

# No. 22-1174

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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FAMILY EQUALITY, TRUE COLORS UNITED, INC., SERVICES AND  
ADVOCACY FOR GLBT ELDERS,

Plaintiffs-Appellants,

v.

XAVIER BECERRA, in his official capacity as Secretary, United States  
Department of Health and Human Services, THE UNITED STATES  
DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellees.

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On Appeal from the United States District Court  
for the Southern District of New York

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**BRIEF FOR DEFENDANTS-APPELLEES**

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## **STATEMENT OF JURISDICTION**

Plaintiffs-appellants invoked the jurisdiction of the district court under 28 U.S.C. § 1331. JA 21. The district court dismissed their suit for lack of standing on March 30, 2022, JA 59-69, and entered judgment that day, JA 70. Plaintiffs filed a timely notice of appeal on May 27, 2022. JA 71; *cf.* Fed. R. App. P. 4(a)(1)(B). Appellate jurisdiction rests on 28 U.S.C. § 1291.

## **STATEMENT OF THE ISSUE**

Plaintiffs are nonprofit advocacy organizations that seek judicial review of a policy notice issued by the Department of Health and Human Services (HHS) advising of its enforcement intentions with respect to certain previously issued nondiscrimination regulations. The question presented is whether the district court correctly concluded that plaintiffs lack Article III standing to challenge the notice.

## **STATEMENT OF THE CASE**

### **A. Statutory and Factual Background**

1. Like many federal agencies, HHS administers various programs that award federal funds to non-federal entities. In 2014, HHS and two dozen other agencies jointly promulgated regulations to implement the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (UAR), a set of standard requirements

for financial management formulated by the Office of Management and Budget. *See* 79 Fed. Reg. 75,871 (Dec. 19, 2014). The UAR regulations are intended to strengthen agencies' oversight over federally awarded funds by "reduc[ing] administrative burden and risk of waste, fraud, and abuse." *Id.* at 75,872. The implementing regulations for grants falling within HHS's authority are set forth in 45 C.F.R. Part 75 (Part 75).

The UAR does not contain any general provision independently prohibiting discrimination against particular groups or persons. Many federal award regimes do contain such protections, however, which vary from program to program. For example, HHS administers Title IV-E of the Social Security Act, which funds foster care and adoption assistance through state-adopted plans. These state plans must "provide[] that neither the State nor any other entity in the State that receives [Federal] funds ... and is involved in adoption or foster care placements" may "deny to any person the opportunity to become an adoptive or a foster parent," or "delay or deny the placement of a child for adoption or into foster care," on the basis of "race, color, or national origin" of the person or child involved. 42 U.S.C. § 671(a)(18)(A)-(B). Similarly, HHS regulations implementing the Runaway and Homeless Youth Act prohibit discrimination on the basis of, *inter alia*,

“race, ethnicity, nationality, age, religion/spirituality, gender identity/ expression, sexual orientation, [and] socioeconomic status,” among other factors. 45 C.F.R. § 1351.22(a).

2. In December 2016, HHS issued a final rule that made various amendments to Part 75 that HHS described as “based on existing law or HHS policy,” but “not previously codified in regulation.” 81 Fed. Reg. 89,393, 89,393 (Dec. 12, 2016) (the 2016 Rule). Among them were two additions to 45 C.F.R. § 75.300, a regulation that already required HHS to “manage and administer the Federal award ... in full accordance with U.S. statutory and public policy requirements,” including “those ... prohibiting discrimination,” *id.* § 75.300(a), and likewise required “[t]he non-Federal entity” to “comply[] with all requirements of the Federal award,” *id.* § 75.300(b). Specifically, the 2016 Rule adopted two additional provisions:

(c) It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.

(d) In accordance with the Supreme Court decisions in *United States v. Windsor* and in *Obergefell v. Hodges*, all recipients must treat as valid the marriages of same-sex couples. This does not

apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law as something other than a marriage.

81 Fed. Reg. at 89,395 (promulgating 45 C.F.R. § 75.300(c) and (d)). In adopting those two provisions, HHS noted that it had received only 12 public comments, “all of which were strongly supportive of the codification of the nondiscrimination provisions in HHS awards and the recognition of same-sex marriages.” *Id.* at 89,393. The 2016 Rule was made legally effective on January 11, 2017, nine days before a change in presidential administration. *Id.* To date, relevant portions of the 2016 Rule have never been enforced.

Various lawsuits concerning § 75.300(c) and (d) were soon commenced. In *Texas v. Azar*, No. 3:19-cv-365 (S.D. Tex.), the plaintiffs claimed, among other things, that § 75.300(c) and (d) violated the Religious Freedom Restoration Act and the First Amendment. In *Rogers v. HHS*, No. 6:19-cv-1567 (D.S.C.) and *Maddonna v. HHS*, No. 6:19-cv-448 (D.S.C.), the plaintiffs challenged HHS’s decision to issue South Carolina’s Title IV-E program a conditional exemption from compliance with § 75.300(c) insofar as it sought to use federal funds to reimburse certain faith-based organizations that provide

foster care services.<sup>1</sup> In *Buck v. Gordon*, No. 1:19-cv-286 (W.D. Mich.), the court preliminarily enjoined HHS from enforcing § 75.300(c) in Michigan as to a particular subgrantee. *See* 429 F. Supp. 3d 447 (W.D. Mich. 2019).

3. On November 19, 2019, HHS issued the policy notice at issue here. *See* 84 Fed. Reg. 63,809 (Nov. 19, 2019) (the 2019 Notice). Among other things, the 2019 Notice states that HHS will not enforce certain regulatory provisions adopted in the 2016 Rule, including § 75.300(c) and (d), until the provisions are amended or repromulgated to address concerns about compliance with the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* *See* 84 Fed. Reg. at 63,809-63,811.

On the same day, HHS also issued a notice of proposed rulemaking that (as relevant here) would amend § 75.300(c) and (d). *See* 84 Fed. Reg. 63,831 (Nov. 19, 2019). HHS proposed to revise § 75.300(c) to state that “[i]t is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services, to the extent doing so is prohibited by federal statute.” *Id.* at 63,832. It suggested

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<sup>1</sup> HHS may authorize “[e]xceptions on a case-by-case basis for individual non-Federal entities” from most Part 75 requirements. 45 C.F.R. § 75.102(b).

that this revision would simplify compliance by avoiding potential conflicts between statutory requirements and HHS public policy requirements. *Id.* at 63,833. In addition, HHS proposed to revise § 75.300(d) to state simply that “HHS will follow all applicable Supreme Court decisions in administering its award programs,” without singling out particular rulings. *Id.* at 63,835.

Following notice and comment, HHS adopted those two revisions in a January 2021 final rule. *See* 86 Fed. Reg. 2257 (Jan. 12, 2021) (the 2021 Rule). But litigation was soon brought challenging the 2021 Rule on both procedural and substantive grounds. *See Facing Foster Care in Alaska v. HHS*, No. 1:21-cv-308 (D.D.C.). In June 2022, the government consented to vacatur of the 2021 Rule after concluding it was promulgated using a comment-review process that “present[ed] a substantial risk that the agency failed to address significant concerns raised, or viable alternatives suggested, by the public.” Defs.’ Mot. for Remand with Vacatur at 6-7, *Facing Foster Care in Alaska v. HHS*, No. 1:21-cv-308 (D.D.C. June 17, 2022). The government explained that vacatur of the 2021 Rule would not disrupt the status quo, because “the purpose of the 2021 Rule is to repeal formally the 2016 Rule”; “the 2016 Rule has never been enforced”; and HHS “stated publicly [in the 2019 Notice] that it will not enforce the 2016 Rule pending

promulgation of a new rule.” *Id.* at 8-9. The D.C. district court granted that relief on June 29, 2022. The 2021 Rule thus has been vacated, but the 2019 Notice remains an accurate statement of current HHS policy.

## **B. Procedural History**

Plaintiffs Family Equality, True Colors United, Inc., and Services & Advocacy for LGBT Elders (SAGE) are three nonprofit organizations that advocate for the interests of, respectively, LGBTQ families, youth, and older people. JA 16, 17, 19 (Am. Compl. ¶¶ 9, 12, 15). Family Equality works to “advance legal and lived equality for LGBTQ families” through federal- and state-level lobbying as well as community outreach intended to educate families about their rights. JA 16-17 (*id.* ¶¶ 9-10). True Colors United engages in lobbying at “federal, state and local levels to promote funding” for LGBTQ youth experiencing homelessness and offers training and education designed to ensure that youth “have access to safe and supportive services.” JA 18 (*id.* ¶ 13). SAGE is a “national advocacy and services organization whose mission is to allow LGBTQ older people to age with respect and dignity,” and which provides training, education, and connections to other social services. JA 19 (*id.* ¶¶ 15-16).

In March 2020, plaintiffs brought this lawsuit claiming that the 2019 Notice violated the Administrative Procedure Act (APA).<sup>2</sup> The government moved to dismiss, arguing that plaintiffs had not pled any valid basis for standing. This litigation was stayed for a time pending HHS’s consideration of amendments to § 75.300, which culminated in adoption of the 2021 Rule. JA 9-10, 57. After the effective date of the 2021 Rule was postponed, however, the district court lifted the stay at the parties’ request to permit resolution of the government’s pending motion to dismiss. JA 10, 58.

In March 2022, the district court granted the government’s motion and dismissed for lack of standing. JA 59-69. The court noted that Article III requires organizational plaintiffs, like individual plaintiffs, to show an “actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision.” JA 64 (quoting *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998)).

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<sup>2</sup> Plaintiffs asserted three “claim[s] for relief”: (1) that HHS unlawfully promulgated the 2019 Notice without notice and comment; (2) that the 2019 Notice is arbitrary and capricious because its statements about the Regulatory Flexibility Act were erroneous; and (3) that HHS otherwise failed to provide a sufficiently reasoned explanation in the 2019 Notice. JA 48-50 (Am. Compl. ¶¶ 94-109). In light of the district court’s dismissal for lack of standing, the parties have not briefed—and the district court had no occasion to decide—the merits of any of those claims.

The court stated that to show such an injury, an organization “must demonstrate a ‘perceptible impairment’ of its activities” insofar as the challenged action “impeded, and will continue to impede, the organization’s ability to carry out its responsibilities” or “divert[ed] its resources away from its current activities.” JA 64 (quoting *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110-11 (2d Cir. 2017)) (alteration in original).

The district court concluded that plaintiffs had failed to make such a showing. The court acknowledged plaintiffs’ allegations that the 2019 Notice would render “‘less effective’” their efforts to prevent discrimination against LGBTQ persons and that, because of the 2019 Notice, plaintiffs had chosen to “reform[] and adjust[]” the content of “their outreach services.” JA 66. But the court explained that “[u]nder binding precedent, ‘expenditures or other activities if incurred at the organization’s own initiative[] cannot support a finding of injury.’” JA 67-68 (quoting *Connecticut Parents Union v. Russell-Tucker*, 8 F.4th 167, 174 (2d Cir. 2021)) (second alteration in original). To support standing, the challenged action must not simply frustrate an organization’s “abstract social interests,” but instead must concretely “impede[] the organization’s ability to carry out its

responsibilities.” JA 68 (citations omitted). Here, the court reasoned, the 2019 Notice does nothing to impede plaintiffs’ ability to “engage in advocacy” directed at preventing discrimination against LGBTQ individuals. JA 69. The court accordingly dismissed this suit without prejudice. *Id.*

### **SUMMARY OF ARGUMENT**

Plaintiffs are nonprofit advocacy organizations that seek review of an HHS policy notice advising of the agency’s enforcement intentions with respect to then-recently promulgated nondiscrimination regulations, which had proven controversial and spawned various forms of litigation. Plaintiffs do not allege that HHS’s issuance of this 2019 Notice directly impaired the functioning of their organizations, such as by inhibiting their ability to engage in advocacy, outreach, or education. Plaintiffs instead contend that the 2019 Notice, which disclosed HHS’s intention not to enforce relevant regulatory provisions pending further rulemaking, has set back the cause of preventing discrimination by recipients of certain HHS grants, thereby motivating plaintiffs to work harder to achieve their mission.

The district court correctly held these allegations to be insufficient for Article III standing. Where, as here, plaintiffs are not themselves the object of the government’s actions, they cannot sue absent a showing of “an

involuntary material burden on [their] established core activities.”

*Connecticut Parents Union v. Russell-Tucker*, 8 F.4th 167, 173 (2d Cir.

2021). Plaintiffs have not made such a showing. Instead, they assert that the

2019 Notice has taken time to understand; has affected the content of their

educational efforts; and has complicated their public messaging. Br. 23-24.

But Article III does not permit an organization to establish standing simply

by “expend[ing] resources” to understand, and in turn “oppose,” a

government action with which it disagrees. *Connecticut Parents Union*,

8 F.4th at 173. All of plaintiffs’ assertions reflect the type of generalized

grievance that has long been held insufficient for standing, no matter how

extensive an organization’s expertise or how serious its commitment to its

mission.

### **STANDARD OF REVIEW**

This Court “review[s] *de novo* a district court’s dismissal of a complaint

for lack of standing.” *Connecticut Parents Union v. Russell-Tucker*, 8 F.4th

167, 172 (2d Cir. 2021).

## ARGUMENT

### THE DISTRICT COURT CORRECTLY CONCLUDED THAT PLAINTIFFS LACK ARTICLE III STANDING

#### A. An Organizational Plaintiff Must Show The Challenged Agency Action Has Caused Concrete Injury To Its Activities, Not Merely Has Some Effect On Its Mission.

1. “[N]o principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013) (citation omitted). A core part of that limitation is standing, which requires courts to ensure that “the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant [its] invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on [its] behalf.” *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (citation omitted). Standing is thus “the threshold question in every federal case.” *Id.* at 498.

An organization suing on its own behalf “must ‘meet the same standing test that applies to individuals.’” *New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012) (quoting *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998)) (alteration and citation omitted). That is, at the pleading stage, a plaintiff organization

must allege “actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision.” *Irish Lesbian & Gay Org.*, 143 F.3d at 649 (citation omitted). Plaintiffs “bear[] the burden of establishing’ standing.” *Faculty, Alumni & Students Opposed to Racial Preferences v. New York Univ.*, 11 F.4th 68, 74 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2813 (2022).<sup>3</sup>

To satisfy the first element—“injury in fact”—an organization must, like all plaintiffs, show it has “suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016)

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<sup>3</sup> Beyond Article III standing, plaintiffs also “must satisfy ... an additional test: The interest [they] assert[] must be ‘arguably within the zone of interests to be protected or regulated by the statute’ that [they] say[] was violated.” *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 567 U.S. 209, 224 (2012). A claim may not proceed if the plaintiff’s asserted interests are only “marginally related to” or “inconsistent” with the purposes of the underlying statute. *Id.* at 225 (citation omitted). This zone-of-interests test, though historically deemed a matter of “prudential standing” or “statutory standing,” is now understood as part of a merits inquiry into whether the plaintiff “has a cause of action under the statute.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 & n.4 (2014); *see also Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1302 (2017). Here, the district court did not address this issue because it concluded that plaintiffs lack Article III standing, thus depriving it of jurisdiction. JA 69. That issue would remain open on any remand.

(quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).<sup>4</sup> An organization’s “mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient.” *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 226 (1974). Instead, as the Supreme Court explained in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), an organization must show a “concrete and demonstrable injury to the organization’s *activities*[,] with [a] consequent drain on the organization’s resources.” *Id.* at 379 (emphasis added); *see id.* (distinguishing such injury from a mere “setback to the organization’s abstract social interests”).

Moreover, for organizational and individual plaintiffs alike, “when the plaintiff is not [it]self the object of the government action or inaction [it] challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.” *Lujan*, 504 U.S. at 562 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)). Nonprofit organizations have no greater power

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<sup>4</sup> A plaintiff organization may also pursue “representational” or “associational” standing to sue on behalf of its members. *See, e.g., New York Civil Liberties Union*, 684 F.3d at 294. As the district court noted (JA 63), however, plaintiffs have not sought to proceed under such a theory here.

than individual citizens to sue to compel “the Government act in accordance with law,” *Allen*, 468 U.S. at 754, much less to require the government to investigate, prosecute, or discipline third parties for violating particular legal requirements, *see, e.g., Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *In re Attorney Disciplinary Appeal*, 650 F.3d 202, 204 (2d Cir. 2011) (per curiam); *Brady v. Berman*, 837 F. App’x 70, 71 (2d Cir. 2021).

Consistent with these principles, this Court has recognized that “[o]rganizations may have standing to challenge actions that cause them direct injury.” *New York Univ.*, 11 F.4th at 75; *see id.* at 75 n.27 (“An organization can ‘have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy[.]’”) (quoting *Warth*, 422 U.S. at 511). Such injury occurs when the defendant takes an action that “perceptibly impair[s]” the organization’s ability to function. *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017) (quoting *Havens Realty*, 455 U.S. at 379).

By contrast, “where, as here, an organization is not *directly regulated* by a challenged law or regulation,” it is not enough that an organization has

identified some expenditure of time or money motivated by the defendant’s action. *Connecticut Parents Union*, 8 F.4th at 173 (emphasis added).

“[E]xpenditures or other activities, if incurred at the organization’s own initiative, cannot support a finding of injury[.]” *Id.* at 174. Rather, the organization must show “an *involuntary material burden* on its established core activities.” *Id.* at 173 (emphasis added); *accord, e.g., Lawyers Comm. for 9/11 Inquiry, Inc. v. Garland*, 43 F.4th 276, 282-83 (2d Cir. 2022)

(“An organization can demonstrate standing if it shows that a defendant’s actions have caused a ‘concrete and demonstrable *injury to [its] activities—* with the *consequent* drain on [its] resources.’”) (emphases added, alteration in original) (quoting *Havens Realty*, 455 U.S. at 379).<sup>5</sup>

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<sup>5</sup> The district court, perceiving some “lack of clarity” in precedent, JA 65, initially implied that an organization might establish standing by showing resource diversion alone. JA 64 (plaintiff must “*either*” show injury inflicted by defendant “*or*” diversion of resources) (emphasis in original) (citing *Centro de la Comunidad*, 868 F.3d at 110-11). As the court ultimately concluded, however—and as plaintiffs agree (*see infra* p. 25)—the law requires them to show that the defendant inflicted an “involuntary material burden” upon them. JA 65 (quoting *Connecticut Parents Union*, 8 F.4th at 173); *see Connecticut Parents Union*, 8 F.4th at 174 (“[E]xpenditures ... incurred at the organization’s own initiative[] cannot support a finding of injury.”). Plaintiffs correctly do not argue on appeal that a “substantial expenditure of resources and frustration of [their] mission” alone would suffice to establish Article III standing. *Cf. Moya v. U.S. Dep’t of Homeland Security*, 975 F.3d 120, 130 (2d Cir. 2020). *See also infra* p. 31 n.9 (explaining

*Continued on next page.*

These principles comport with the law in the D.C. Circuit, which frequently addresses organizational standing in the administrative-law context. That court has long “distinguished between organizations that allege that their activities have been impeded [and] those that merely allege that their mission has been compromised.” *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (citation omitted). “An organization must allege more than” a mere “frustration of its purpose because frustration of an organization’s objectives ‘is the type of abstract concern that does not impart standing.’” *Id.* Rather, “[t]he key issue” is whether a plaintiff “has suffered a ‘concrete and demonstrable injury to its activities.’” *People for Ethical Treatment of Animals v. U.S. Dep’t of Agric. (PETA)*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (emphasis added; alteration omitted); *see also, e.g., Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015) (requiring “alleg[ation] that the defendant’s conduct ‘perceptibly impaired’ the organization’s ability to provide services”; “the expenditure of resources on advocacy is not a cognizable Article III injury”); *National Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 663 F.3d

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that resource diversion may be corroborating evidence of some injury inflicted by a defendant, but is not the injury itself).

470, 475-76 (D.C. Cir. 2011) (no standing to challenge government action that “d[id] nothing to hinder the [plaintiff’s] ability to fulfill its regular mission of informing and counseling its members of [regulatory] developments”; it was insufficient that plaintiff had directed resources to “responding” to the challenged action); *Center for Law & Educ. v. Department of Educ.*, 396 F.3d 1152, 1162 n.4 (D.C. Cir. 2005) (“[T]o hold that a lobbyist/advocacy group had standing to challenge government policy with no injury other than injury to its advocacy would eviscerate standing doctrine’s actual injury requirement ....”).

2. The district court properly applied these principles. It explained that “[u]nder binding precedent, ‘expenditures or other activities if incurred at the organization’s own initiative[] cannot support a finding of injury.’” JA 67-68 (quoting *Connecticut Parents Union*, 8 F.4th at 174) (second alteration in original). Otherwise, a person could always establish standing to challenge agency action simply by “expend[ing] resources to oppose that [action].” JA 68 (quoting *Connecticut Parents Union*, 8 F.4th at 173). Here, because the 2019 Notice does not directly regulate or otherwise act upon plaintiffs, plaintiffs must show they have “suffered an *involuntary* burden” on their “established core activities.” JA 67.

The district court correctly concluded that plaintiffs have not plausibly alleged such a burden. Though they are concerned about protecting LGBTQ persons from discrimination, plaintiffs do not allege that HHS has discriminated against them or their members. Plaintiffs also “do not ‘identify any restrictions on [their] ability to perform the core activities’” in which they engage, whether characterized as “education, outreach, lobbying, ‘meetings, lectures, [or] general organizing.’” JA 68 (quoting *Connecticut Parents Union*, 8 F.4th at 175). Because their abilities to advocate and educate remain unaffected, it is apparent that plaintiffs do not sue to “vindicate [the] rights and immunities” of their respective organizations. *New York Civil Liberties Union*, 684 F.3d at 294 (quoting *Warth*, 422 U.S. at 511).

Instead, plaintiffs assert that one of their organizational objectives—preventing discrimination against LGBTQ persons by recipients of federal funds—has been hindered by the 2019 Notice (and conversely, that their mission would be easier to achieve if the 2016 Rule were enforced). But the fact that plaintiffs have undertaken additional or more intensive advocacy and educational activities “in response to the [2019] Notice” (JA 68) cannot suffice to establish Article III standing, in much the same way that an

individual citizen cannot garner standing by voluntarily undertaking efforts that she believes should instead be undertaken by the government itself. *Cf. PETA*, 797 F.3d at 1106 (Millett, J., dubitante) (“The same principles that prevent any individual caped crusader from using the courts ... should preclude the same gambit by a group of likeminded individuals. As for Batman or Wonder Woman, so too for the Justice League.”); *id.* at 1099 (invoking “the general rule that a plaintiff’s voluntary expenditure of resources to counteract governmental action that only indirectly affects the plaintiff does not support standing”); *National Treasury Emps. Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996) (reasoning that “[i]ndividual persons cannot obtain judicial review of otherwise non-justiciable claims simply by incorporating [and] drafting a mission statement”).

Plaintiffs cannot avoid these principles by alleging specific hours spent in seeking to “assess” the 2019 Notice or to adapt their advocacy and outreach strategy. *See* Br. 16-17, 19, 30-31, 35. Well-managed nonprofit organizations—like engaged citizens—regularly strive to keep informed of legal and policy developments on issues that matter to them, and to reframe their advocacy and written materials as necessary. If it were enough for

Article III standing that a citizen or nonprofit group has documented the time it has taken to understand some new statute or regulation (or, as here, a policy notice merely reaffirming existing agency practice) and to update their work product accordingly, it would allow virtually anyone to sue over virtually any government action. Such a “generally available grievance about government ... does not state an Article III case or controversy.” *Lujan*, 504 U.S. at 573-74; accord, e.g., *Fair Elections Ohio v. Husted*, 770 F.3d 456, 460 (6th Cir. 2014) (rejecting theory of standing based on organization’s need to update its materials, and explaining that it would “eviscerate[]” constitutional requirements “if an advisor or organization can be deemed to have Article III standing merely by virtue of its efforts and expense to advise others how to comport with the law”); *Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012) (similar).

As the district court recognized, plaintiffs’ allegations of injury are materially different than those for which this Court has found Article III standing. For example, in *Centro de la Comunidad*, 868 F.3d 104, the plaintiffs challenged “a town ordinance that sought to limit the solicitation of employment by people approaching cars next to public rights-of-way.” JA 66. One plaintiff organization’s core activity was to organize day laborers

who were soliciting employment in just that fashion. To the extent the ordinance “would require the physical dispersal of laborers,” it would “impede organizing activity, one of the [plaintiff’s] primary ‘responsibilities.’” *Id.* (quoting *Connecticut Parents Union*, 8 F.4th at 174, and *Centro de la Comunidad*, 868 F.3d at 109-10). Moreover, the organization’s own personnel “face[d] the risk of ‘erroneous arrest’ while conducting ‘advocacy activities’ among the laborers.” *Id.* (quoting *Connecticut Parents Union*, 8 F.4th at 174). And, as a *consequence* of those harms, the organization had to “divert resources from other of its activities to combat the effects of the challenged ordinance.” *Id.* (quoting *Connecticut Parents Union*, 8 F.4th at 174) (alteration omitted). This Court found that those alleged harms, though they had not yet occurred, were sufficiently imminent to support a “pre-enforcement action” against the ordinance. *Centro de la Comunidad*, 868 F.3d at 110.

Similarly, this Court has recognized organizational standing to challenge government action where, for example, an organization was “deni[ed] ... a particular opportunity to express [its] views” by rejection of a parade permit it had sought, *Irish Lesbian & Gay Org.*, 143 F.3d at 649; where an organizational observer was excluded from a public hearing, *see*

*New York Civil Liberties Union*, 684 F.3d at 295; where an unprecedented interpretation of immigration law caused third parties to turn “away from public benefits programs” and toward the plaintiff’s “social service programs,” *New York v. U.S. Dep’t of Homeland Sec.*, 969 F.3d 42, 60-62 (2d Cir. 2020), *cert. dismissed*, 141 S. Ct. 1292 (2021); and where a taxi driver organization was compelled to assist its “members who face[d] summary suspension” when the City “initiated proceedings against” them, *Nnebe v. Daus*, 644 F.3d 147, 157-58 (2d Cir. 2011).<sup>6</sup> In each instance, a government actor took some action directly against the plaintiff organization or, by acting against others associated with it, imposed an involuntary material burden on the organization’s operations.

The 2019 Notice, by contrast, does nothing to make it more difficult for plaintiffs to engage in their core advocacy, outreach, and educational activities. Plaintiffs allege that the 2019 Notice has prompted them to pursue

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<sup>6</sup> See also, e.g., *Moya*, 975 F.3d at 129 (immigrants’ naturalization applications seeking disability waivers from English and civics tests, which were prepared by the plaintiff organization, were routinely denied by agency for allegedly unlawful reasons, requiring “substantial time and resources” to process revisions and further applications); *New York State Citizens’ Coal. for Children v. Poole*, 922 F.3d 69, 75 (2d Cir. 2019) (organization lost “hundreds of hours” of time “fielding ... calls” from “aggrieved foster families”).

more time-consuming strategies that they otherwise might not undertake. But the fact that they have continued to work ardently to further their goals is not an Article III injury. Just as an individual citizen cannot bring suit complaining that the government’s failure to adopt his preferred policy has necessitated costly additional advocacy, neither can an organizational plaintiff establish standing simply by alleging that it must work harder to attain its existing objectives. *See, e.g., Connecticut Citizens Def. League, Inc. v. Lamont*, 6 F.4th 439, 447 (2d Cir. 2021) (advocacy organization lacked standing to challenge a policy change where its alleged injuries—that it “diverted resources” to communicate with citizens and state officials about the policy change—were “not a departure from [its] usual activities”).

3. Though addressed by the district court (and briefed by the parties) principally through the lens of injury-in-fact, the same point can be understood in terms of causation. To support Article III, a claimed injury must not only be judicially cognizable, but also “fairly traceable to the challenged action of the defendant.” *Lujan*, 504 U.S. at 560 (citation and alterations omitted); *cf., e.g., Food & Water Watch*, 808 F.3d at 919 (asking whether the “*defendant’s conduct* causes an ‘inhibition of the organization’s daily operations’”) (emphasis added; alteration omitted). Expenditures

motivated by an advocacy group’s commitment to its mission in the face of changing agency policy are “self-inflicted” budgetary choices, not injuries that are “fairly traceable” to the defendant. *Food & Water Watch*, 808 F.3d at 919 (quoting *Clapper*, 568 U.S. at 418); *cf., e.g., National Family Planning & Reprod. Health Ass’n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) (“[E]ven if self-inflicted harm qualified as an injury[,] it would not be fairly traceable to the defendant’s challenged conduct.”).

**B. Plaintiffs’ Arguments Fail To Identify Any Cognizable Article III Injury.**

1. Plaintiffs acknowledge that Article III requires them to show that the “[2019 Notice] imposed an *involuntary material burden* on” their core activities. Br. 23 (emphasis added); *see* Br. 26, 28, 29, 32. They suggest that the 2019 Notice can be deemed to have imposed such a burden insofar as it has allegedly made their activities “significantly more time-intensive and less effective in two ways”: (1) by causing “confusion” and introducing “complexities” into the subject matter of their educational efforts, and (2) by “eliminating their ability to rely on the [2016 Rule] as an important

educational tool.” Br. 29, 33.<sup>7</sup> The district court properly rejected both rationales.

Plaintiffs plainly cannot establish standing to challenge agency action—and to seek its invalidation on various unrelated grounds, *see supra* p. 8 n.2—simply because they find the actions to be “complex” or to contribute to “confusion” among the public. However desirable it may be to have a single “clear and generally applicable standard” (Br. 16), citizens have no cognizable Article III interest in forcing the government to formulate one. Concerns about the intelligibility of federal policy are a “generally available grievance about government.” *Lujan*, 504 U.S. at 573-74.

That conclusion holds true even when an organization alleges that the consequence of confusion or complexity is that its activities have become “more difficult and time-consuming” (Br. 16). Such complaints are obviously not sufficient to establish standing for a private individual. *See Perez v. McCreary, Veselka, Bragg & Allen, P.C.*, 45 F.4th 816, 825 & n.5 (5th Cir. 2022) (reaffirming that a “state of confusion, absent more, is not a concrete

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<sup>7</sup> Plaintiffs’ passing assertion that the 2019 Notice imposed “restrictions” on “[their] ability to perform” their activities, Br. 25, 38, does not identify any direct harms inflicted by HHS, but instead appears to restate the two theories discussed above.

injury under Article III,” and collecting cases); *Ward v. National Patient Account Servs. Sols., Inc.*, 9 F.4th 357, 363 (6th Cir. 2021) (“confusion alone is not a concrete injury for Article III purposes”); *cf. Carney v. Adams*, 141 S. Ct. 493, 499 (2020) (reaffirming that a “plaintiff cannot establish standing by asserting an abstract ‘general interest common to all members of the public’”). Plaintiffs appropriately concede that, “[a]s with any other litigant,” Article III requires them to show “‘distinct and palpable’” injury to themselves. Br. 26 (quoting *Connecticut Parents Union*, 8 F.4th at 172). Standing is “not measured by the intensity of the litigant’s interest” in the subject matter, even when that interest can be demonstrated by outlays of time or money. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982).

In addition to being legally insufficient, plaintiffs’ allegations of “confusion” are also implausible on their own terms. Though HHS administers a variety of grant programs, governed by distinct statutes and regulations, each plaintiff alleges that it focuses on one distinct program—foster care services under Title IV-E of the Social Security Act, in the case of Family Equality; the Runaway and Homeless Youth Act, in the case of True Colors United; and the Older Americans Act, in the case of SAGE. The 2019

Notice, while disclaiming enforcement of certain generally applicable regulations (including § 75.300(c) and (d)), did nothing to change any other program requirements. It is unclear how the alleged existence of a “patchwork” of protections—as viewed at a distance by litigating counsel—does anything to confound the efforts of particular organizations focused on particular statutory programs for the benefit of particular members of the LGBTQ community.<sup>8</sup>

Plaintiffs’ second theory of injury—that the 2019 Notice “removed an important educational tool” on which they could rely (Br. 24)—fails to add anything of substance. The “tool” to which they refer is the 2016 Rule itself, which plaintiffs favor because it imposed a “clear and generally applicable standard” in place of a “patchwork of nondiscrimination requirements” (Br. 1, 2). Plaintiffs’ second theory thus simply restates in different language

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<sup>8</sup> It is also not apparent that plaintiffs’ “patchwork” criticism is best directed at HHS. “[A]n administrative agency [is] a ‘creature of statute, having no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.’” *Natural Res. Def. Council v. National Highway Traffic Safety Admin.*, 894 F.3d 95, 108 (2d Cir. 2018). As plaintiffs emphasize, “there are no federal statutes providing ... universal protections in the grants program context against discrimination on the basis of religion or sex, including sexual orientation or gender identity.” Br. 5.

their mistaken assertion that they can establish standing based upon the “complexity” of federal regulation or alleged “confusion” about its contents.

More generally, in seeking to recast substantive legal requirements as a “tool” for advocacy, plaintiffs misunderstand the purpose of agency regulations. Statutes and rules exist primarily to regulate primary behavior and to allocate substantive benefits and burdens, not to serve as training materials for private advocacy. A plaintiff organization’s interest in simple, effective communication does not allow it to sue about any law or agency action that the organization disfavors and believes to be unnecessarily complicated as compared to some favored alternative.

2. Plaintiffs are mistaken in suggesting (Br. 3) that they have suffered injuries “nearly identical to those” inflicted in *New York v. Department of Homeland Sec.*, 969 F.3d 42. In that case, DHS issued a rule that departed from decades of precedent by interpreting the “public charge” statutory ground of inadmissibility so as to prevent aliens from adjusting status if, *inter alia*, they would be expected to seek “supplemental non-cash benefits” such as Medicaid or food stamps. *Id.* at 79; *see id.* at 54-57. That rule had numerous real-world effects, including by “increas[ing] demand” for private social services as aliens “turn[ed] away from public benefits programs.” *Id.*

at 61. DHS's actions thus visited the kind of "involuntary material burden" necessary for standing under this Court's precedent. *Connecticut Parents Union*, 8 F.4th at 173. Here, by contrast, the 2019 Notice has had no involuntary effect on plaintiffs' activities. Plaintiffs have made no allegation of increased external demand for their services. Nor could they—the 2019 Notice simply crystallized agency practice and reaffirmed the status quo, under which HHS has enforced existing statutory and program-specific regulatory protections but not the 2016 Rule.

As plaintiffs note (Br. 32), *New York v. DHS* also recited other allegations of injury made by various plaintiffs in that case, such as one organization's assertion that "[t]he complexities of the Rule required [it] to change its educational outreach from group sessions to time-intensive individual meetings," 969 F.3d at 61, and another's assertion that it "conducted almost forty workshops for community members devoted exclusively to the Rule," *id.* But this Court did not separately analyze those allegations, much less conclude that each would have been independently sufficient for standing. The Court did not need to; when "multiple parties seek the same relief, 'the presence of one party with standing is sufficient'" to satisfy Article III. *Centro de la Comunidad*, 868 F.3d at 109. Contrary to

plaintiffs’ suggestion, the Court did not squarely hold that the “complexities” of agency policy, or an organization’s voluntary “diversion of resources” from one program to another, is automatically sufficient for standing. As discussed, if an organization could sustain Article III injury solely by deciding to reallocate its resources in response to the latest policy announcement by an agency, it is not apparent how any organization willing to make “just a dash of volitional counter-expenditures” would ever lack standing to sue. *PETA*, 797 F.3d at 1103 (Millett, J., dubitante).<sup>9</sup>

Plaintiffs’ suggestion that their injuries are like those in *Centro de la Comunidad*, in that their work has also allegedly been made “less effective” or “more costly” (Br. 24, 37-38), similarly overlooks fundamental differences

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<sup>9</sup> Where (unlike here) the defendant does act upon a plaintiff’s activities—*e.g.*, by denying the plaintiff’s parade permit, excluding its observers from its meetings, refusing its requests for information made disclosable by statute, or the like—the fact that a plaintiff responds by making additional or different expenditures may be relevant in confirming that the alleged harm caused by the defendant’s conduct was real, not fanciful. *Cf. Food & Water Watch*, 808 F.3d at 919 (“[W]e ask, *first*, whether the agency’s action or omission to act injured the [organization] ... and, *second*, whether the organization used its resources to counteract that harm.”) (emphases added) (quoting *PETA*, 797 F.3d at 1094). In that circumstance, a “*consequent* drain on the organization’s resources” is corroborating evidence of the injury to the organization; but it is not the injury itself. *Havens Realty*, 455 U.S. at 379 (emphasis added). Otherwise, organizations or citizens could always establish standing to challenge government action simply by “diverting resources” (Br. 24) to oppose it.

between the cases. In *Centro de la Comunidad*, the challenged action—an ordinance expressly designed to disperse roadside labor markets—was reasonably expected to have a direct and concrete effect on the plaintiff’s organizational operations, which depended on meeting with day laborers where they assembled. This case, by contrast, involves a policy notice pertaining to the legal regime that governs the subject matter of plaintiffs’ advocacy, without imposing any burdens on plaintiffs’ operations at all. Again, the bare fact that the 2019 Notice “touch[es] an[] issue within the scope of [plaintiffs’] mission,” and that plaintiffs have “expend[ed] resources to oppose” it, is insufficient under precedent. *Connecticut Parents Union*, 8 F.4th at 173.

Plaintiffs are also incorrect (Br. 24) that the district court’s application of this Court’s precedent would render it inconsistent with *Havens Realty*. “The [Supreme] Court [in *Havens Realty*] did not base standing on the diversion of resources from one program to another, but rather on the alleged injury that the defendants’ actions themselves had inflicted upon the organization’s programs.” *Fair Emp’t Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994). Indeed, the challengers in *Havens Realty* were not suing the government to seek greater

enforcement of the law against private actors; they were suing the discriminatory private actors themselves. *See also, e.g., Olsen v. Stark Homes, Inc.*, 759 F.3d 140, 158 (2d Cir. 2014) (similar); *Ragin v. Harry Macklow Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993). Here, by contrast, plaintiffs sue HHS not because it has allegedly engaged in discrimination, but because they believe HHS's enforcement of the 2016 Rule (and rescission of the 2019 Notice) would help them attain their organizational goals. But “[f]rustration of an organization’s objectives is the type of abstract concern that does not impart standing.” *Center for Law & Educ.*, 396 F.3d at 1161-62 (quoting *National Treasury Emps. Union*, 101 F.3d at 1429).

Finally, plaintiffs’ suggestion that the 2019 Notice “gives HHS grant recipients a license to discriminate” (Br. 10; *see* Br. 34) is both baseless and irrelevant. It is baseless because federal grant-making programs remain subject to numerous nondiscrimination requirements imposed by statute or regulation, which HHS has continued (and will continue) to enforce. *See, e.g., supra* pp. 2-3. And it is irrelevant because this assertion cannot serve as a basis for standing, given that plaintiffs have made no attempt to demonstrate that they are entitled to litigate on behalf of beneficiaries of HHS grant programs. *See, e.g., Mid-Hudson Catskill Rural Migrant Ministry, Inc. v.*

*Fine Host Corp.*, 418 F.3d 168, 174 (2d Cir. 2005) (discussing third-party standing requirements).

## CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because it contains 7,163 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in CenturyExpd BT 14-point font, a proportionally spaced typeface.

*s/ Jeffrey E. Sandberg*  
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## **CERTIFICATE OF SERVICE**

I hereby certify that on November 28, 2022, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

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