No. 22-16490

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA ALLIANCE FOR RETIRED AMERICANS et al.,
Plaintiffs-Appellees,
v.
KRISTIN K. MAYES, in her official capacity as Arizona Attorney General,
Defendant-Appellant,
and
YUMA COUNTY REPUBLICAN COMMITTEE,
Intervenor-Defendant-Appellant,
and
ADRIAN FONTES, in his official capacity as Arizona Secretary of State, et al.,
Defendants.

On Appeal from the United States District Court
for the District of Arizona
Case No. 2:22-cv-01374-GMS

PLAINTIFFS-APPELLEES' SECOND SUPPLEMENTAL BRIEF

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STATEMENT OF THE ISSUE

Whether and how the Supreme Court's decision in *Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. __, 2024 WL 2964140 (June 13, 2024), impacts organizational standing, particularly with regards to Ninth Circuit caselaw construing *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

ARGUMENT

The Supreme Court's decision in *Alliance for Hippocratic Medicine* does not alter the requirements for establishing organizational standing under this Court's existing precedent. In *Alliance for Hippocratic Medicine*, the Supreme Court simply emphasized that its prior decision in *Havens* does not allow an organization to establish standing merely by "divert[ing] its resources in response to a defendant's actions"; the organization's mission must also be "perceptibly impaired" by the defendant's conduct. *All. for Hippocratic Med.*, 2024 WL 2964140, at *13. An organization can show such impairment by establishing that the defendant's actions "directly affected and interfered with" its "core . . . activities," and may seek prospective injunctive relief if it can "establish a sufficient likelihood of future injury." *Id.*

Because the Ninth Circuit has construed *Havens* the same way—requiring an organizational plaintiff to show both diversion of its resources *and* frustration of its mission—*Alliance for Hippocratic Medicine* does not alter this Circuit's test for organizational standing. *See E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 765 (9th Cir. 2018); *see also, e.g.*, *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015); *El Rescate Legal Servs., Inc. v. Exec. Off. of Immig. Rev.*, 959 F.2d 742, 748 (9th Cir. 1991). Nor has this Court permitted an organization to "spend its way into standing simply by expending money to gather information and advocate against the defendant's action." *All. for Hippocratic Med.*, 2024 WL 2964140, at *13; *see, e.g.*, *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) ("An organization . . . . cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all.").

The District Court correctly held that the Plaintiffs in this case—the Arizona Alliance for Retired Americans (the "Arizona Alliance"), Voto Latino, and Priorities USA—have standing to challenge A.R.S. § 16-1016(12) (the "Felony Provision"), and A.R.S. § 16-165(A)(11) and (B) (the

"Cancellation Provision"). Under the lower standing threshold that applies to pre-enforcement constitutional challenges, Plaintiffs the Arizona Alliance and Voto Latino have standing to challenge the Felony Provision because of the direct chilling effect it would have on their voter registration activities, which are protected by the First Amendment. 1-ER-008 n.3; *Lopez v. Candaele*, 630 F.3d 775, 788, 792 (9th Cir. 2010)); *Canatella v. California*, 304 F.3d 843, 853 & n.11 (9th Cir. 2002) ("relaxed standing analysis" for pre-enforcement challenge implicating activities protected by First Amendment).

With respect to the Cancellation Provision, the Arizona Alliance and Voto Latino each have associational standing on behalf of their members and constituents, so this Court need not even reach organizational standing to affirm the preliminary injunction. *See* ECF No. 64 at 9–14 (describing how Plaintiffs' members are at risk of being disenfranchised by Cancellation Provision, which directly affects and regulates their registration status); *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1096 (9th Cir. 2021) ("An association or organization can sue based on injuries to itself *or* to its members." (emphasis added)); *see also*

Town of Chester v. Laroe Ests., Inc., 581 U.S. 433, 439 (2017) (only one plaintiff need establish standing for a suit to be proper).

But each plaintiff also has organizational standing in its own right under the *Alliance for Hippocratic Medicine* analysis. Unlike the plaintiffs in that case, Plaintiffs here are not simply advocacy organizations that disagree with government policy and spend funds in support of that effort. Just as the organizational plaintiff in *Havens* provided housing counseling services, 455 U.S. at 365, Plaintiffs here provide voters with services such as registration and mobilization that would be "perceptibly impaired" by Defendants' implementation of the Cancellation Provision. Because Plaintiffs would have to divert resources away from these services and towards combatting the negative effects of the Cancellation Provision, they have standing under the relevant precedent.

I. The plaintiffs in *Alliance for Hippocratic Medicine* lacked standing under *Havens* and other existing precedent.

In *Alliance for Hippocratic Medicine*, the Supreme Court applied well-established standing principles to hold that the plaintiffs lacked Article III standing where they had "sincere legal, moral, ideological, and policy objections" to government action but did not face any actual or

potential injury. 2024 WL 2964140, at *9. The plaintiffs challenged regulations promulgated by the Food and Drug Administration that relaxed the requirements for prescribing and obtaining mifepristone, a drug approved 24 years ago for use in early termination of pregnancies. The plaintiffs—individual physicians and medical associations opposed to reproductive rights—were not themselves affected by the challenged regulations: the doctors did not prescribe mifepristone and were protected under federal law from treating mifepristone complications against their consciences, and the associations did not assert any organizational injury other than the costs they incurred by challenging the FDA's regulations and advocating against the use of mifepristone. *Id.* at *6. The unanimous Court thus held that plaintiffs lacked Article III standing because citizens may not "sue merely because their legal objection is accompanied by a strong moral, ideological, or policy objection to a government action." *Id.*

Though the plaintiffs "advance[d] several complicated causation theories" to "try to establish standing," none held up to scrutiny under the Supreme Court's existing precedent. *Id*. at *9. First, the doctors claimed that they suffered "downstream conscience injuries," but the

Court rejected that theory because under federal law the doctors could not be "forced to participate in an abortion or provide abortion-related medical treatment over their conscience objections." *Id.* Second, the individual doctors alleged that they would suffer "monetary and related injuries" such as increased insurance costs, but the Court rejected that theory because "[t]he causal link between FDA's regulatory actions and those alleged injuries is too speculative or otherwise too attenuated to establish standing." *Id.* at *11.

Finally, the medical associations argued that they had organizational standing "based on their incurring costs to oppose FDA's actions" through activities such as "conduct[ing] their own studies on mifepristone so that the associations can better inform their members and the public about mifepristone's risks" and "drafting citizen petitions to FDA, as well as engaging in public advocacy and public education" in opposition to the use of mifepristone. *Id.* at *13. Citing several previous cases—including *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982), *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972), and *Havens*—the Court rejected this argument because Article III standing requires "far more than simply a

setback to the organization's abstract social interests," 2024 WL 2964140, at *13 (quoting *Havens*, 455 U.S. at 379), and an organization "cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action," *id.* Otherwise, "all the organizations in America would have standing to challenge almost every federal policy that they dislike, provided they spend a single dollar opposing those policies." *Id.*

II. The Supreme Court's decision in *Alliance for Hippocratic Medicine* reinforced the requirements for establishing organizational standing but did not alter them.

The Supreme Court's rejection of the *Alliance for Hippocratic Medicine* plaintiffs' attempt to manufacture standing did not change the requirements for establishing organizational standing; it simply reinforced the requirements set forth in *Havens* and its progeny.

Under *Havens*, organizations may have standing "to sue on their own behalf for injuries they have sustained." *Havens*, 455 U.S. at 379, n.19. To do so, organizations must satisfy the usual standards for injury in fact, causation, and redressability that apply to individuals. *Id*. at 378–79. In *Alliance for Hippocratic Medicine*, the Supreme Court confirmed that *Havens* does not allow organizations to establishing an injury in fact

merely by "divert[ing] its resources in response to a defendant's actions." 2024 WL 2964140, at *13. Instead, the organization must also show that the defendant's conduct "perceptibly impair[s]" the organization's ability to carry out its core activities, whether that is providing services for housing counseling, legal services, labor organizing, or as in this case, voter registration. *Id.* (*see also infra*).

This Court has consistently applied the same test for organizational standing: "[U]nder *Havens Realty*, a diversion-of-resources injury is sufficient to establish organizational standing for purposes of Article III if the organization shows that, independent of the litigation, the challenged policy frustrates the organization's goals *and* requires the organization to expend resources in representing clients they otherwise would spend in other ways." *E. Bay*, 932 F.3d at 765 (cleaned up); *see also, e.g.*, *La Raza*, 800 F.3d at 1041; *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (day-laborer organization had standing when challenged ordinance frustrated its mission by preventing day laborers from soliciting employment and "the time and resources spent in assisting day laborers during their arrests and meeting with workers about the status of the ordinance

would have otherwise been expended toward [the organization's] core organizing activities").

La Raza is particularly instructive here. In that case, this Court applied *Havens* when it held the plaintiff civil rights organizations, which had a "voter registration mission," had standing to challenge Nevada's failure to comply with the National Voter Registration Act ("NVRA") when that failure caused the plaintiff organizations to "expend[] extra resources registering voters" which "they would have [otherwise] spent on some other aspect of their organizational purpose—such as registering voters the NVRA's provisions do not reach, increasing their voter education efforts, or any other activity that advances their goals." 800 F.3d at 1036–37, 1040. Unlike the *Alliance for Hippocratic Medicine* organizational plaintiffs, who alleged diversion of resources for mere issue advocacy in opposition to the challenged regulation, *see* 2024 WL 2964140, at *13, the organizational plaintiffs in *La Raza* had standing because the challenged conduct "perceptibly impaired" their ability to provide mission-critical voter registration services by making it more costly to register voters. *Id.*; *see also La Raza*, 800 F.3d at 1040.

III. The *Alliance for Hippocratic Medicine* decision does not impact Plaintiffs' standing in this case.

A. Plaintiffs have standing to challenge the Felony Provision.

The District Court held that Plaintiffs had standing to challenge the Felony Provision because they had shown an "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and . . . a credible threat of prosecution thereunder." 1-ER-008 n.3 (quoting *Carrico v. City & Cnty. of San Francisco*, 656 F.3d 1002, 1005–06 (9th Cir. 2011)). The District Court's reasoning did not rely on the diversion of resources theory addressed in *Alliance for Hippocratic Medicine* and is accordingly not impacted by that decision. For the reasons discussed in Plaintiffs' answering brief, the District Court's conclusion in this regard was correct. *See generally* ECF No. 30 at 17–28 (describing "low threshold" for showing Article III standing in pre-enforcement cases implicating First Amendment-protected activities, and noting that "the government's disavowal [of prosecution] must be more than a mere litigation position," (citing *Lopez*,

630 F.3d at 792)).[1]

B. Plaintiffs have standing to challenge the Cancellation Provision.

The District Court also correctly held that Plaintiffs have associational standing to challenge the Cancellation Provision because it "puts the Plaintiffs' members at risk of disenfranchisement," which would be "an irreparable harm." 1-ER-021 (quoting *Jones v. Governor of Florida*, 950 F.3d 795, 828 (11th Cir. 2020)). That is sufficient to establish standing without any need to consider the *Havens* standard discussed in *Alliance for Hippocratic Medicine*. *See Rousseau*, 985 F.3d at 1096.

But the District Court also correctly recognized that, under the *Havens* standard, Plaintiffs have organizational standing because the Cancellation Provision's "apparent conflict" with the NVRA "establishes the risk that Plaintiffs will need to divert resources to assist in canceling former voter registrations because failing to do so would risk the voter's registration being cancelled without notice." 1-ER-015 n.7 (cleaned up). In other words, because the Cancellation Provision allows the State to

[1] Plaintiffs also have associational and organizational standing to challenge the Felony Provision because of Plaintiffs' self-censorship and the expenses imposed on them. *See generally* ECF No. 30 at 18–25.

cancel voter registrations without following the NVRA's notice requirements, *see* 52 U.S.C. § 20507(d)(1)(B), Plaintiffs will need to begin providing that notice to their members and constituents themselves so that they are not disenfranchised. This constitutes an injury in fact because enforcement of the Cancellation Provision will "perceptibly impair" Plaintiffs' ability to register and mobilize voters, which are "core . . . activities" central to their respective missions. *Havens*, 455 U.S. at 379; *see also* 2-ER-231–32; 2-ER-274–78; *All. for Hippocratic Med.*, 2024 WL 2964140, at *6 ("An injury in fact can be . . . an injury to one's constitutional rights.").

In stark contrast to the plaintiffs in *Alliance for Hippocratic Medicine*, the record in this case shows that the harm to Plaintiffs from implementation of the Cancellation Provision would be "far more than simply a setback to [their] abstract social interests." 2024 WL 2964140, at *13 (quoting *Havens*, 455 U.S. at 379). It would directly impact their ability to engage in their core voter registration activities and require them to engage in activity in response that would drain their resources.

This was evident from the testimony of the president of the Arizona Alliance, who explained that SB 1260 would require the organization to

"reshape its voter education, registration, and mobilization activities to prioritize the need to affirmatively cancel other voter registrations, which [it] has never before spent significant time or money on." 2-ER-253 ¶ 29. This would directly harm the Arizona Alliance's mission of ensuring that its members and prospective members are able to register to vote through traditional voter registration and mobilization efforts. 2-ER-249 ¶ 5; 2-ER-251 ¶ 15; *see also* 2-ER-248–53 ¶¶ 4, 13–14, 16, 25–28. The impact of these resource reallocations—directly caused by the Cancellation Provision—would be particularly burdensome on the Arizona Alliance, which has "a limited budget and only two paid staff members who work part-time." 2-ER-250 ¶ 12.

A vice president of Voto Latino identified similar harm: the Cancellation Provision "threaten[s] Voto Latino's constituents' fundamental rights and strike[s] directly at the heart of the organization's mission to grow the political engagement of the young Latinx community," and would force Voto Latino to educate its constituents about "the need for them to check whether they have multiple voter registrations[.]" 2-ER-259 ¶¶ 18, 20; *see also* 2-ER-257 ¶¶ 5, 9; 2-ER-259 ¶¶ 19, 21. It would further require Voto Latino to allocate

resources away from its traditional core service of helping voters register and toward helping voters navigate the complex process of cancelling their nonactive registrations. 2-ER-259 ¶ 21; 2-ER-276–77 ¶ 26. Voto Latino also reasonably expects that its constituents would be more likely targeted by third parties coordinating efforts to purge Latinx voters and students from Arizona's voter rolls, which has occurred in other states and which the Cancellation Provision would permit with no notice to affected voters. 2-ER-259 ¶ 19; 2-ER-276–77 ¶ 26.

Priorities USA, too, would be directly affected: "To continue effectuating its mission of educating and turning out Arizona voters in light of SB 1260, ... the Cancellation . . . Provision[] will require Priorities to provide more grant funds to in-state partner organizations so that they can provide education and training on the harms of the Cancellation . . . Provision[], namely that significant numbers of voters could be purged from the registration rolls . . . without any notice or opportunity to contest their removal." 2-ER-266 ¶ 15; *see also* 2-ER-263–64 ¶¶ 3–6; 2-ER-266 ¶¶ 16–20.

At bottom, the Cancellation Provision would require Plaintiffs to expend resources helping their members and constituents check for and

affirmatively cancel existing registrations to avoid being disenfranchised without notice, which is not a service Plaintiffs currently provide, and which would come at the cost of their traditional voter registration and mobilization activities. ECF No. 64 at 4–9; *see also, e.g.*, 2-ER-231–32 ("Plaintiffs do not currently expend any resources on assisting voters with canceling their other voter registrations. . . . Plaintiffs will now need to help voters identify and personally cancel any other voter registrations in other counties . . . because failing to do so would risk the voter's registration being cancelled . . . . This, too, would require a massive diversion of resources that would otherwise go toward Plaintiffs' traditional voter registration and mobilization activities.").

Thus, "there can be no question that" Plaintiffs would suffer an injury in fact if the Cancellation Provision took effect. *Havens*, 455 U.S. at 379. The District Court's reasoning is correct under *Havens* and remains valid after *Alliance for Hippocratic Medicine*.

Respectfully submitted this 27th day of June, 2024.

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UNITED STATES COURT OF APPEALS
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I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 27, 2024.

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