22-1174

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

The District Court's dismissal for lack of standing should be reversed. Defendants' primary argument to the contrary is that the 2019 Notice of Nonenforcement—which announced that HHS would no longer enforce the 2016 Grants Rule's nondiscrimination protections—did not impose an involuntary material burden on Plaintiffs' core activities.

But that assertion mischaracterizes Plaintiffs' allegations. Prior to the 2019 Notice, Plaintiffs' core activities included (1) educating LGBTQ communities on their rights to receive—and HHS grant recipients on their obligations to provide—nondiscriminatory services and (2) training grant recipients on *how* to provide such services. The first activity is significantly more time-consuming because of the 2019 Notice, which forces Plaintiffs to teach a patchwork of protections, rather than the single federal standard provided by the 2016 Grants Rule. Likewise, Plaintiffs are less effective at the second activity because they can no longer rely on the 2016 Grants Rule to motivate providers to accept Plaintiffs' trainings. Such injuries are neither self-imposed nor generally available: they could be sustained only by entities who previously engaged in education work that is similarly affected by the Notice.

Defendants' efforts to distinguish *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982), and this Court's precedents likewise fail because Defendants largely rely on the same misunderstanding that Plaintiffs—unlike those in prior cases—have not identified any impairments to their activities. That is incorrect. Indeed, Plaintiffs' injuries are strikingly similar to those previously recognized by this Court. For example, as in *New York v. Department of Homeland Security*, Plaintiffs have standing because the "complexities of [the challenged action] required [Plaintiffs] to change [their] educational outreach" in a "time-intensive" manner. 969 F.3d 42, 61 (2d Cir. 2020).

In response, Defendants are forced to misread that case, arguing that *New York v. DHS* did not find standing based on changes to an organization's educational work. But that reading is precluded by *Connecticut Parents Union v. Russell-Tucker*, in which this Court recognized that the plaintiff in *New York v. DHS* suffered an "involuntary material burden" because the challenged rule "necessitated costly changes to its education programs." 8 F.4th 167, 174 n. 26 (2d Cir. 2021). The Court should therefore reject these arguments and the others discussed below and reverse the District Court's dismissal.

ARGUMENT

As explained in our opening brief, Pls. Br. 26-36, Plaintiffs' allegations—which the Court must "accept[] as true" at this stage, *Katz v. Donna Karan Co., LLC*, 872 F.3d 114, 118 (2d Cir. 2017)—demonstrate an injury-in-fact under the precedents of this Court and the Supreme Court. Plaintiffs have shown that the 2019 Notice imposes an "involuntary material burden on [their] established core activities." *Conn. Parents Union*, 8 F.4th at 173; *Havens Realty*, 455 U.S. at 379 (organization had standing where the challenged act "perceptibly impaired" the organization's activities "with [a] consequent drain on . . . resources").[1] Such a burden exists here because—as discussed in detail below, *infra* 4-10—the 2019 Notice action "adversely affects . . . the activities [Plaintiffs] regularly conducted (prior to the challenged act)."

[1] Defendants spill substantial ink on the 'involuntary material burden' standard, explaining that abstract social interests and self-inflicted injuries—such as expenditures incurred at an organization's own initiative—are insufficient to establish standing. Defs. Br. 15-18; 20; 31 n.9. Defendants need not have devoted so much of their brief to this discussion since Plaintiffs do not contend otherwise. Indeed, Plaintiffs' central argument is that the 2019 Notice imposes an involuntary material burden on their activities—with a consequent drain of resources—that was not self-inflicted.

Conn. Parents Union, 8 F.4th at 173-74. None of Defendants' arguments to the contrary has merit.

A. Plaintiffs' Injuries Are Not Self-Inflicted, Generally Available, Or Implausible.

Throughout their brief, Defendants repeatedly mischaracterize Plaintiffs' allegations, suggesting in turn that Plaintiffs' injuries are self-inflicted, are grievances shared by the broader public, and are implausible on their own terms. Each of these arguments ignores the specifics of Plaintiffs' actual allegations.

1. The first half of Defendants' brief echoes the District Court's unsupported conclusion that "'Plaintiffs do not identify any restrictions on [their] ability to perform the core activities in which they engage." Defs. Br. 19 (quoting the District Court at JA68); *see also id.* at 10 (similar); *id.* at 23-24 (similar). In Defendants' telling, any resources expended by Plaintiffs were self-inflicted injuries, rather than resources expended to combat the effects of the Notice. *Id.* at 19 (claiming that Plaintiffs voluntarily "undert[ook] additional . . . education activities").

Defendants are demonstrably incorrect on this count. Plaintiffs have made specific and detailed allegations that the Notice "impairs[]

and frustrates . . . [their] activities," JA40 (¶77); JA42 (¶82); JA46 (¶90), resulting in two injuries.

First, as in *New York v. DHS*, the Notice makes Plaintiffs' education activities more "time-intensive" by making the subject of that work significantly more "complex[]." 969 F.3d at 61. As part of their "daily operations," each Plaintiff has engaged in education to help advance its mission of ensuring that beneficiaries of HHS-funded services can access those services in a nondiscriminatory manner. JA16-17 (¶¶9-10); JA18 (¶¶12-13); JA19-20 (¶¶15-16). By educating beneficiaries on their rights to nondiscriminatory services and by training providers on their legal obligations to provide such services, Plaintiffs increase the likelihood that HHS grant programs are safe and inclusive. *Id.*

Prior to the Notice, these efforts were straightforward because Plaintiffs educated their constituents on a single federal standard set forth in the 2016 Rule. By not enforcing that standard, the 2019 Notice creates a complex landscape in which the only clearly enforceable protections are a "patchwork of federal and state statutory and regulatory protections, which vary from program to program and state to state." JA40 (¶78); JA44 (¶86) (same). As a result, educating

constituents on those protections is now more time-consuming, requiring Plaintiffs to divert significant resources to continue their work. *See* Pls. Br. 15-18 (describing these efforts in detail and citing JA40-41 (¶¶79-80); JA44 (¶¶86-87)). The Notice therefore imposes an "involuntary material burden" on Plaintiffs because it "necessitated costly changes to [their] education programs." *Conn. Parents Union*, 8 F.4th at 174 n. 26; *see also Moya v. Dep't of Homeland Sec.*, 975 F.3d 120, 129-30 (2d Cir. 2020) (nonprofit immigration organization had standing to challenge a rule that required it to spend "twice as much time servicing clients" to "overcome[] . . . discriminatory barriers to naturalization").

Second, Plaintiffs "face increased difficulty" in their education work because the Notice prevents them from relying on the 2016 Rule as a training tool. *Centro de la Comunidad Hispana v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017) (organization had standing where it "face[d] increased difficulty" meeting with and organizing day laborers as a result of the challenged ordinance).[2] In addition to teaching service

[2] Defendants assert that this injury is legally insufficient because regulations "exist primarily to regulate . . . , not to serve as training materials." Defs. Br. 29. This unsupported assertion is irrelevant to the legal test for Article III standing. Under that test, the critical inquiry is

providers the contours of their legal obligations, Plaintiffs also work to persuade service providers that it is *important* not to discriminate and to implement nondiscriminatory practices through their programs via trainings on *how* to provide culturally competent, inclusive services. JA18 (¶13); JA19-20 (¶16). Because the 2016 Rule imposes a clear legal obligation to not discriminate, True Colors United and SAGE both previously relied on the 2016 Rule to encourage providers to not only avoid direct discrimination, but also to accept Plaintiffs' trainings on how to offer culturally competent services that "accommodate . . . [the] unique needs" of LGBTQ program beneficiaries. JA47 (¶93).[3]

With respect to the former, True Colors United "regularly relied upon the 2016 Grants Rule to educate service providers on the importance of not discriminating against LGBTQ youth." JA43 (¶83); JA19 (¶14). Likewise, SAGE "relied" on the 2016 Rule "to help ensure

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whether Plaintiffs have established an involuntary material burden on their activities. Plaintiffs have shown that burden.

[3] Defendants wrongly assert that this second injury is merely a restatement of the first, suggesting that Plaintiffs relied on the 2016 Rule as a tool "because it imposed a clear and generally applicable standard." Defs. Br. 28-29. But, as just explained, Plaintiffs used the Rule as a tool for other reasons: *i.e.*, to persuade grant recipients to provide non-discriminatory services and to accept training on how to do so. The two injuries are therefore distinct.

that service providers who receive funds under the Older Americans Act [did] not discriminate against LGBTQ older people." JA20 (¶17).

As to the latter, True Colors United used the 2016 Rule's prohibition against discrimination to prompt participation "in interactive question-and-answer sessions [that] help[ed] providers understand what discrimination look[ed] like in practice." JA43 (¶83). SAGE similarly relied on the 2016 Rule to encourage providers to follow the organization's "guidance on how aging services agencies can provide inclusive services for LGBT adults." JA47 (¶93).

As Plaintiffs allege, these efforts are "less effective" as a direct result of the Notice, which announced that HHS would not enforce the 2016 Rule under any circumstances, thereby removing it as a "tool." JA42-43 (¶83). Where the 2016 Rule previously threatened consequences for discrimination, the 2019 Notice now "serves as a signal to service providers that they may discriminate with . . . impunity." JA46 (¶91); JA43 (¶83). And where the 2016 Rule helped Plaintiffs to persuade service providers to learn how to make their services inclusive and welcoming, the 2019 Notice now "signal[s] that providers do not need to

improve their services for LGBTQ youth," JA43 (¶83), nor "accommodate LGBTQ older people's unique needs," JA47 (¶93).[4]

In response, both True Colors United and SAGE have been forced to divert significant resources towards "obtain[ing] state level protections" in order to "replace the defunct federal standard[]" as a tool. JA43 (¶84); JA46 (¶91). Doing so is necessary to encourage service providers to place the same level of importance on providing nondiscriminatory, inclusive services as they previously did when the 2016 Rule was enforceable.

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[4] Defendants suggest that HHS grant recipients do not discriminate since they "remain subject to numerous nondiscrimination requirements . . . , which HHS has continued (and will continue) to enforce." Defs. Br. 33. That is incorrect. As explained in Plaintiffs' opening brief, the requirements that HHS is currently enforcing have significant gaps in protection. Pls. Br. 5-7. For example, aside from the non-enforced 2016 Rule, there are no federal statutory or regulatory protections against SOGI or religious discrimination in HHS-funded foster care/adoption programs. *Id.* at 5-6. Further, the danger of discrimination is not hypothetical. In addition to the harms that are well documented in Plaintiffs' complaint, JA33-34 (¶¶59-62), discriminatory practices in the frequently appear in the news. *See, e.g.*, Emily Goodykoontz, *Faith Based Anchorage Women's Shelter Sues City Over Changes to LGBTQ Anti-Discrimination Law*, ANCHORAGE DAILY NEWS (July 4, 2021), https://tinyurl.com/48fze27y (homeless shelter for women refused to admit transgender women); Christine Hauser, *Tennessee Couple Says Adoption Agency Turned Them Away for Being Jewish*, NEW YORK TIMES (Jan. 22, 2022), https://tinyurl.com/2smhwn3w.

Because the Notice makes Plaintiffs' various education efforts both more time-consuming and less effective, it directly impairs those activities. *New York v. DHS*, 969 F.3d at 61; *Centro*, 868 F.3d at 110. Further, the resources that Plaintiffs continue to expend in response to these impairments are "reasonably necessary to continue an established core activity." *Conn. Parents Union*, 8 F.4th at 174. Without expending greater staff time, Plaintiffs would not be able to continue educating their constituents on their legal rights and obligations. *See* JA40 (¶¶77-78); JA44-45 (¶¶86-87). Likewise, to remain effective in their efforts to persuade service providers not to discriminate and to teach them how to do so, Plaintiffs must continue to expend significant staff time to replace the 2016 Rule as a training tool. JA42-44 (¶¶83-85); JA46 (¶91). Such expenses are therefore not self-inflicted.[5]

[5] For the same reasons, Defendants are wrong to suggest that Plaintiffs do not satisfy Article III's causation prong because Plaintiffs' injuries are not caused by the Notice. *See* Defs. Br. 24-25. But for the Notice, Plaintiffs' preexisting educational work could continue in the same vein as before, without the added time and expense required by the Notice. Plaintiffs could much more efficiently educate constituents on their rights and obligations (by teaching a single federal standard) and could likewise rely on the 2016 Rule as a training tool.

2. Defendants further mischaracterize Plaintiffs' first injury as "challeng[ing] agency action . . . simply because they find the actions to be complex." Defs. Br. 26. Defendants argue that such confusion over the law is a "generally available grievance" that courts have rejected as insufficient for standing purposes. *Id.* at 26-27.

This is a misstatement of Plaintiffs' allegations. Plaintiffs are not injured by the Notice simply because it makes the *legal landscape* more complex. Rather, Plaintiffs are injured because the Notice makes the *subject of Plaintiffs' pre-existing core education work* more complex, thereby requiring Plaintiffs to make difficult and time-consuming changes to their education programs. *Supra* 5-6. This injury is *not* a generally available grievance: it could be sustained only by entities that were previously engaged in specific education work that was made more time-consuming by the challenged action.[6]

[6] Defendants' fears that a finding of standing here would result in a slippery slope—allowing "virtually anyone to sue over virtually any government action"—are therefore misplaced. Defs. Br. at 21. Accordingly, there is nothing controversial or alarming about finding standing where the challenged action requires costly changes to an organization's education programs. Indeed, many courts—including this one—have done so. *Infra* 16-19 (discussing *New York v. DHS* and other cases).

The out-of-circuit cases cited by Defendants, which rejected standing based on mere confusion, are therefore inapposite. For example, in *Perez v. McCreary, Veselka, Bragg, & Allen*, the Fifth Circuit found that an individual lacked standing to challenge a debt collection letter based on the theory that the letter "misled and confused her about the enforceability of her debt." 45 F.4th 816, 820 (5th Cir. 2022). Emphasizing the need for "tangible harm," the court held that "the state of confusion, absent more, is not a concrete injury." *Id.* at 825. *See also Ward v. Nat'l Patient Acct. Servs. Sols., Inc.*, 9 F.4th 357, 363 (6th Cir. 2021) ("confusion *alone* is not a concrete injury" (emphasis added)).

In contrast, Plaintiffs have alleged a "tangible harm" beyond "a state of confusion": the 2019 Notice made Plaintiffs' preexisting education work more time-consuming and less effective, resulting in a diversion of Plaintiffs' resources. *Supra* 4-10.[7] Indeed, in those cases with allegations similar to Plaintiffs', many courts—including this

[7] Defendants nevertheless assert that *Perez* and *Ward* stand for the proposition that confusion cannot be the basis for standing "even when the organization alleges that the consequence of confusion or complexity is that its activities have become more difficult and time-consuming." Defs. Br. 26. Not so. Neither case addresses whether such circumstances give rise to standing.

Court—have found standing. *See infra* 16-19 (citing *New York v. DHS* and other cases).

3. Defendants also argue that Plaintiffs' first injury is "implausible on its own terms" because the Notice does not actually make the subject of Plaintiffs' education work more complicated. Defs. Br. 27. Noting that each Plaintiff organization "focuses on one distinct program," Defendants question how a patchwork of protections across programs "does anything to confound [Plaintiffs'] efforts[.]" *Id.* at 27-28.

That too is incorrect. As Plaintiffs explained in the Complaint, protections vary even within one federal program because, in "the absence of [the 2016 Rule], grant recipients are subject to a patchwork of . . . state statutory and regulatory protections, which vary from . . . state to state." JA40 (¶78); JA44 (¶86) (same). This variation in state-level protections exists because the funding for many HHS programs—including those that concern Plaintiffs—flows through states, which may or may not impose their own nondiscrimination protections on grant recipients. Pls. Br. 7.

Thus, Plaintiffs must "respond to the confusion the Notice has caused" by spending significant staff time to "understand the anti-

discrimination protections left in place;" to understand "the impacts on youths and families;" to "creat[e] and disseminat[e] educational materials" for providers and beneficiaries; and to brief partner organizations (who in turn distribute the information to providers and beneficiaries). JA40-41 (¶¶79-80); JA44 (¶87).[8] Defendants' argument that Plaintiffs' first injury is implausible therefore fails.

B. Plaintiffs' Injuries Fall Within This Court's Precedents That Find Standing.

Plaintiffs' injuries are also on all fours with those recognized in this Court's prior cases, as set forth in our opening brief. *See* Pls. Br. 32-33, 37-38, 41. Defendants' efforts to distinguish this body of precedent are flawed largely because they rely on the various mischaracterizations of Plaintiffs' allegations discussed above.

For instance, Defendants summarize a handful of this Court's organizational standing cases and note (correctly) that organizational

[8] True Colors United is also forced to address particularly acute confusion when training providers under the Runaway and Homeless Youth Act. As explained in Plaintiffs' opening brief, grant recipients under that program have received "strong signal[s] that service providers need not comply" with program-specific nondiscrimination requirements—a message that is "reinforced by the Notice of Nonenforcement." Pls. Br. 31 n.6 (citing JA44 (¶¶86-87)). Defendants do not refute this.

plaintiffs have demonstrated standing where the challenged action "imposed an involuntary material burden on the organization's operations." Defs. Br. 21-23 (describing *Centro*, *New York v. DHS*, *Nnebe v. Daus*, and *Moya*, among others). They then argue that Plaintiffs' injuries are distinguishable from the foregoing cases because "the 2019 Notice, by contrast, does nothing to make it more difficult for plaintiffs to engage in their core . . . educational activities." *Id.*

But as discussed above, that characterization is not accurate: Plaintiffs have alleged that the Notice makes Plaintiffs' pre-existing educational work more time-consuming (by making the subject of their work more complicated) and less effective (by removing an important training tool). *Supra* pages 4-10. Defendants offer no analysis of Plaintiffs' allegations to support their conclusion to the contrary. Defs. Br. at 23.[9]

[9] For similar reasons, Plaintiffs' injuries are also consistent with the various D.C. Circuit cases cited by Defendants, which "distinguish[] 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). *See also* Defs Br. at 17-18 (collecting similar cases). As noted above, Plaintiffs *have* alleged impediments to their activities.

Defendants are likewise unpersuasive in their attempts to specifically distinguish this case from *Centro* and *New York v. DHS*. In *Centro*, the organizational plaintiffs were injured because the challenged ordinance dispersed day laborers and therefore made it more "difficult[]" and "costly" for the organization to meet with those laborers. 868 F.3d at 110. Defendants repeat their argument that Plaintiffs' allegations are "fundamental[ly] differen[t]" from *Centro* because the 2019 Notice does not "impos[e] any burdens on plaintiffs' operations at all." Defs. Br. 32. But this summary assertion is not supported by any discussion of Plaintiffs' allegations. *Id.* Nor could Defendants have done so. Plaintiffs' allegations demonstrate that Plaintiffs, like those in *Centro*, "face increased difficulty" and costs in their educational work as a result of the 2019 Notice. *Compare Centro*, 868 F.3d at 110, *with supra* 4-10.

As for *New York v. DHS*, Defendants are forced to misread that case's holding to distinguish it. There, this Court found that three organizations—Catholic Charities, Make the Road, and African Services Committee—each had standing to challenge a government rulemaking. 969 F.3d at 61. In so concluding, the Court rejected the government's argument that the "Organizations [had] only shown harm to their

abstract social interests," concluding that "the Organizations [made] clear that the Rule required a significant diversion of resources." *Id.*

The Court then specified the resources diverted by each organization. For Catholic Charities, the "complexities of the Rule required [the organization] to change its educational outreach from group sessions to time-intensive individual meetings and to institute a series of evening phone banks." 969 F.3d at 61. Likewise, Make the Road "conducted almost forty workshops for community members devoted exclusively to the Rule." *Id.* The African Services Committee for its part "fund[ed] a campaign of radio-based public service announcements to disseminate information about the Rule and [] documented an increased demand on its social service programs[.]" *Id.* Because the "Organizations . . . expended significant resources to mitigate the Rule's impact on those they serve," the Court found they had all suffered "a perceptible opportunity cost that suffices to confer standing." *Id.*

Just so here. Catholic Charities' injuries in *New York v. DHS* are particularly analogous to Plaintiffs' allegations. In both instances, the "complexities" of the challenged action required "time intensive" changes

to preexisting educational work with communities impacted by the policy change. *Compare New York v. DHS,* 969 F.3d at 61, *with supra* 5-6.

To overcome that similarity, Defendants assert that the *New York v. DHS* opinion merely recited Catholic Charities' allegations without concluding that they were sufficient for standing. Defs. Br. 30. In Defendants' telling, this Court instead found standing based solely on the African Services Committee's allegations regarding an increased demand for their social services programs. *Id.* at 29-30.

That is incorrect. As the decision's language makes clear, the Court found that all three organizations had standing. Every aspect of the Court's reasoning refers to all three "Organizations," including the holding that the "Organizations . . . diverted resources that . . . suffice[] to confer standing." *New York v. DHS*, 969 F.3d at 61. With respect to Catholic Charities, this conclusion was based on "time intensive" changes to its educational outreach work. *See id.* Conversely, there is nothing in the Court's language to suggest that the African Services Committee's injuries were somehow distinct from—or more persuasive than—the harms sustained by the other two organizations.

This Court has subsequently confirmed this interpretation of *New York v. DHS*. In *Connecticut Parents Union*, the Court cited approvingly to *New York v. DHS* as a case in which an organization suffered an involuntary material burden because the challenged rule "necessitated costly changes to its education program." 8 F.4th at 174 n.26.

This Court's reasoning in *New York v. DHS* and *Connecticut Parents Union* is also consistent with precedents in other circuits, which have routinely recognized standing when the challenged action rendered an organization's educational work more time-consuming. *See, e.g.*, *OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (organization had standing based on extra time spent educating voters about a new voting law); *Northeast Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016) (organization was injured by a new law that required it to "overhaul" and "revise its voter-education and get-out-the-vote programs"); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (NAACP had standing to challenge a photo ID law based on time spent educating voters about the new requirements); *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165-66 (11th Cir. 2008) (finding standing because organizations had "to divert personnel and

time to educating volunteers and voters on compliance with [new voting law][.]").[10]

Defendants' position ultimately boils down to their view that involuntary changes to education programs—taken in response to rules that complicate the subject of those programs—cannot constitute an involuntary material burden. Defs. Br. 26 ("Plaintiffs plainly cannot establish standing to challenge agency action . . . simply because they find the actions to be 'complex' . . . even when [they] allege[] that the consequence of . . . complexity is that [their] activities have become more 'difficult and time consuming.'"). But Defendants offer no meaningful distinction between the impairment of education activities and the impairment of other activities (such as meeting with day laborers) that they freely acknowledge confers standing. In any event, Defendants'

[10] Although Defendants identify two cases that appear to come to the opposite conclusion, Defs. Br. 21, each is distinguishable. Unlike Plaintiffs in this case, the organization in *Lane v. Holder* alleged that it spent time educating members on a new gun law, but did not allege that the law impaired *preexisting* education work. 703 F.3d 668, 675 (4th Cir. 2012). As for *Fair Elections Ohio v. Husted*, 770 F.3d 456 (6th Cir. 2014), the Sixth Circuit itself noted the limits of that decision just two years later in *Northeast Ohio Coalition*, 837 F.3d at 624 (mentioned just above), which found standing based on an "overhaul" of the plaintiff's education program.

position is foreclosed by the law of this Court, which unequivocally recognizes that involuntary costly changes to education programs are cognizable injuries. *Conn. Parents Union*, 8 F.4th at 174 n.26; *New York v. DHS*, 969 F.3d at 61.

C. The District Court Erred in Concluding that Plaintiffs' Activities Were Not Impaired Because Plaintiffs Still Engage in Those Activities.

As Plaintiffs explained in their first brief, the Supreme Court's decision in *Havens Realty*—along with this Court's subsequent precedent—precludes the District Court's conclusion that Plaintiffs' activities were not impaired by the Notice "since each organization plainly continues in the same educational activities . . . it previously undertook." Pls. Br. 40 (quoting the District Court at JA69).

This is so because—as *Havens Realty* and a myriad of this Court's cases make clear—a plaintiff organization need not cease its activities altogether to demonstrate that its activities have been impaired. Pls. Br. 40-41 (citing *Havens Realty*, 455 U.S. at 379, and various Second Circuit cases). In fact, Plaintiffs explained that this Court has already explicitly rejected the same argument adopted by the District Court in *Moya*. Pls. Br. 40 (citing 475 F.3d at 130).

While Defendants nominally respond that the District Court's decision is consistent with *Havens Realty*, they make no attempt to defend the District Court's position that Plaintiffs lack standing because they continue to engage in the same activities. *See* Defs Br. 32-33. Instead, Defendants attempt to distinguish Plaintiffs' injuries from those in *Havens Realty* on two other grounds. *Id.* Neither has merit.

First, Defendants argue that the plaintiff organization in *Havens Realty* sued discriminatory private actors, whereas in this case Plaintiffs have sued the government to obtain greater enforcement of nondiscrimination laws against private actors. *Id.* This argument misses the point that in *Havens Realty* the Supreme Court found standing both on behalf of an individual tester who experienced discrimination and, separately, on behalf of a fair housing organization. *Havens Realty*, 455 U.S. at 374, 379. The fair housing organization made no allegations that it was a victim of discrimination, but rather, that its work to help low- and moderate-income people find housing was made more difficult by racial discrimination. *Id.* at 379. Just as in *Havens Realty*, the Plaintiff organizations' work to help LGBTQ people access a variety of HHS-funded services is made more difficult by the 2019

Notice's abandonment of nondiscrimination protections. Defendants do not explain why the distinction of whether the Defendant is actively discriminating or failing to enforce nondiscrimination requirements is significant. Indeed, they cannot, since the nature of the defendant is irrelevant to the critical inquiry for organizational standing: *i.e.*, whether Plaintiffs have demonstrated an involuntary material burden on their activities.

Second, Defendants suggest that the Plaintiffs here—unlike those in *Havens Realty*—have alleged only a frustration of their objectives. Defs. Br. 33. This argument is a reprise of earlier assertions that the 2019 Notice does not impair Plaintiffs' activities, and it fails for the reasons discussed above. *Supra* 4-10.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the case remanded for further proceedings.

Date: December 23, 2022

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CERTIFICATE OF COMPLIANCE

This filing complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32.1(a)(4)(B) because, excluding parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 4619 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared using Microsoft Word in Century Schoolbook font, in a size measuring no less than 14 points.

Dated: December 23, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December 2022, I electronically served a copy of the foregoing document on the following counsel of record via CM/ECF, in accordance with Local Rule 25.1(h)(2):

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