. of Police Libr. of Cong. Lab. Comm. v. Libr. of Cong.</i> , 639 F. Supp. 2d 20 (D.D.C. 2009)	18
<i>Free Speech Coalition, Inc., v. Attorney General United States</i> , 974 F.3d 408 (3rd Cir. 2020)	17
<i>Hisp. Nat’l L. Enft Ass’n NCR v. Prince George’s Cty.</i> , 2021 WL 1575772 (D. Md. Apr. 21, 2021)	18
<i>Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston</i> , 515 U.S. 557 (1995)	9, 11
<i>Int’l Ass’n of Machinists & Aerospace Workers v. Nat’l Mediation Bd.</i> , 374 F. Supp. 2d 135 (D.D.C. 2005)	19
<i>McDermott v. Ampersand Publ’g, LLC</i> , 593 F.3d 950 (9th Cir. 2010)	9
<i>Moses v. Comcast Cable Commc’ns Mgmt., LLC</i> , 2022 WL 2046345 (S.D. Ind. June 7, 2022)	19
<i>NAACP v. Alabama ex rel Patterson</i> , 357 U.S. 449 (1958)	9

<i>Nat'l Family Planning & Reproductive Health Ass'n, Inc. v. Gonzales</i> , 468 F.3d 86 (D.C. Cir. 2006)	17
<i>Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville</i> , <i>Fla.</i> , 508 U.S. 656 (1993)	18
<i>Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.</i> , 551 U.S. 701 (2007)	18
<i>Power Mobility Coal v. Leavitt</i> , 404 F. Supp. 2d 190 (D.D.C. 2005)	15
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	10
<i>Save Jobs USA v. U.S. Dep't of Homeland Sec.</i> , 105 F. Supp. 3d 108 (D.D.C. 2015)	8, 15
<i>Sherley v. Sebelius</i> , 644 F.3d 388 (D.C. Cir. 2011)	8
<i>Summers v. Earth Island Institute</i> , 555 U.S. 488 (2009)	16
<i>T.S. by and through T.M.S. v. Hearth of CarDon, LLC</i> , 43. F.4th 737 (7th Cir. 2022)	12
<i>United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.</i> , 517 U.S. 544 (1996)	16
<i>Veich v. Danzig</i> , 135 F. Supp. 2d 32 (D.D.C. 2001)	19
Statutes	
11 U.S.C. § 101	13
42 U.S.C. § 2000d	11
42 U.S.C. § 18116	3, 6, 11, 12, 13, 14
D.C. Code § 2-1401.11	3, 14, 15

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Defendants Project HOPE–The People-to-People Health Foundation, Inc. (“Project HOPE”) and *Health Affairs* hereby oppose Plaintiff Do No Harm’s Motion for a Preliminary Injunction.¹ For the reasons set forth below, the Court should deny Plaintiff’s motion in its entirety.

I. INTRODUCTION

A preliminary injunction in this case would violate the First Amendment, and it must be denied. As the nation’s leading journal of health policy thought and research, *Health Affairs* is a quintessential example of creative expression. Its content and message can only be expressed through the voices of its authors. *Health Affairs* values and seeks to achieve racial and ethnic equity in its expressive content, which undoubtedly begins with the authors whose content is published in the journal. In 2021, less than one-third of *Health Affairs*’ authors were from racially and ethnically underrepresented groups, while two-thirds of its authors identified as White. *Health Affairs* recognizes that to advance racial equity in health policy research and scholarly publishing, it must take steps to elevate the representation and voices of diverse scholars in its own publication. *Health Affairs*’ ability to diversify the voices that contribute to its creative message is irrefutably protected by the First Amendment.

The Health Equity Fellowship for Trainees (HEFT) aims to advance racial equity and representation in scholarly publishing by providing mentorship to researchers from underrepresented racial and ethnic backgrounds. HEFT strives to break down barriers that researchers from underrepresented backgrounds have faced in publishing and increase the likelihood that those researchers will be published in scholarly journals such as *Health Affairs*.

¹ Pursuant to Fed. R. Civ. P. 12(a), Defendants’ deadline to file their responsive pleading is November 6, 2022. Defendants do not waive, and expressly preserve, their right to file a dispositive motion under Fed. R. Civ. P. 12 before their responsive pleading is filed, or raise any applicable defense in their responsive pleading.

Project HOPE and *Health Affairs* firmly believe that increasing the quality and quantity of health equity research authored by researchers who are underrepresented in *Health Affairs* will not only elevate diverse voices with unique insight and value as to issues of racial equity, but also drive advances in health equity overall.

Given this goal, it is axiomatic that researchers who have faced the barriers that HEFT seeks to dismantle and who would increase diverse representation in *Health Affairs* would be invited to apply for the fellowship. It is not the intent of HEFT to unlawfully discriminate based on race. Rather, the intent of HEFT is to help achieve the expressive goals of Project HOPE and *Health Affairs* in the health equity field. Project HOPE's and *Health Affairs*' freedom of association and creative expression through programs like HEFT is absolutely protected by the First Amendment and there is no compelling interest that can overcome that protection. A preliminary injunction that prohibits Project HOPE and *Health Affairs* from controlling the creative content of *Health Affairs* or that infringes on the organizations' expressive association would violate the First Amendment and should be denied.

In addition to violating the First Amendment, there are several other reasons Plaintiff's motion should be denied:

- Neither Title VI nor Section 1557 of the Affordable Care Act (ACA) apply to Project HOPE or *Health Affairs* because they are not principally engaged in the business of providing healthcare and *Health Affairs* does not receive federal funding.
- The D.C. Human Rights Act (DCHRA) is inapplicable because Project HOPE and *Health Affairs* are not professional associations, and HEFT applicants and fellows are not employed by or seeking employment with Project HOPE or *Health Affairs*.

- Both Do No Harm and “Member A” lack standing because neither can show that they have suffered or are under threat of suffering an injury in fact, nor can they show that they will suffer irreparable harm.
- The balance of harms and public interest weigh against intruding on Project HOPE’s and *Health Affairs*’ First Amendment rights.

As explained below, there is no possibility that Plaintiff can succeed on the merits of its claims or meet its burden of establishing irreparable harm, and the Court should deny Plaintiff’s motion.

II. FACTUAL BACKGROUND

A. Project HOPE Empowers Healthcare Workers to Solve Public Health Challenges in Their Communities.

Project HOPE is a nonprofit organization created to conduct and support programs and activities aimed at solving some of the world’s greatest public health challenges, with a specific focus on enabling health workers to serve their local communities. (Declaration of Chris Skopec (“Skopec Decl.”) ¶ 3.) Project HOPE works in five main areas: disasters and health crises; infectious diseases; noncommunicable diseases; maternal, neonatal and child health; and health policy. (*Id.*) In each of these areas, Project HOPE provides funding, medical supplies, training, and technical assistance to third parties such as local clinics and health ministries to enable them to provide improved direct health care services to their communities. (*Id.*) Project HOPE seeks to improve the quality of local healthcare around the world by working with and supporting those who provide healthcare directly in their communities. (*Id.*)

Project HOPE does not provide healthcare services except as incidental to emergency responses to natural and manmade disasters. (*Id.* ¶ 4.) From January 2018 to August 2022, approximately 1% of Project HOPE’s global health services revenue was spent on programs or

emergency response activities that had a component of direct patient care by Project HOPE, and less than 0.1% was spent on the one emergency response effort in the U.S. (Puerto Rico) that had a component of direct patient care. (*Id.*)

Since 2018, Project HOPE and its foreign subsidiaries have operated approximately 247 projects in the areas listed above, and 31 of those projects, or 13%, have received federal funds. (*Id.* ¶ 5.) Six of the projects that received federal funds were awarded to and operated by Project HOPE's foreign subsidiaries.² (*Id.*) Of the four programs that Project HOPE has operated over the past five years that had a direct care component, only one, which was in Haiti, had a federally funded component, and such funding represented less than 0.8% of the total program revenue since 2018. (*Id.*)

Project HOPE does not receive funding from the U.S. government to operate its portfolio of global health programs as a whole. (*Id.* ¶ 6.) Rather, other than the recovery of indirect costs,³ federal funds do not go into Project HOPE's overall operating budget and are specific to individual programs or projects. (*Id.*) While federally funded projects may be supplemented with private funds, projects that are privately funded are not supplemented with federal funds designated for other projects; such funds can only be used for the purpose listed in the award document. (*Id.* ¶ 7.)

B. Health Affairs Is The Leading Journal of Health Policy Thought and Research in The U.S.

As part of Project HOPE's health policy mission, it founded the peer-reviewed health policy journal, *Health Affairs*, in 1981. (*Id.* ¶ 8.) *Health Affairs*, which is funded by

² For example, for a large portion of USAID funding accounted for, Project HOPE Namibia, which is a separate legal entity, is actually the direct recipient of the USAID funds (*Id.*)

³ The recovery of indirect costs charged to federal grants is governed by a Negotiated Indirect Cost Rate Agreement (NICRA) with USAID. The NICRA sets forth the indirect cost rate negotiated between the government and a grantee's organization, which reflects the indirect costs (facilities and administrative costs) and fringe benefit expenses incurred by the organization. (*Id.*)

nongovernmental sources, explores health policy issues of current concern in domestic and international spheres. (Declaration of Alan Weil (“Weil Decl.”) ¶ 4.) Its mission is to serve as a high-level, nonpartisan forum to promote analysis and discussion on improving health and health care, and to address issues such as cost, quality, and access. (*Id.*) *Health Affairs* reaches a broad audience that includes government and health industry leaders; health care advocates; scholars of health, health care, and health policy; and others concerned with health and health care issues in the United States and worldwide. (*Id.*) Research published by *Health Affairs* frequently contributes to the formulation of health policy. (*Id.* ¶ 5) *Health Affairs* publications have been cited 47 times in U.S. congressional testimony in 2022 and in 13 proposed rules published in the *Federal Register* in 2022. (*Id.*) The journal also informs federal regulations, as evidenced by the fact that there were eight citations in final rules published in the *Federal Register* in 2022. (*Id.*) Since 2020, *Health Affairs* has been cited in six federal cases, including in a Supreme Court decision regarding the Affordable Care Act. (*Id.*) *Health Affairs* is frequently cited by national media, including the Washington Post, New York Times, Wall Street Journal, network television and radio, and NPR. (*Id.* ¶ 6.)

In early 2021, *Health Affairs* renewed and elevated its mission to advance racial equity in health policy and health services scholarly publishing. (*Id.* ¶ 7.) As part of its mission, *Health Affairs* has published articles addressing racial inequity in health access and outcomes, including potential sources of racial inequity and recommendations for reducing racial and socio-economic disparities. (*Id.*) Yet, the vast majority of *Health Affairs* submissions come from a small set of elite institutions, and the dominant voices in its work are those with power and privilege. (*Id.*) Even as *Health Affairs* has dramatically increased the volume of its content focused on equity, the narrative has primarily been written by those in power. (*Id.*) It is *Health Affairs*’ desire to amplify the voices of those who have been harmed by the burdens of racism on publishing, and to expand its efforts

to include greater diversity in the thoughts, ideas, and perspectives reflected in *Health Affairs*. (*Id.*) Research shows that researchers from underrepresented backgrounds more often than those from privileged backgrounds focus on and propose community and population-based research that helps identify and address racial health inequities. (*Id.*) *Health Affairs*' desire to diversify its authors and content is therefore intrinsically tied to its desire to identify and address racial inequities. (*Id.*)

Health Affairs operates separately from Project HOPE and is entirely privately funded. (Skopec Decl. ¶ 8.) It does not receive funding or programmatic support from any government agency. (*Id.*) While Project HOPE and *Health Affairs* share back-office operations, such as IT, human resources, and legal, they have separate missions, leadership, fundraising, and funding. (*Id.*) Consistent with best practices in the field, *Health Affairs* retains complete editorial independence from Project HOPE, its publisher. (Weil Decl. ¶ 3.)

C. HEFT Advances *Health Affairs*' Mission to Achieve Racial Equity in Health Policy and Publishing.

To further its goal of addressing inequity in health policy and scholarly publishing, *Health Affairs* launched the Health Equity Fellowship for Trainees in 2021. (Declaration of Vabren Watts ("Watts Decl." ¶ 7.) Research shows that one of the barriers to success for many researchers from underrepresented racial and ethnic groups is a lack of mentorship. (*Id.* ¶ 9.) With that in mind, HEFT fellows are paired with multiple mentors, including experienced *Health Affairs* authors and editorial staff, for one year as they prepare manuscripts to submit to *Health Affairs* or other journals. (*Id.*) Fellows are required to meet with each mentor for an hour every month. (*Id.*) Fellows also attend monthly seminar meetings designed to support their research and career advancement. (*Id.*) While the fellowship does not guarantee publication in *Health Affairs* or any other journal, its goal is to increase the likelihood that the fellows' manuscript submissions will be accepted by

a journal within the fellowship year and, ultimately, to increase the quality and quantity of manuscripts published by researchers of color. (*Id.*)

HEFT fellows do not receive compensation and the fellowship does not involve employment in any capacity. (*Id.* ¶ 10.) The current HEFT application period closed on September 19, and decisions are expected to be made by November 10. (*Id.* ¶ 11.) Fellows are selected by a selection committee that includes experts in the health equity space and individuals from *Health Affairs'* editorial team. (*Id.*) Selections are based on an applicant's proposed study design, methodology, topic area, and potential for social impact. (*Id.*) The HEFT application does not require applicants to disclose their racial identities; applicants may select "prefer not to respond." (*Id.* ¶ 13.)

III. LEGAL STANDARD

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011); *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014) ("[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.") (emphasis in original). To obtain a preliminary injunction, Plaintiff must establish that: (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its favor, and (4) an injunction is in the public interest." *Sherley*, 644 F.3d at 392. While DC courts disagree as to whether these factors should be weighed separately or jointly on a sliding scale, under either approach, the movant must show irreparable harm. *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 105 F. Supp. 3d 108, 112 (D.D.C. 2015). If Plaintiff cannot make a showing of irreparable injury, the Court may deny its motion without considering any other factors. *Id.*

IV. ARGUMENT

Plaintiff's motion should be denied because Plaintiff cannot show a substantial likelihood of success on the merits of its claims given the strong First Amendment protections that are applicable here and the fact that none of the statutes on which Plaintiff relies are applicable to Project HOPE, *Health Affairs*, or HEFT. Even if First Amendment protections were set aside and the statutes applied, Plaintiff cannot show that it and Member A have standing to bring claims or that they will suffer irreparable harm without an injunction. Further, Plaintiff cannot show that the balance of harms and public interest weigh in favor of curtailing Defendants' First Amendment rights.

A. Plaintiff Cannot Show a Likelihood of Success on The Merits.

1. **The First Amendment Protects Project HOPE's and *Health Affairs*' right to seek racial equity in health policy publishing through HEFT.**

The U.S. Supreme Court recognized that the First Amendment protects "the freedom to engage in association for the advancement of beliefs and ideas" over 60 years ago. *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 460 (1958). That right extends to associating and engaging in expression to advance a wide range of beliefs, regardless of whether they pertain to "political, economic, religious or cultural matters." *Id.* at 460. Courts have held that the individuals an organization hires, admits to their ranks, or selects as messengers can be an integral component of the organization's expressive message. *See, e.g., McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 962 (9th Cir. 2010) (approving district court's refusal to grant injunction reinstating newspaper's discharged editorial staff members and reporters because "telling the newspaper that it must hire specified ... editors and reporters ... is bound to affect what gets published. To the extent the publisher's choice of writers affects the expressive content of its newspaper, the First Amendment protects that choice."); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*

of Boston, 515 U.S. 557, 572-73 (1995) (holding that because “every participating ... unit affects the message conveyed by [a parade’s] private organizers,” a state court’s interpretation of a law to require inclusion of one group of prospective marchers “violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message”); *see also First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) (“In the realm of protected speech, the legislature is constitutionally disqualified from dictating ... the speakers who may address a public issue.”).

Project HOPE’s and *Health Affairs*’ “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends” is “implicit in the right to engage in activities protected by the First Amendment.” *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). This right extends to *Health Affairs*’ decisions about who can contribute to the journal because those decisions directly impact its ability to express its views. *See, e.g., Claybrooks v. American Broadcasting Companies*, 898 F. Supp. 2d 986, 993 (M.D. Tenn. 2012) (holding that applying Section 1981 to ABC’s casting decisions would “force the defendants to employ race-neutral criteria [and] thereby regulat[e] the creative content” of its shows); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85, (1978) (“In the realm of protected speech, the legislature is constitutionally disqualified from dictating ... the speakers who may address a public issue.”).

HEFT, including its fellowship criteria, is an integral part of Project HOPE’s and *Health Affairs*’ initiative to advance racial equity in health policy through scholarly publishing and research. (Watts Decl. ¶ 7.) HEFT exists to increase the quality and quantity of health policy research focused on racial equity and authored by members of racial and ethnic groups that have historically been underrepresented in *Health Affairs*. (*Id.* ¶ 8.) Diverse scholars produce research with unique insight and value as to racial equity issues, and increased representation of diverse

scholars within health policy journals will encourage other diverse individuals to pursue health scholarship and further drive advances in health equity. (*Id.*) The selection criteria used by the program, therefore, cannot be separated from the overall expressive goals of Project HOPE and *Health Affairs* in the health equity field. As such, the criteria are a form of expression protected by the First Amendment that the state cannot “significantly burden,” even when advancing general compelling interests. *See, e.g., Hurley*, 515 U.S. at 572 (finding that the application of a public accommodation anti-discrimination law violated the First Amendment to the extent it infringed on an organization’s expressive association); *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000) (holding that “the state interests embodied in” a public accommodation anti-discrimination law cannot “justify . . . a severe intrusion on [an organization’s] right[] to freedom of expressive association.”).

Applying the antidiscrimination provisions of Title VI, Section 1557, and D.C. law to HEFT, as Plaintiff demands, would significantly burden Project HOPE’s and *Health Affairs*’ protected speech by effectively barring them from expressing their view that diverse representation in scholarship is vital to health equity. This burden on Defendants’ First Amendment protections is not permitted by the Constitution and the Court should decline to impose it.

2. Title VI and Section 1557 of the ACA do not apply to Project HOPE and *Health Affairs* because they are not principally engaged in the business of providing health care and *Health Affairs* does not receive federal funding.

The antidiscrimination provisions of Title VI apply to any program or activity receiving federal financial assistance, and the provisions of the ACA apply to any health program or activity receiving federal financial assistance. 42 U.S.C. § 2000d; 42 U.S.C. § 18116(a). Under Title VI, “program or activity” includes all of the operations of an entity (i) if the entity receives federal financial assistance “as a whole,” or (ii) if the entity is principally engaged in the business of

providing health care, education, housing, social services, or parks and recreation. Under the ACA, “health program or activity” encompasses all of the operations of entities principally engaged in the business of providing healthcare that receive federal financial assistance. Under both the ACA and Title VI, if the entity is not principally engaged in the business of providing healthcare, then the antidiscrimination provisions apply to the entity’s operations *only to the extent that* any such operation receives federal financial assistance. *See T.S. by and through T.M.S. v. Hearth of CarDon, LLC*, 43. F.4th 737 (7th Cir. 2022) (“[S]ection 1557 [of the ACA] applies only to the part of an entity's operations that receives federal funding when the entity is not principally engaged in providing healthcare.”). Accordingly, there are four circumstances in which the antidiscrimination provisions of these statutes apply to HEFT:

- i. Under Title VI, if Project HOPE receives federal financial assistance “as a whole.”
- ii. Under Title VI and the ACA, if Project HOPE is principally engaged in the business of providing healthcare and receives federal financial assistance;
- iii. Under the Title VI, if *Health Affairs* is a program or activity that receives federal financial assistance; or
- iv. Under the ACA, if *Health Affairs* is a health program or activity that receives federal financial assistance.

None of these circumstances are present here. First, Project HOPE does not receive federal funding to operate its portfolio of global health programs “as a whole.” (Skopec Decl. ¶ 6.) Rather, some of Project HOPE’s programs receive federal funding while others do not. (*Id.* ¶ 6-7.) Since 2018, Project HOPE and its foreign subsidiaries have operated approximately 247 projects in the areas listed above, and 31 of those projects, or 13%, have received federal funds. (*Id.* ¶ 5.) A

portion of that funding went directly from USAID to Project HOPE's foreign subsidiaries. (*Id.*) The fact that Project HOPE's privately funded programs and projects do not receive federal funds demonstrates that Project HOPE's global portfolio does not receive federal funding "as a whole." Rather, only parts of its operations receive such funding.

Second, Project HOPE is not principally engaged in the business of providing health care. The phrase "principally engaged" has been interpreted in other statutory contexts as referring to the primary activities of a business, excluding only incidental activities. *See Doe v. Salvation Army in U.S.*, 685 F.3d 564, 571 (6th Cir. 2012). Title VI and the ACA do not define the term "health care business," but that term is defined in other statutes, such as the United States Bankruptcy Code, as an entity "that is primarily engaged in offering to the general public facilities and services for (i) the diagnosis or treatment of injury, deformity, or disease; and (ii) surgical, drug treatment, psychiatric, or obstetric care." 11 U.S.C. § 101 (27A).

Project HOPE does not provide healthcare services except as incidental to emergency responses to disasters. (Skopec Decl. ¶ 4.) Project HOPE primarily provides funding, medical supplies, training, and technical assistance to third parties including local clinics and health ministries who provide direct services. (*Id.* ¶ 3.) Project HOPE seeks to improve the quality of local health care around the world by working with and supporting those who provide health care directly in their communities. (*Id.*) Project HOPE's total revenue from its global health operations from January 2018 to August 2022 was approximately \$200 million. (*Id.* ¶ 4.) Of that amount, a total of \$2.2 million was spent on programs wherein there was some component of direct patient care provided by Project HOPE. (*Id.*) Thus, the percentage of overall global health operations in the last five years that involves direct patient care is 1%. (*Id.* ¶ 4.) At best, Project HOPE's direct patient care activities can be characterized as incidental, but the marginal amount of such work

demonstrates that Project HOPE is not “principally engaged” in the business of providing healthcare.

Third, because Project HOPE’s global portfolio does not receive federal funding “as a whole” and it is not principally engaged in providing health care, Title VI would only apply to *Health Affairs* if it receives federal assistance. It does not. Indeed, *Health Affairs* does not receive any financial support from any government agency. Likewise, HEFT is funded entirely by private grants that have the specific goal of increasing racial equity in scholarly publishing.

Fourth, *Health Affairs* is not covered by the ACA because it is not a “health program or activity;” rather, *Health Affairs* is a journal. It does not provide any healthcare services and, again, does not receive federal funding.

In sum, the antidiscrimination provisions of Title VI and Section 1557 of the ACA simply do not apply to Project HOPE or *Health Affairs* because they are not principally engaged in the business of providing healthcare and *Health Affairs* does not receive federal financial assistance.

3. The DHCRA does not apply because HEFT candidates and fellows are not employees or applicants for employment with Project HOPE or *Health Affairs*.

The DCHRA does not apply here because neither Project HOPE nor *Health Affairs* is a professional association, and HEFT fellows are not members or employees of any such association. Contrary to being professional associations, Project HOPE and *Health Affairs* do not have members who are organized to practice their profession together. Fellows, specifically, work independently with their mentors on their own manuscripts—they do not work in conjunction with other fellows. Simply attending seminars cannot plausibly turn the fellowship into something akin to a bar association.

Further, the DCHRA only protects employees, which includes any individual *employed by or seeking employment from* an employer. There is no aspect of HEFT that involves employment

or even the provision of services to Project HOPE or *Health Affairs* for compensation. (See ECF No. 2-8 (“There will be no financial compensation associated with the fellowship.”); Watts Decl. ¶ 10.) Moreover, under the DCHRA, prohibited acts of discrimination are limited to failing or refusing to hire, discharging from employment, or otherwise discriminating against an individual with respect to the terms, conditions, or privileges of employment based on a protected characteristic. Defendants do not and cannot engage in any of these activities through HEFT because the fellowship does not contemplate employment. See D.C. Code § 2-1401.11.

B. Plaintiff Lacks Standing Because It Has Not Suffered an Injury and Is Not Under Threat of Suffering an Injury, and It Will Not Suffer Irreparable Harm.

Plaintiff cannot meet the “considerable burden” of showing irreparable harm because there is no injury here that “is *certain, great and actual*—not theoretical—and *imminent*, creating a clear and present need for extraordinary equitable relief to prevent harm.” *Save Jobs USA*, 105 F. Supp. 3d at 112 (emphasis in original); see also *Power Mobility Coal v. Leavitt*, 404 F. Supp. 2d 190, 204 (D.D.C. 2005). For the same reason, Plaintiff lacks standing to seek injunctive relief.

1. Plaintiff Lacks Associational Standing Because “Member A” Has Not Suffered an Injury.

As an initial matter, Member A has not suffered and is not under threat of suffering any injury, which deprives Plaintiff of associational standing to seek injunctive relief on Member A’s behalf. Plaintiff can only establish associational standing if (1) Member A has standing in his or her own right, (2) the interests it seeks to protect are germane to the organization’s purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual

members in the lawsuit. *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553 (1996). The first and third element are not present here.⁴

With respect to Member A’s standing in his or her own right, Member A declares that he or she “would like to apply” to HEFT, but not that he or she has ever applied. Member A makes conclusory and self-serving statements that he or she is “able and ready to apply,” but because Member A is anonymous, there is absolutely no way to test whether Member A in fact meets the requirements of the fellowship.⁵ In other words, Member A cannot *prove*, rather than merely allege, that he or she meets the requirements. Notably, while Member A vaguely claims that his or her research has “addressed” barriers that disadvantage racial minorities and “relat[es] to race equity issues,” Member A never states that he or she is “engaged in health services research that ***advances racial health equity*** among historically marginalized populations,” as required to be eligible for HEFT. Indeed, such a focus would seem antithetical to Do No Harm’s crusade against the “radical ideology of anti-racism” and the concept of “equity.”⁶

Member A has never been rejected from the fellowship, deemed by Defendants to be ineligible, or prevented from applying. The HEFT application is open to the public and applicants are welcome to select “prefer not to respond” for their race (which a current fellow selected when he or she applied in the 2021 cycle). (Watts Decl. ¶ 13.) Member A has absolutely no proof that

⁴ The second element is questionable given Plaintiff’s mission, but Defendants will concede the point solely for the sake of this argument. Defendants do not generally concede—and reserve the right to challenge—the second element later in this case.

⁵ Member A’s anonymity also dooms Plaintiff’s standing because to establish associational standing, Plaintiff must name the individuals who were harmed by the challenged program. *See Summers v. Earth Island Institute*, 555 U.S. 488, 498 (2009). The only exception is where *all* the members of the organization are affected by the challenged activity (*id.*), but that is not the case here.

⁶ <https://donoharmmedicine.org/faqs/>, accessed on September 27, 2022.

HEFT “categorially excludes white applicants” (and, in fact, two current fellows selected “white” as their race when they applied in the 2021 cycle). (Watts Decl. ¶ 13.) To the extent that Member A’s alleged injury is the result of his or her own choice not to apply, the injury is self-inflicted rather than being caused by any decisions of Defendants. A self-inflicted, unrealized injury is not a concrete and particularized injury that confers standing. *See Nat’l Family Planning & Reproductive Health Ass’n, Inc. v. Gonzales*, 468 F.3d 86, 831 (D.C. Cir. 2006) (“self-inflicted harm doesn’t satisfy the basic requirements for standing” because it is neither a “cognizable” injury nor “fairly traceable to the defendant’s challenged conduct”); *Allen v. Wright*, 468 U.S. 737, 755-56 (1984) (holding that a plaintiff who has not been “personally subject to the challenged discrimination” lacks a concrete and particularized injury).

Moreover, there is no way that Plaintiff’s claim and the requested relief will not require the participation of Member A in the lawsuit. Plaintiff cannot possibly show that Member A has been excluded from the fellowship *solely* based on race if Member A cannot prove—with “detailed records or evidence necessary to show harm” and not conclusory allegations—that he or she otherwise meets the requirements. *See Free Speech Coalition, Inc., v. Attorney General United States*, 974 F.3d 408 (3rd Cir. 2020). Because Member A’s participation would be necessary, and Member A him or herself lacks standing because there has been no injury, Plaintiff lacks associational standing to seek the requested relief.

2. Plaintiff Cannot Establish Irreparable Harm.

Plaintiff cannot establish that either it or its member will suffer certain, great, actual, and imminent irreparable harm if an injunction is not entered. Because Plaintiff cannot show that HEFT unlawfully discriminates, it cannot show that Member A will suffer unlawful discrimination. And

if the Court ultimately determined that the HEFT criteria unlawfully discriminate based on race, then Plaintiff can apply to the fellowship in a future cycle.⁷

Plaintiff argues that HEFT’s “discriminatory classification” is a “denial of equal treatment” and that, alone, presumes irreparable harm, but the cases it cites are distinguishable because they involved equal protection claims. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) (noting that irreparable “injury in fact” stems from constitutional equal protection claims against government actor); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007) (analyzing constitutional equal protection clause claim). In equal protection cases, the irreparable harm is the deprivation of a constitutional right by a government actor. *See Hisp. Nat’l L. Enf’t Ass’n NCR v. Prince George’s Cty.*, 2021 WL 1575772, at *23 (D. Md. Apr. 21, 2021). This case does not involve constitutional rights or government actors, so Plaintiff’s cited case law is unavailing.

Member A avers that he or she would “greatly benefit from [HEFT’s] professional networking and collaboration opportunities” and that its “seminars, workshops, and other meetings” would help him or her meet new people and improve his or her research. Member A also believes that *Health Affairs*’ assistance would make it more likely that his or her work was published in other journals. But there is no guarantee at all that Member A’s research would be published even if he or she participated in the fellowship. Thus, there is no certain, great, or actual injury that Member A will suffer if he or she does not participate in the fellowship.

Case law is clear that loss of training opportunities or professional advantage does not qualify as irreparable harm. *Fraternal Ord. of Police Libr. of Cong. Lab. Comm. v. Libr. of Cong.*,

⁷ Member A declares that he or she earned a Ph.D. within the last three years. If Member A is qualified for HEFT now, then he or she has been qualified since its inception only one year ago. Member A does not explain why there is suddenly urgency and irreparable harm in 2022 when he or she did not seek an injunction at the last cycle.

639 F. Supp. 2d 20, 24 (D.D.C. 2009) (finding “denial of training [and] loss of promotion opportunities” were not irreparable harm); *Veich v. Danzig*, 135 F. Supp. 2d 32, 36 (D.D.C. 2001) (finding damage to professional reputation stemming from loss of employment insufficient to constitute irreparable harm); *Moses v. Comcast Cable Commc'ns Mgmt., LLC*, 2022 WL 2046345, at *4 (S.D. Ind. June 7, 2022) (denying White business owners’ request for a preliminary injunction because failure to qualify for a minority-focused grant program did not constitute irreparable harm); *Int’l Ass’n of Machinists & Aerospace Workers v. Nat’l Mediation Bd.*, 374 F. Supp. 2d 135, 142 (D.D.C. 2005) (“It is well-settled that economic loss alone will rarely constitute irreparable harm.”). Member A speculates that participating in HEFT would improve his or her professional reputation, but this is simply insufficient to show irreparable harm.

C. The Harm to Project HOPE and *Health Affairs* and The Public Interest Weigh Heavily Against Granting Plaintiffs’ Requested Injunction.

The balancing of the hardships and public interests tip sharply in favor of Project HOPE and *Health Affairs*. There is no question that HEFT exists solely for the purpose of advancing racial equity in health policy research and publishing. Plaintiff does not dispute the value of the program and, despite its contempt for the concepts of anti-racism and equity, it cannot dispute the value because the basis for its lawsuit is its member’s desire to participate in it. Plaintiff has not alleged any imminent harm aside from its generalized claim of discrimination, but the harm that Project HOPE, *Health Affairs*, and the public would suffer from an injunction would truly be irreparable. The requested injunction would require this Court to completely disregard Project HOPE’s and *Health Affairs*’ First Amendment rights and force them to abandon their goal of increasing the number of diverse voices that contribute to *Health Affairs*. It would also deprive underrepresented voices from the opportunity to gain valuable mentorship that research suggests

has not been available to them. Meanwhile, Member A can still take advantage of his or her “many other research fellowships.”

The theoretical, unparticularized harm that Member A may suffer if he or she cannot participate in a single fellowship that seeks to amplify the voices of researchers from diverse backgrounds who may not have “many other research fellowships” simply does not, and cannot, outweigh the harm to Defendants if their constitutional rights are curtailed, or the public interest in protecting those rights.

V. CONCLUSION

Plaintiff’s attempt to mischaracterize HEFT’s altruistic goal of advancing racial equity in health policy and research as unlawful discrimination should be rejected. Defendants’ right to create its desired content and messaging and to diversify the voices that deliver that content and messaging is absolutely protected by the First Amendment. The statutes on which Plaintiff’s claims are based cannot curtail Defendants’ constitutional rights and, for myriad reasons set forth above, those statutes do not apply to HEFT anyway. The potential threat to Defendants’ constitutional rights and the lack of any harm whatsoever to Plaintiff weigh heavily against entering the requested preliminary injunction, and Plaintiff’s motion should be denied.

Dated: September 30, 2022

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