

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. Pastor Council, et al.,

Plaintiffs,

v.

**Equal Employment Opportunity
Commission**, et al.,

Defendants.

Case No. 4:18-cv-00824-O

REPLY BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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The defendants oppose class certification on numerous grounds, but none of their arguments have merit.

I. THE PROPOSED CLASSES SATISFY THE COMMONALITY AND TYPICALITY REQUIREMENTS

Commonality requires only a single common question of law and fact, and each of the proposed classes includes *multiple* legal questions common to the class members. For the first class of religious objectors, the common legal questions include: (1) Whether the government has a “compelling” interest in enforcing *Bostock* against employers who oppose homosexual or transgender conduct for sincere religious reasons;¹ (2) Whether Title VII, as construed in *Bostock*, qualifies as a “generally applicable” law under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990);² (3) Whether *Bostock* prohibits employment discrimination against bisexuals;³ and (4) Whether *Bostock* allows employers to establish sex-neutral rules of conduct that have the effect of excluding homosexual or transgender employees.⁴ Issues (1), (3), and (4) are also common to members of the second proposed class, which includes employers with religious or non-religious objections to homosexual or transgender conduct.

The defendants do not deny any of this, but they complain that the common legal questions are “divorced from any particular factual allegations,” and are therefore “too general to allow for effective appellate review.” Defs.’ Br. (ECF No. 82) at 6 (quoting *M.D. ex rel Stukenberg v. Perry*, 675 F.3d 832, 842 (5th Cir. 2012)). But the answers to the common legal questions in this lawsuit *do not depend* on factual allegations. The plaintiffs are contending that there is no compelling governmental interest in enforcing *Bostock’s* holding as a matter of law because: (1) The Title VII statute contains exceptions that are incompatible

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1. See Pls. Amended Br. in Support of MSJ (ECF No. 90) at 8–11; *id.* at 12–13.
 2. See *id.* at 11–13.
 3. See *id.* at 14–15.
 4. See *id.* at 16–17.

with the idea of a compelling interest in uniform enforcement;⁵ and (2) Congress has repeatedly failed to enact explicit statutory anti-discrimination protections for homosexual and transgender employees.⁶ This argument in no way depends on the particular factual circumstances of an individual class member. The same goes for whether Title VII qualifies as a “generally applicable law” under *Smith*, as well as the plaintiffs’ claims concerning the scope of *Bostock*’s holding. These are pure questions of law, and the answers to these common legal questions do not turn on the facts surrounding any individual class member. The defendants suggest that it is improper to use class actions to resolve a pure question of law,⁷ but they cite no authority to support this idea, and Rule 23 specifically contemplates that class actions will be used to resolve common questions “of law *or* fact.” Fed. R. Civ. P. 23(a)(2) (emphasis added).

The defendants try to get around this problem by insisting that the compelling-interest test necessarily requires a Court to examine the facts of each particular class member. *See* Defs.’ Br. (ECF No. 82) at 8 (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726–27 (2014)); *id.* (“Without assessing the facts and circumstances of *these employers’ specific policies*, it is not possible to answer the abstract legal questions of whether RFRA or the First Amendment ‘compel[] exemptions to *Bostock*’s interpretation of Title VII.”). That is an imprecise characterization of the Supreme Court’s pronouncements. The defendants are certainly correct to observe that the compelling-interest test requires courts to assess the “harm of granting specific exemptions to particular religious claimants,”⁸ but that does *not* mean that the compelling-interest test will always require a fact-specific inquiry into an objecting

5. *See* Pls. Amended Br. in Support of MSJ (ECF No. 90) at 9–10; *id.* at 12–13; *see also* *Fulton v. Philadelphia*, No. 19-123 (U.S. June 17, 2021), slip op. at 7–10; *id.* at 14–15.

6. *See* Pls. Amended Br. in Support of MSJ (ECF No. 90) at 10–11.

7. *See* Defs. Br. (ECF No. 82) at 6 (“[T]he asserted common questions are merely abstract questions about the interaction of various laws and the scope of a recent Supreme Court decision presented in a vacuum.”).

8. *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

employer’s policies and beliefs. It remains possible (and entirely appropriate) for a court to hold that there is no “compelling interest” in forcing *any* religious objector to comply with *Bostock* (or, for that matter, with the Contraceptive Mandate)—perhaps because the asserted government interest is not sufficiently important, or perhaps because other statutory exemptions undercut the government’s claim that religious exemptions cannot be tolerated. *See, e.g., Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2392–94 (2020) (Alito, J., concurring). That is precisely what the plaintiffs are asserting here,⁹ and there is no “balancing”¹⁰ to perform when a litigant is contending that the government’s asserted “interests” are non-compelling as a matter of law. And the notion that RFRA and Free Exercise claims inherently involve individualized inquiries that preclude class certification was considered and rejected in *DeOtte v. Azar*, 332 F.R.D. 188, 197 (N.D. Tex. 2019).

The defendants’ reliance on *M.D. ex rel Stukenberg* is likewise misplaced, and the common question questions of law are no more “general” than the questions certified in *DeOtte*, 332 F.R.D. at 201, and *Vita Nuova, Inc. v. Azar*, No. 4:19-cv-00532-O, 2020 WL 8271942, at *5 (N.D. Tex. Dec. 2, 2020). In *DeOtte*, the Court certified a class to litigate “whether the Contraceptive Mandate . . . violates the Religious Freedom Restoration Act as applied to employers who hold sincere religious objections to some or all contraceptive services.” *DeOtte*, 332 F.R.D. at 201. One can replace “Contraceptive Mandate” with “*Bostock*,” and replace “some or all contraceptive services” with “homosexual or transgender behavior”—and the rationale of *DeOtte* carries over to this case. *DeOtte* found *M.D. ex rel Stukenberg* inapplicable because the plaintiffs in that case had challenged “numerous systemic deficiencies” rather than a single regulatory requirement, and had alleged “various harms” and the “violation of constitutional rights in various ways.” *Id.* at 198 (citation and internal quotation

9. *See* Pls. Amended Br. in Support of MSJ (ECF No. 90) at 9–11; *id.* at 12–13.

10. Defs.’ Br. (ECF No. 82) at 9.

marks omitted). The plaintiffs in this case have avoided these vagueness and generality problems by targeting the EEOC's enforcement of *Bostock* and by specifying the laws and constitutional provisions that the EEOC is violating. *See id.* at 198–99 (distinguishing *M.D. ex rel Stukenberg*).

The defendants also suggest that individual class members may have differing policies with respect to homosexual or transgender employees and job applicants, and that not every class member may want to exclude those individuals from employment. *See* Defs. Br. (ECF No. 82) at 6–7. That does not defeat commonality or typicality because the representative class members are seeking a declaration of the class members' *right to choose* whether to adopt such policies—which presents a legal question common to every class member—and the plaintiffs are not required to show or allege that every single class member will adopt employment policies that affect homosexuals or transgender people. *See Prantil v. Arkema Inc.*, 986 F.3d 570, 581–82 (5th Cir. 2021) (“Rule 23(b)(2) does not require ‘a specific policy uniformly affecting—and injuring—each [plaintiff] . . . so long as declaratory or injunctive relief “settling the legality of the [defendant’s] behavior with respect to the class as a whole is appropriate.”’” (quoting *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 847–48 (5th Cir. 2012)); *J.D. v Azar*, 925 F.3d 1291, 1313 (D.C. Cir. 2019) (certifying Rule 23(b)(2) class of pro-abortion and anti-abortion women because “[t]he class members all assert a common entitlement to make that choice on their own, free from any veto power retained” by the government). The defendants’ insistence that a certified class may include only employers who actually will exclude homosexuals or transgender individuals is incompatible with *J.D.*, which they do not cite or acknowledge anywhere in their brief.¹¹

11. And even if the defendants were right to object to class certification on this ground, the proper response would be to modify the class definition or certify sub-classes, not to reject certification across the board.

II. THE NAMED PLAINTIFFS ARE ADEQUATE CLASS REPRESENTATIVES

The defendants suggest that the named plaintiffs—who are admittedly *religious* objectors to the *Bostock* regime—will not adequately represent the interests of the *non-religious* employers that fall within the second proposed class. *See* Defs.’ Br. (ECF No. 82) at 13. They also claim that Braidwood Management Inc., as a closely held corporation, will not adequately represent the interests of “class members who do not share its status as a closely held corporation.” *Id.* These contentions are meritless.

The named plaintiffs have every incentive to vigorously defend the rights of secular employers by arguing for a narrow interpretation of *Bostock*. *See* Pls. Amended Br. in Support of MSJ (ECF No. 90) at 14–17. That is because there is no guarantee that this Court (or an appellate court) will agree with the plaintiffs’ contention that the government lacks a “compelling” governmental interest in enforcing *Bostock* against religious employers. One federal appellate court has already held that the EEOC has a “compelling” interest in eliminating workplace discrimination against transgender employees—even when the employer holds sincere religious objections to transgender behavior. *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 584 (6th Cir. 2018) (“Failing to enforce Title VII against the Funeral Home means the EEOC would be allowing a particular person—Stephens—to suffer discrimination, and such an outcome is directly contrary to the EEOC’s compelling interest in combating discrimination in the workforce.”). And the Supreme Court has held that the government’s interest in eradicating discrimination against women is sufficiently “compelling” to override First Amendment objections. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *but see Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (refusing to hold that the state’s interest in preventing discrimination against homosexuals was sufficiently “compelling” to override associational freedoms under the First Amendment). If the Supreme Court or the Fifth Circuit were to extend the holding of *U.S. Jaycees* to the post-*Bostock* understanding of “sex” discrimination, then religious employers must pin their hopes on the *Bostock*-related arguments that protect religious and secular employers alike.

And there is certainly no adequacy-of-representation problem with respect to non-closely-held employers. The plaintiffs are not making any arguments in this case that would limit relief to closely held corporations at the expense of publicly traded corporations, and it is hard to imagine an argument that would help the named plaintiffs while throwing the non-closely-held (or non-religious) employers under the bus. The defendants do not suggest any scenario in which this might happen; they merely speculate that the named plaintiffs will make a half-baked effort on behalf of these absent class members,¹² even though it is undisputed that the plaintiffs are seeking relief that will benefit *all* employers who object to homosexual or transgender behavior on religious or secular grounds. The defendants need more than bald assertion and rank speculation to defeat adequacy of representation; they must explain how the named plaintiffs would face *incentives* to shortchange the absent class members, and there is no conceivable incentive for the named plaintiffs to do so when they will *benefit* from a ruling that helps the non-religious and publicly traded class members.¹³

The defendants also suggest that the named plaintiffs will lack standing to appeal if this Court grants relief under RFRA while rejecting the free-association or *Bostock* claims that would benefit non-religious employers. *See* Defs.’ Br. (ECF No. 82) at 14–15. But that is no reason to deny class certification. Once a class is certified, the class becomes its own distinct legal entity,¹⁴ and the class itself can appeal if the absent class members are injured by the district court’s ruling—regardless of whether the class representatives would have standing

12. *See* Defs.’ Br. (ECF No. 82) at 14.

13. The defendants’ stance is also incompatible with *DeOtte*, which certified a class of “[e]very current and future employer in the United States that objects, based on its sincerely held religious beliefs, to establishing, maintaining, providing, offering, or arranging for: (i) coverage or payments for some or all contraceptive services; or (ii) a plan, issuer, or third-party administrator that provides or arranges for such coverage or payments.” *DeOtte*, 332 F.R.D. at 201. The Court had no hesitation in including both closely held and publicly traded employers within this class definition.

14. *See Sosna v. Iowa*, 419 U.S. 393, 399 (1974) (“When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant.”).

to appeal as individuals. *See Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1176 (5th Cir. 1978) (“[T]he ‘class’ itself clearly has standing to appeal a judgment of the district court”). That is why class-action litigation can continue even after the named plaintiff’s claims have been mooted by subsequent events—as long as the class was certified *before* the lead plaintiff’s claims became moot. *See Sosna v. Iowa*, 419 U.S. 393, 401–02 (1974); *id.* at 402 (“The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.”). A certified class can likewise continue litigating even if the named plaintiffs lack standing to appeal. And in all events, an absent class member can always intervene for the purpose of appealing if this Court issues a ruling that benefits only religious employers. *See Walker v. City of Mesquite*, 858 F.2d 1071, 1073–74 (5th Cir. 1988).

III. THE PLAINTIFFS HAVE PROVEN NUMEROSITY

The plaintiffs defined their classes to include: (1) Every employer in the United States that opposes homosexual or transgender behavior for sincere religious reasons; and (2) Every employer in the United States that opposes homosexual or transgender behavior for religious or non-religious reasons. *See* Mot. for Class Certification (ECF No. 71). The plaintiffs’ evidence proves that each of these classes, as defined, easily exceeds the numerosity threshold. *See* Pls.’ Br. in Support of Class Certification (ECF No. 71-1) at 2–4, 8–9.

The defendants complain that not all of the employers that “oppose” homosexual or transgender behavior will implement employment policies that discriminate against individuals who engage in that behavior. *See* Defs.’ Br. (ECF No. 82) at 15–16. But we have not defined the classes in a manner that is limited to employers who have policies of that sort. The classes are defined to include employers that oppose the relevant behavior, and it seeks relief that preserves their right to *choose* whether to implement policies that exclude or discriminate against homosexual or transgender employees or job applicants. A class definition of this sort is entirely proper, even though it will inevitably include some employers that may

never implement a policy that conflicts with *Bostock* or the EEOC's interpretations of Title VII. The D.C. Circuit recognized the propriety of this class definition when it allowed a pregnant minor seeking an abortion to represent a class of *all* pregnant unaccompanied minors in the government's custody, even though many of the absent class members had no desire to abort their unborn children or obtain judicial relief that would enable them to do so:

[T]he fact that the class representatives chose to terminate their pregnancies, whereas the lion's share of the class might make the opposite choice, entails no "conflict[] of interest between named parties and the class they seek to represent" for purposes of Rule 23(a)(4)'s adequacy standard. The constitutional right asserted by the class is a woman's "right to choose to terminate her pregnancy" before viability. The class members all assert a common entitlement to make that choice on their own, free from any veto power retained (unconstitutionally, the class says) by ORR. And on the plaintiffs' theory, they are all denied the right to terminate their pregnancies by a veto power that effectively supersedes it. The class representatives are suited to press that interest on the class's behalf, even if various class members might make varying ultimate decisions about how to exercise their choice.

J.D. v. Azar, 925 F.3d 1291, 1313 (D.C. Cir. 2019) (citations omitted). So too here. The named plaintiffs are seeking to vindicate the right of every employer that objects to homosexual or transgender behavior to establish employment policies that reflect those values, regardless of whether a particular employer in the class intends or desires to do so. It is undisputed that these classes (as defined) satisfy the numerosity requirement.

IV. THE PROPOSED CLASSES SATISFY THE REQUIREMENTS OF RULE 23(b)(2)

Certification under Rule 23(b)(2) is allowed when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b). That is exactly the situation presented here. The EEOC is threatening *every* employer in the United States with its "guidance documents" that announce that employers must cease any employment practice that discriminates on account of "sexual orientation or gender identity"—and that refuse to recognize any religious exemptions for anyone, not

even for churches. The EEOC’s lawsuit against Harris Funeral Homes,¹⁵ an overtly Christian employer that made clear that its objections to transgender conduct rested on its sincere religious beliefs, is another shot across the bow to every religious employer that opposes homosexual or transgender behavior, as well as to every secular employer that holds these objections.

The defendants note that the EEOC “has not taken *actual* enforcement action against every member of the class.” Defs.’ Br. (ECF No. 82) at 16 (emphasis added). But the EEOC has *threatened* every class member with its guidance documents and its lawsuit against Harris Funeral Homes—and it is those *threats* that “apply generally to the class” and allow the plaintiffs to seek certification under Rule 23(b)(2). The EEOC has done nothing to withdraw those threats or renounce its previous actions against Harris Funeral Homes, and the quotes from Section 12 of the EEOC’s Compliance Manual only heighten the uncertainty by leaving every class member guessing as to what their rights under RFRA and the First Amendment might be. This is the precisely the type of case in which classwide declaratory relief is warranted. *See, e.g., MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007).

V. THE PROPOSED CLASSES ARE ASCERTAINABLE

Nothing in the text of Rule 23 requires a class to be “ascertainable” or “identifiable.”¹⁶ But numerous courts—including the Fifth Circuit—have imposed an “ascertainability” requirement on top of the criteria for class certification spelled out in Rule 23. *See DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam) (“[T]o maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable.”). This “ascertainability” doctrine allows courts to deny certification to vague or poorly defined classes. *See John v. National Security Fire & Casualty Co.*, 501 F.3d 443, 445 (5th

15. *See Harris Funeral Homes*, 884 F.3d at 584.

16. *See* Robert G. Bone, *Justifying Class Action Limits: Parsing the Debates over Ascertainability and Cy Pres*, 65 U. Kan. L. Rev. 913, 913 (2017) (“[C]lass ascertainability . . . [is] neither mandated by the text of Rule 23 nor supported by a reasonable interpretation of the Rule’s language and purpose.”).

Cir. 2007) (“There can be no class action if the proposed class is ‘amorphous’ or ‘imprecise.’” (citation omitted)). *DeBremaecker*, for example, rejected a proposed class of “residents of this State active in the ‘peace movement,’” because of the “patent uncertainty of the meaning of ‘peace movement’ in view of the broad spectrum of positions and activities which could conceivably be lumped under that term.” *Id.*

There is nothing vague or imprecise about the proposed class definitions. An employer either objects to homosexual or transgender behavior, or it doesn’t. And its objections are either based in religious reasons, or they’re not. The EEOC can easily find out whether an employer holds these beliefs by asking. Harris Funeral Homes certainly made no secret that it opposed transgender behavior—and that it did so for sincere religious reasons. *See Harris Funeral Homes*, 884 F.3d at 568–69. And it is unfathomable to think that an employer protected by a classwide injunction would keep those beliefs secret from the EEOC.

More importantly, the requirement of “ascertainability” is applied with far less rigor when certification is sought under Rule 23(b)(2). At least three circuits hold that “ascertainability” is categorically inapplicable to (b)(2) classes.¹⁷ And the Fifth Circuit (along with many other courts) has recognized that the ascertainability requirement is greatly relaxed in the (b)(2) context:

[T]he precise definition of the [(b)(2)] class is relatively unimportant. If relief is granted to the plaintiff class, the defendants are legally obligated to comply, and it is usually unnecessary to define with precision the persons entitled to enforce compliance.

17. *See Shelton v. Bledsoe*, 775 F.3d 554, 563 (3rd Cir. 2015) (“[A]scertainability is not a requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief”); *Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016) (“The advisory committee’s notes for Rule 23(b)(2) assure us that ascertainability is inappropriate in the (b)(2) context.”); *Shook v. El Paso County*, 386 F.3d 963, 972 (10th Cir. 2004) (“[W]hile the lack of identifiability [of class members] is a factor that may defeat Rule 23(b)(3) class certification, such is not the case with respect to class certification under Rule 23(b)(2).”).

In re Monumental Life Ins. Co., 365 F.3d 408, 413 n.6 (5th Cir. 2004) (quoting *Rice v. City of Philadelphia*, 66 F.R.D. 17, 19 (E.D. Pa. 1974)).¹⁸ *In re Rodriguez*, 695 F.3d 360 (5th Cir. 2012), and *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 623 (5th Cir. 1999), approved (b)(3) classes despite the extensive individualized inquiries that were required; that creates an even steeper hill for the defendants, who must explain why this Court should reject ascertainability in the more forgiving (b)(2) context.

VI. THE PROPOSED CLASSES SATISFY ARTICLE III

Any employer that opposes homosexual or transgender behavior—whether for religious or non-religious reasons—is suffering Article III injury because the EEOC’s guidance documents and threatened enforcement actions are constraining its right to adopt employment policies of its choice. The defendants complain that some of the class members will lack standing because they would never adopt policies that even arguably conflict with *Bostock* or the EEOC’s guidance. But even if that is true, the Fifth Circuit has never (to our knowledge) held that every member of a Rule 23(b)(2) class must have Article III standing. And more importantly, this idea is very hard to square with the Supreme Court’s repeated pronouncements that only one plaintiff needs to establish standing to seek declaratory or injunctive relief. See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367,

18. See also *Finch v. New York State Office of Children and Family Services*, 252 F.R.D. 192, 198 (S.D.N.Y. 2008) (“A Rule 23(b)(2) class need not be defined as precisely as a Rule 23(b)(3) class”); *Multi-Ethnic Immigrant Workers Organizing Network v. City of Los Angeles*, 246 F.R.D. 621, 630 (C.D. Cal. 2007) (“[L]ess precision is required of class definitions under Rule 23(b)(2) than under Rule 23(b)(3), where mandatory notice is required by due process Manageability is not as important a concern for injunctive classes as for damages classes.” (citations omitted)); Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. Kan. L. Rev. 325, 390 (2017) (“Conditioning certification on the ascertainability of class members should not apply to Rule 23(b)(2) classes because it is immaterial whether individual class members can be identified.”); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. Rev. 615, 638–39 (2017) (“The definiteness and ascertainability requirements either do not apply in Rule 23(b)(2) cases, or apply in a far less demanding and precise manner.”).

2379 n.6 (2020) (“Under our precedents, at least one party must demonstrate Article III standing for each claim for relief. . . . The Third Circuit accordingly erred by inquiring into the Little Sisters’ independent Article III standing.”); *Department of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (“For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue.”); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006) (“[T]he presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement.”). The defendants correctly observe that the Second Circuit requires every absent class member to have Article III standing,¹⁹ but that is not a binding pronouncement and should not (in our view) be followed. If the Court decides that Article III standing is indeed necessary for every absent class member, then it can simply tweak the class definitions and narrow them to individuals who are suffering Article III injury in fact on account of the EEOC’s behavior. It is no reason to deny class certification across the board.

CONCLUSION

The motion for class certification should be granted.

Respectfully submitted.

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19. See *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263–64 (2d Cir. 2006) (“[N]o class may be certified that contains members lacking Article III standing.”).

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CERTIFICATE OF SERVICE

I certify that on June 23, 2021, I served this document through CM/ECF upon:

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