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

BRIEF FOR PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Family Equality is a non-profit entity and has no parent corporation. No publicly owned corporation owns 10% or more of the stock of Family Equality.

True Colors United, Inc. is a non-profit entity and has no parent corporation. No publicly owned corporation owns 10% or more of the stock of True Colors United, Inc.

Services and Advocacy for GLBT Elders ("SAGE") is a non-profit entity and has no parent corporation. No publicly owned corporation owns 10% or more of the stock of SAGE.

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INTRODUCTION

The U.S. Department of Health and Human Services ("HHS") is the largest social service grant-making agency in the United States. HHS grant programs award approximately $500 billion annually to recipients to provide services for a wide variety of vulnerable populations, including children in foster care, their families, youth experiencing homelessness, and older people who rely on social services to age with dignity.

In 2016, HHS adopted rules that established generally applicable prohibitions on discrimination in all of its grant programs, replacing a patchwork of nondiscrimination requirements that had significant gaps in protection. Under the 2016 Rule, participants in all HHS Grant programs were protected from discrimination on the basis of age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Three years later, in 2019, HHS abruptly reversed course and abandoned its prohibition on discrimination through a Notice of Nonenforcement ("Notice") that announced—without providing an opportunity for comment or a reasoned explanation—that the agency would no longer enforce the regulatory nondiscrimination protections with respect to any grant recipients. At the same time, the agency

proposed a rulemaking that would permanently rescind those regulatory protections and thus return to the prior patchwork of protections.

Plaintiffs Family Equality, True Colors United, and Services and Advocacy for GLBT Elders ("SAGE"), challenge—pursuant to the Administrative Procedure Act ("APA")—the 2019 Notice issued by HHS determining not to enforce the generally applicable regulatory nondiscrimination requirements for its grant-funded services. Each plaintiff organization works with and on behalf of vulnerable populations receiving support from HHS grant-funded services. The district court dismissed the suit on the ground that plaintiffs had not adequately alleged standing.

That decision is at odds with this Court's precedent. Plaintiffs made detailed allegations as to how the Notice "necessitated costly changes to [their] education programs." *Conn. Parents Union v. Russell-Tucker*, 8 F.4th 167, 174 n. 26 (2d Cir. 2021) (citing *New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 60-61 (2d Cir. 2020)). Specifically, because the Notice eliminates a clear and generally applicable standard of nondiscrimination—leaving in place a complex hodge-podge of limited protections—Plaintiffs must spend significantly

more time on their preexisting efforts to educate HHS grant recipients (on their legal obligations to provide nondiscriminatory services) and program beneficiaries (on their rights to receive the same). The Notice also prevents Plaintiffs from relying on the 2016 nondiscrimination protections as an educational tool and removes an incentive for providers to accept nondiscrimination trainings offered by Plaintiffs, making Plaintiffs' work less effective.

These injuries are nearly identical to those recognized as cognizable by this Court in *New York v. U.S. Department of Homeland Security*. 969 F.3d at 61 (organization was injured where the "complexities of the [challenged] Rule" made its educational outreach more "time-intensive"); *see also Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017) (organization was injured where it "face[d] increased difficulty" providing its services to day laborers as a result of the challenged ordinance). The district court's reasoning to the contrary was grounded in its misapplication of this Court's precedent and is otherwise precluded by the Supreme Court's decision in *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982).

JURISDICTION

Plaintiffs invoked the jurisdiction of the District Court pursuant to 28 U.S.C. § 1331, raising claims under the APA, 5 U.S.C. §§ 701-706. Joint Appendix ("JA") JA13. The District Court (Vyskocil, J.) dismissed the complaint on the ground that Plaintiffs lacked Article III standing. JA59-69. Plaintiffs filed a timely notice of appeal on May 27, 2022. JA71. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

QUESTION PRESENTED FOR REVIEW

Whether, under *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982), and this Court's precedent, Plaintiffs have standing to challenge HHS's Notice of Nonenforcement.

STATEMENT OF THE CASE

A. Course of the Proceedings Below

Plaintiffs challenged the Notice of Nonenforcement under the APA in the United States District Court for the Southern District of New York. Defendants moved to dismiss, arguing that Plaintiffs lacked standing. Judge Vyskocil granted Defendants' motion, and Plaintiffs timely appealed.

B. Legal Background

1. The Pre-2016 Legal Landscape

Prior to 2016, only a smattering of federal and state prohibitions provided explicit protections for the beneficiaries of and participants in HHS grant-funded programs against discrimination on the basis of religion, sex, sexual orientation, or gender identity. Although all federal grant programs are subject to generally applicable statutes that bar discrimination on the basis of race, color, national origin, disability, and age,[1] there are no federal statutes providing such universal protections in the grants program context against discrimination on the basis of religion or sex, including sexual orientation or gender identity.

Accordingly, prohibitions on the latter forms of discrimination vary widely across critical programs depending on whether the authorizing statute or implementing regulations provide program-specific protections. For example, sex discrimination is barred by statute and regulation in some grant programs, but not in others. Title IV-E of the Social Security Act (which funds foster care and adoption assistance) does not explicitly prevent HHS-funded child welfare agencies from

[1] *See* 42 U.S.C. § 2000d; 29 U.S.C. § 794(a); 42 U.S.C. § 6102.

discriminating against children, parents, or prospective foster or adoptive parents on the basis of sex, sexual orientation, or gender identity. 42 U.S.C. § 671(a)(18). The Older Americans Act (which funds a wide range of social services for older adults) does not provide any of its own nondiscrimination protections. *See* 42 U.S.C. § 3001 *et seq*. The Runaway and Homeless Youth Act (which funds youth emergency shelters and transitional living programs) does not have explicit nondiscrimination protections, 34 U.S.C. § 11201 *et seq*., but for that program, HHS has promulgated regulations that prohibit discrimination based on religion, sexual orientation, and gender identity. 45 C.F.R. § 1351.22(a).

Federal statutory and regulatory protections against religious discrimination are similarly absent in many critical grant programs. A significant number of grant-authorizing statutes—including Title IV-E and the Older Americans Act—do not contain independent prohibitions on religious discrimination. *See* 42 U.S.C. § 671(a)(18); 42 U.S.C. § 3001 *et seq*. Though a generally applicable regulation bars grantees from discriminating against HHS beneficiaries or prospective beneficiaries on the basis of religion, *see* 45 C.F.R. § 87.3(d), that regulation does not

protect people not typically treated as beneficiaries. This leaves prospective foster or adoptive parents who have been turned away from an HHS-funded foster care or adoption agency based on religious views without clear statutory or regulatory recourse.

Adding further complexity to this patchwork of protections, the funding for some HHS grant programs—including programs under Title IV-E and the Older Americans Act—flows through states, which may or may not impose their own nondiscrimination requirements on grant recipients.

2. The 2016 Grants Rule

In 2016, HHS addressed these gaps in protection by adopting a clear and generally applicable standard for its grant programs that conformed with its public policy on nondiscrimination, as well as overarching constitutional principles. In its Health and Human Services Grants Regulation ("2016 Grants Rule"), HHS prohibited discrimination in all grant programs "based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation." Health and Human Services Grants Regulation, 81 Fed. Reg. 89,393, 89,395 (Dec. 12, 2016) (codified at 45 C.F.R. § 75.300(c)).

The 2016 Grants Rule also codified HHS's implementation of the Supreme Court's recent decisions in *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 576 U.S. 644 (2015), *see* 81 Fed. Reg. at 89,396 (codified at 45 C.F.R. § 75.300(d)), by requiring grant recipients to treat as valid the marriages of same-sex couples.

These provisions applied to nearly all HHS-funded grant programs, with a few specified exceptions not relevant to this litigation. *See* 45 C.F.R. § 75.101(d).

3. The Notice of Nonenforcement and 2021 Grants Rule

In 2019, HHS reversed course. It took two actions that undermined the effectiveness of—and eventually would eliminate—the 2016 Grant Rule's generally applicable nondiscrimination protections.

First, on November 1, 2019, HHS issued a notice of proposed rulemaking that proposed to eliminate the protections established by the 2016 Grants Rule. If adopted, that proposal would require grantees to comply only with the statutory discrimination protections set forth in the various authorizing statutes. *See* Office of the Assistant Secretary for Financial Resources, Health & Human Services Grants Regulation, 84 Fed. Reg. 63,831, 63,832 (Nov. 19, 2019) ("2019 Proposed Rule"). It would

also remove the explicit requirement that the marriages of same-sex couples receive equal recognition by grantees. *Id.* at 63,833.

Second, on the same day, HHS announced—without notice and comment—a Notice of Nonenforcement stating that HHS would no longer enforce the 2016 Grants Rule "with respect to any grantees" pending the agency's decision on the contemporaneously proposed rulemaking. Notice of Nonenforcement of Health and Human Services Grants Regulation, 84 Fed. Reg. 63,809, 63,811 (Nov. 19, 2019) ("Notice of Nonenforcement"). The Department's sole explanation for the Notice was that it had "significant concerns" about whether the 2016 Grants Rule complied with the Regulatory Flexibility Act, which requires agencies to analyze the impacts of regulations on small entities. *Id.* at 63,809.

Despite receiving many comments intensely opposing the 2019 Proposed Rule, HHS finalized the rule without change on January 12, 2021. Health and Human Services Grants Regulation, 86 Fed. Reg. 2,257 (Jan. 12, 2021) ("2021 Grants Rule").

The 2021 Grants Rule, however, was immediately challenged in separate litigation in the District Court for the District of Columbia. That litigation resulted in multiple postponements of the effective date

of the Rule. HHS ultimately confessed error as to the process that led to the 2021 Grants Rule and agreed to a court order vacating it. Order, ECF No. 44, *Facing Foster Care in Alaska v. HHS*, 21-cv-308-JMC (D.D.C. June 29, 2022) (remanding and vacating 2021 Grants Rule).[2]

Although the Notice of Nonenforcement was intended to end with the "repromulgation" of a revised grants rule," 84 Fed. Reg. at 63,811—and the rulemaking that would have done so has now been vacated—HHS has left the Notice of Nonenforcement in place for nearly three years. HHS has thus effectively nullified the 2016 Rule's protections without notice and comment.

C. Factual Background

1. Grant Programs Affected by the Notice

The Notice of Nonenforcement gives HHS grant recipients a license to discriminate while providing critical government-funded services—approximately $500 billion in grants[3]—to millions of people. Among

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[2] The 2021 Grants Rule litigation was brought by the Plaintiffs in this case, along with one additional Plaintiff: Facing Foster Care in Alaska. Counsel in this case also represented the plaintiffs in the 2021 Grants Rule litigation.

[3] *2017 TAGGS Annual Report: Department of Health and Human Services*, TRACKING ACCOUNTABILITY IN GOV'T GRANT SPENDING, https://taggs.hhs.gov/2017AnnualReport/ (last visited Aug. 25, 2022).

those most impacted by the Notice are LGBTQ children, youth, families, and older adults who receive services through grant programs authorized by three statutes: Title IV-E of the Social Security Act (foster care and adoption assistance services), the Runaway and Homeless Youth Act (shelters and transitional living programs), and the Older Americans Act (social services for older adults).

LGBTQ children and adolescents who are in the child welfare system or who experience homelessness are particularly vulnerable since they depend on HHS-funded services to meet their basic needs and, in the context of child welfare, are almost always involuntarily placed into government care. In both contexts, LGBTQ youth are overrepresented. JA33 (¶ 59). They are also prone to experience discrimination, including abuse by social work professionals, foster parents, service providers, and peers. JA33 (¶60). As a result, LGBTQ youth in the child welfare system tend to experience worse outcomes than their non-LGBTQ peers, such as exiting foster care to homelessness. JA33 (¶60), JA34 (¶62), JA35 (¶65). These harms are compounded when foster care and adoption agencies refuse to license LGBTQ prospective parents and guardians, thereby

depriving children in need of potential safe and loving homes. JA33-34 (¶61).

LGBTQ older adults likewise rely on critical services funded under the Older Americans Act in order to age with dignity in their homes. JA39 (¶74). Many LGBTQ older adults live with serious economic insecurity after a lifetime of housing and employment discrimination. JA38-39 (¶73). These vulnerabilities leave LGBTQ older people particularly reliant on HHS-funded home and community-based services, such as home-delivered nutrition services, congregate meal programs, and in-home chore assistance. JA39 (¶74).

By inviting service providers to discriminate, the Notice of Nonenforcement further jeopardizes these already vulnerable LGBTQ children, youth, and older adults. JA34-35 (¶¶64-65), JA39-40 (¶75).

2. Plaintiffs' Activities Affected by the Notice

To advance their respective missions, all three plaintiff organizations work towards reducing discrimination in HHS-funded services provided to the LGBTQ community. For each organization, education services for HHS program beneficiaries and grant recipients are central to their efforts.

Family Equality's mission is to advance legal and lived equality for LGBTQ families—a pursuit that recognizes that every LGBTQ person has a right to form a family and that all children deserve a stable, loving family. JA16-17 (¶9). To that end, Family Equality strives to ensure that "adoption and foster care services, including those funded by HHS grant programs, are free from discrimination" against both LGBTQ youth in foster care and LGBTQ families seeking to foster or adopt. *Id.* Among other "daily operations," Family Equality furthers its mission by "conduct[ing] outreach and education to LGBTQ families and support groups to ensure that those families understand their rights and are empowered to advocate for themselves." JA17 (¶10).

True Colors United's mission is to implement innovative solutions to youth homelessness that focus on the unique experiences of LGBTQ young people, who are 120 percent more likely to experience homelessness than their LGBTQ peers. JA18 (¶12). Like Family Equality, True Colors United's "daily operations" include various activities that reduce discrimination in homelessness services and ensure that such services are safe for LGBTQ youth. JA18 (¶13). As part of that work, "True Colors United offers free training, education, and technical

assistance programs to homelessness service providers" to ensure that those services are "safe and supportive." *Id.*

Prior to the Notice of Nonenforcement, True Colors United educated service providers on their legal obligations under the 2016 Grants Rule and "regularly relied" on the Rule's non-discrimination protections to teach providers about the importance of not discriminating against LGBTQ youth. JA19 (¶14). For example, True Colors United "has educated service providers on the federal non-discrimination protections when presenting at conferences, such as True Colors United's annual Impact Summit." *Id.*; *see also* JA42-43 (¶83) (listing seven other conferences at which True Colors conducted trainings that relied on the 2016 Grants Rule from 2017 to 2019). During these trainings, True Colors United "informed providers of their legal obligations" under the 2016 Grants Rule, JA19 (¶14), and "presented information on the federal prohibitions against [] discrimination . . . to help providers understand what discrimination looks like in practice, as well as its negative impacts on LGBTQ youth," JA42-43 (¶83).

SAGE's mission is to allow LGBTQ older people to age with dignity and respect. JA19 (¶15). To that end, SAGE works to facilitate access to

non-discriminatory social services for LGBTQ older adults. JA19-20 (¶16). Among other things, SAGE operates the National Resource Center on LGBT Aging, a technical assistance resource center aimed at improving the quality of services offered to LGBTQ older people. *Id.* The National Resource Center provides "resources, training, and technical assistance to a federal network of [HHS grant recipients] . . . on issues such as LGBTQ inclusion [and] cultural competency"—trainings that help prevent discrimination. *Id.* Likewise, SAGE trains service providers in "how to work effectively, respectfully, and in a non-discriminatory manner with LGBTQ people." *Id.* SAGE "relied" on the 2016 Grants Rule in its pre-Notice work "to help ensure that service providers who receive funds under the Older Americans Act [did] not discriminate against LGBTQ older people." JA20 (¶17).

As alleged in the Complaint, the Notice of Nonenforcement impairs each Plaintiff's ability to engage in their respective education work in two ways.

First, the Notice "introduces substantial confusion regarding the legal obligations of grant recipients and the right of the populations they serve to be free from discrimination." JA40 (¶78); *see also* JA44 (¶86),

JA46-47 (¶92). Under the 2016 Grants Rule, all HHS grant recipients were subject to the same anti-discrimination prohibitions. Following HHS's announcement that the 2016 Grants Rule would no longer be enforced (despite remaining in place), grant recipients are "subject to a patchwork of federal and state statutory and regulatory protections, which vary from program to program and state to state." JA40 (¶78). Absent enforcement of a clear and generally applicable standard, it is more difficult and time-consuming to educate program beneficiaries and service providers, resulting in a diversion of Plaintiffs' resources from their other current activities. JA40-42 (¶¶79-80), JA44-45 (¶87), JA45-46 (¶89), JA46-48 (¶¶92-93).

Family Equality, for example, had already spent 40 hours of staff time at the time of the complaint to "assess[] the legal effect of the Notice" and "understand the anti-discrimination protections left in place for HHS's many grant programs." JA40-41 (¶79). It had also spent 15 hours "analyzing the Notice['s] . . . impacts on youths and families" and another 10 hours "identifying and interviewing LGBTQ families that have experienced discrimination in the foster care system to better understand the impacts of HHS's action." *Id.* Relying on that research and analysis,

Family Equality spent approximately 70 hours "creating and disseminating educational materials" to its constituents, partner organizations, child welfare advocates, LGBTQ parents, faith-based and organizations. *Id.* It also spent 22 hours "preparing for and conducting informal briefings" for its partner organizations and another 23 hours on media relations. *Id.* Family Equality "expects to continue to expend significant staff time on these efforts going forward." JA41 (¶80).

Likewise, True Colors United has been "required . . . to conduct an education and outreach campaign to ensure that service providers receiving Runaway and Homeless Youth grant funds understand their existing obligations to not discriminate against LGBTQ youth." JA44 (¶87). Indeed, homelessness service providers faced particular confusion. JA44 (¶86). On the one hand, Runaway and Homeless Youth grant programs are technically subject to program-specific anti-discrimination regulations. *Id.*; *see also* JA36 (¶67) (citing 45 C.F.R. § 1351.22(a)). On the other hand, the Notice of Nonenforcement, coupled with the 2019 Proposed Grants Rule, sent strong signals that HHS would not enforce any regulatory nondiscrimination protections. Indeed, the 2019 Proposed Rule proposed to prevent discrimination only "to the extent . . .

prohibited by federal *statute*," 84 Fed. Reg. at 63,832 (emphasis added), thereby calling into question the validity of the nondiscrimination *regulations* specific to the Runaway and Homeless Youth grants.

Adding to this confusion, HHS conspicuously "abandoned" all "efforts to ensure that grant recipients understand and comply with" the Runaway and Homeless Youth protections. JA37 (¶70). The agency ceased training on the requirements, stopped including the nondiscrimination requirements in its funding opportunity announcements for Runaway and Homeless Youth grants, and no longer required grant recipients to "certify that their programs do not discriminate against LGBTQ youth." JA37 (¶¶ 70-71).

To address the confusion created by the Notice of Nonenforcement and these other actions, True Colors United has been forced to conduct—and expects to continue conducting—briefings with partner organizations "to explain the impact of the agency's Notice of Nonenforcement and to emphasize that, despite the lack of any enforcement, service providers are still subject to the nondiscrimination provisions specific to the Runaway and Homeless Youth grant programs." JA44-45 (¶87) (listing partner organizations).

Second, the Notice of Nonenforcement impairs Plaintiffs' educational work by eliminating True Colors United and SAGE's ability to rely on the 2016 Grants Rule as an important tool in their efforts to (1) convince service providers to provide nondiscriminatory services and (2) teach them how to provide inclusive, culturally competent services.

As noted above, True Colors United relied on the 2016 Grants Rule when teaching service providers about the importance of not discriminating against LGBTQ youth. JA19 (¶14), JA42-43 (¶83). The Notice makes these education efforts "less effective" by removing the 2016 Grants Rule as a training "tool." JA42-43 (¶83). The Notice also impairs the same educational efforts by "signal[ing] that providers do not need to improve their services for LGBTQ youth" and "serv[ing] as an explicit invitation to discriminate." *Id.*

In response, True Colors United has been forced to work to "obtain state-level protections" in order to "replace the defunct federal standards" as tools in its education work. JA43 (¶84). At the time of the Complaint, True Colors United had already spent approximately 135 hours trying to obtain protections in three states. *Id.* And True Colors United "expects to continue this work to improve protections in as many states as

possible" given that the Notice has rendered the 2016 Grants Rule toothless. JA43-44 (¶85).

Likewise, SAGE relied on the 2016 Grants Rule to ensure that service providers understood their obligation to not discriminate, JA46 (¶91), and supported providers through trainings on how to provide services in an inclusive and culturally competent manner, JA19 (¶16). By making the 2016 Grants Rule's protections ineffectual, the Notice "serves as a signal to service providers that they may discriminate against LGBTQ older people with impunity," JA46 (¶91), and "diminishes . . . providers' obligation to accommodate LGBTQ older people's unique needs," JA47 (¶93). This in turn makes service providers less likely to be receptive to SAGE's trainings on nondiscrimination. JA46 (¶91), JA47-48 (¶93).

In response, SAGE has been forced to expend valuable staff time teaching providers about "the importance of making their services inclusive and safe for LGBTQ older people" and "encouraging them to continue to meet [LGBTQ older people's unique] needs despite the rollback of HHS's non-discrimination protections." JA47 (¶93). In addition, SAGE "has already diverted, and will continue to divert,

resources" to "obtain state-level protections to fill the gap left by HHS's now-abandoned non-discrimination protections." JA46 (¶91).

D. Procedural Background

Plaintiffs filed suit on March 19, 2020, alleging that the Notice violates the APA because it was promulgated without an opportunity for comment; was premised on an incorrect legal determination; and was arbitrary and capricious because it failed to consider the effect of the agency's action on the vulnerable people—including LGBTQ youth and elders—that many of these grant programs help. JA16 (¶7).

On August 7, 2020, Defendants moved to dismiss, arguing that Plaintiffs lacked standing and fell outside of the relevant zone of interests. *See* Memorandum in Support of Defs.' Mot. to Dismiss, D. Ct. Dkt. No. 41.

While the decision on Defendants' motion to dismiss was pending, on January 12, 2021, HHS finalized the 2021 Grants Rule which, had it gone into effect, may have mooted this case. Thereafter, the parties agreed to stay the case. *See* JA52, JA54-55, JA57. On May 5, 2021, the district court lifted the stay, following a request by the parties. JA58.

On March 30, 2022, the district court granted Defendants' motion to dismiss, holding that Plaintiffs lacked standing. JA61, JA65-69.[4] The court acknowledged Plaintiffs' allegations that the Notice of Nonenforcement "introduced 'substantial confusion' regarding the legal obligations of grant recipients," JA67, and that "because of the Notice," "each Plaintiff . . . will be forced to . . . reform[] and adjust[] their outreach services," JA66. The court nevertheless found that Plaintiffs failed to establish a perceptible impairment to their activities, as required to establish injury-in-fact under this Court's precedent. JA65. This holding was grounded in two conclusions.

First, the district court found that Plaintiffs had not suffered an "*involuntary* burden on [Plaintiffs'] established core activities." JA67 (emphasis in original). Central to this conclusion was the court's view that Plaintiffs failed to "'identify any restrictions on [their] ability to perform the core activities' [they] previously engaged in[.]" JA68 (citing *Conn. Parents Union*, 8 F.4th at 175). Under this view, the resources expended by Plaintiffs on their post-Notice education work were not "an

[4] While the court noted in its opinion that "this case may quickly become moot" in light of the 2021 Grants Rule, JA61, that concern is no longer present because the 2021 Grants Rule has since been vacated.

involuntary result" of the burden imposed by the Notice. *Id.* Rather, the court found that Plaintiffs responded to the Notice by pursuing "categorically new activities"—including their post-Notice education work—"at the organization's own initiative." JA67-68 (quoting *Conn. Parents Union*, 8 F.4th at 173-74).

Second, the district court reasoned that "Plaintiffs' ability to carry out [their] responsibilities has not been impeded," JA68, "since each organization plainly continues in the same educational activities and advocacy work it previously undertook," JA69. The court did not cite any authority to support the principle that an organization's activities are not impaired if the organization continues to conduct those activities, even if doing so is more difficult and requires the expenditure of more resources.

SUMMARY OF ARGUMENT

Plaintiffs have shown an injury-in-fact by plausibly alleging that the Notice of Nonenforcement imposed an involuntary material burden on, and thus perceptibly impaired, their core educational activities. Specifically, Plaintiffs alleged in detail that the Notice made the subject of Family Equality and True Colors United's pre-existing education work far more complicated, JA40 (¶78), rendering that work more time-

consuming and diverting resources away from those Plaintiffs' other activities, JA40-42 (¶¶79-80), JA44-45 (¶¶86-87). Further, Plaintiffs alleged that the Notice removed an important educational tool on which True Colors United and SAGE relied. JA42-43 (¶83), JA46 (¶91), JA47-48 (¶93). The Notice therefore made those Plaintiffs' work less effective, forcing them to divert valuable staff time towards replacing that tool. JA43-44 (¶¶84-85), JA46-48 (¶¶92-93). These allegations are sufficient to confer standing under this Court's precedent. *Conn. Parents Union*, 8 F.4th at 173-74.

In holding to the contrary, the district court misapplied this Court's precedent and relied on reasoning that is precluded by the Supreme Court's holding in *Havens Realty*, 455 U.S. 363 (1982).

First, the district court misconstrued this Court's decisions in *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104 (2d Cir. 2017) [hereinafter *Centro*], and *Connecticut Parents Union*, 8 F.4th 167 (2d Cir. 2021). Contrary to the district court's assertions, JA67-68, Plaintiffs in this case—like that in *Centro*—suffered a cognizable injury because the Notice made its pre-existing core work more costly and less effective. JA40-42 (¶¶78-80), JA42-45 (¶¶83-87),

JA46-48 (¶¶91-93). For similar reasons, Plaintiffs in this case are distinguishable from the parent advocacy group in *Connecticut Parents Union* because Plaintiffs here have identified restrictions—and therefore an involuntary material burden—on their pre-existing education activities caused by the Notice. JA40-42 (¶¶78-80), JA42-45 (¶¶83-87), JA46-48 (¶¶91-93).

Second, the district court was wrong to conclude that Plaintiffs' activities are not perceptibly impaired because Plaintiffs continue to engage in those activities. JA68-69. This Court rejected an identical argument two years ago, noting that it is precluded by established organizational standing law, including the Supreme Court's decision in *Havens Realty*. *Moya v. Dep't of Homeland Sec.*, 975 F.3d 120, 130 (2d. Cir. 2020) (citing 455 U.S. at 379). As that case and subsequent decisions from this Court make clear, plaintiff organizations need not cease their activities altogether to demonstrate a perceptible impairment. *See, e.g., Havens Realty*, 455 U.S. at 379; *Conn. Parents Union*, 8 F.4th at 173-74.

STANDARD OF REVIEW

This Court reviews "de novo the district court's decision to dismiss a complaint for lack of standing pursuant to Federal Rule of Civil

Procedure 12(b)(1), 'construing the complaint in plaintiff's favor and accepting as true all material factual allegations contained therein.'" *Katz v. Donna Karan Co., LLC*, 872 F.3d 114, 118 (2d Cir. 2017) (quoting *Donoghue v. Bulldog Invs. Gen. P'ship*, 696 F.3d 170, 173 (2d Cir. 2012)).

ARGUMENT

An organization may sue on its own behalf so long as it satisfies the "irreducible constitutional minimum of standing." *Conn. Parents Union*, 8 F.4th at 172 (quoting *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992)). As with any other litigant, the organization must show: "(i) an imminent injury in fact . . . that is distinct and palpable; (ii) that its injury is fairly traceable to [the challenged act]; and (iii) that a favorable decision would redress its injuries." *Id.* (quoting *Centro*, 868 F.3d at 109).

To establish injury-in-fact, "only a 'perceptible impairment' of an organization's activities is necessary[.]" *Centro* at 110 (quoting *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011)); *Havens Realty*, 455 U.S. at 379. An organization may demonstrate a perceptible impairment by showing that the challenged act imposes an "involuntary material burden on its established core activities." *Conn. Parents Union*, 8 F.4th at 173. Such a burden can take many forms, including "time, money, or danger," so

long as it "adversely affects one of the activities the organization regularly conducted (prior to the challenged act)[.]" *Id.* For example, just last year, this Court recognized that an involuntary material burden existed where the challenged act required an organization to make "costly changes to its education programs." *Id.* at 174, n.26 (citing *New York v. Dep't of Homeland Sec.*, 969 F.3d at 60-61).

Organizations can satisfy these requirements even where the evidence (or allegations at the motion to dismiss stage) of impairment is "scant," *Nnebe*, 644 F.3d at 156-57, and "even if there is no increase in the organization's *total* expenditures," *Conn. Parents Union*, 8 F.4th at 173 n.21. Indeed, "an organization may suffer the requisite injury when it 'diverts its resources away from its [other] current activities,' or otherwise incurs 'some perceptible opportunity cost.'" *Id.* at 173 (quoting *Moya*, 975 F.3d at 129-30). When "multiple parties seek the same relief, 'the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.'" *Centro*, 868 F.3d at 109 (internal quotations omitted).

Plaintiffs' allegations clear this bar. The District Court's incorrect conclusions to the contrary run afoul of this Court's precedent and established law as to organizational standing.

I. Plaintiffs Suffered a Perceptible Impairment to Their Activities Sufficient to Establish Article III Standing.

Plaintiffs suffered an injury-in-fact because the Notice of Nonenforcement imposed an involuntary material burden on, and thus perceptibly impaired, their core educational activities.[5]

Prior to the Notice, Plaintiffs' core activities involved educating program participants on their legal rights to receive services or

[5] Although Defendants challenged—and the District Court addressed—only injury-in-fact, Plaintiffs also satisfy the traceability and redressability requirements. With respect to traceability, Plaintiffs have "demonstrate[d] a causal nexus between the [Notice] and the injury." *Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013) (internal quotation omitted). As explained below, the Notice introduced substantial complexity around the core subject of Plaintiffs' educational work and removed an important educational tool, forcing Plaintiffs to expend considerably more resources to engage in those activities. *See infra* pages 29-35. For similar reasons, Plaintiffs have shown a "substantial likelihood that the relief requested will redress the injury claimed." *E.M. v. N.Y.C. Dep't of Educ.*, 758 F.3d 442, 450 (2d Cir. 2014). Here, vacatur of the Notice—which would reinstate enforcement of the generally applicable protections afforded by the 2016 Rule—would remove the source of confusion and reinstate the Rule as an effective, forceful educational tool, thus rendering Plaintiffs' educational work less time-intensive. *See infra* pages 29-35.

participate in programs in a non-discriminatory manner. JA17 (¶10). Similarly, Plaintiffs' pre-existing work included educating grant recipients on their *legal obligations* not to discriminate and training the same providers on the *importance* of providing services in a non-discriminatory manner. JA18 (¶13), JA19-20 (¶¶16-17), JA42-43 (¶83).

The Notice imposes an involuntary material burden on these core activities by making them significantly more time-intensive and less effective in two ways.

A. The Notice Makes the Subject of Plaintiffs' Education Work More Complicated and Time-Consuming.

To begin, the Notice "introduce[d] substantial confusion regarding the legal obligations of grant recipients and the right of the populations they serve to be free from discrimination." JA40 (¶78). The 2016 Grants Rule had provided a floor of protections that prohibited discrimination across all HHS grant programs, which was straightforward to explain in Family Equality and True Colors United's education work. *See id.* The Notice upended that work by plunging grant recipients and program participants into a confusing landscape in which the only clearly enforceable obligations and protections were the "patchwork of federal

and state statutory and regulatory protections, which vary from program to program, and from state to state." *Id.*

This change made Family Equality and True Colors United's pre-existing "educational outreach" substantially more "time-intensive." *New York v. DHS*, 969 F.3d at 61; *Moya*, 975 F.3d at 125 (finding standing where the challenged rule required the plaintiff to spend "twice as much time servicing . . . clients"). As a result, those plaintiffs have been forced to divert staff time and resources from other organizational goals. *See* JA40-42 (¶¶79-80), JA44-46 (¶¶87, 89).

As set forth above, *supra* pages 15-18, Plaintiffs' allegations in this regard are detailed and show a material cost. *See* JA40-42 (¶¶ 79-80), JA44-46 (¶¶86-88); *Cf. Conn. Parents Union*, 8 F.4th at 175 n.34 (rejecting injuries that were "vague and conclusory" and did not establish a material impairment).

For example, in order to continue educating families about their legal rights, Family Equality was forced to spend dozens of hours of staff time "assessing the legal effect of the Notice of Nonenforcement" and "identify[ing] and understand[ing] the anti-discrimination protections left in place for HHS's many grant programs." JA40-41 (¶79). Relying

on that research, Family Equality's staff has already spent many more hours—and "expects to continue to expend significant staff time"—briefing partner organizations and "creating and disseminating educational materials" that explain the current patchwork of protections and the relevance of the 2016 Grants Rule when it is not being enforced. JA40-42 (¶¶79-80). All told, Family Equality was forced to divert more than 170 hours of staff time updating its educational work at the time the Complaint was filed. JA41 (¶80).

Likewise, True Colors United has been forced to conduct additional briefings—and "expects to hold further briefings in the future"—with partner organizations "to explain the impact of the agency's Notice of Nonenforcement" on the legal obligations of homelessness service providers. JA44-45 (¶87).[6] Such efforts "divert[]" resources "from True Colors United's other work." JA45 (¶89).

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[6] In fact, the confusion faced by homelessness service providers is particularly acute. Although grant programs under the Runaway and Homeless Youth Act are "technically subject to program-specific discrimination protections," grant recipients have received "strong[] signal[s] that service providers need not" comply with those protections—a message that is "reinforced by the Notice of Nonenforcement." JA44 (¶86) (explaining that HHS canceled training programs on the nondiscrimination requirements and stopped requiring service providers

The involuntary material burden alleged by Plaintiffs here is on all fours with those previously recognized by this Court as cognizable injuries. For example, in *New York v. United States Department of Homeland Security,* this Court held that an organization suffered an injury-in-fact when the "complexities of the [challenged] 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; *see also Conn. Parents Union*, 8 F.4th at 173 & n.26 (citing the "necessitated costly changes to [the plaintiff's] education programs" in *New York v. DHS,* 969 F.3d at 60-61, as an example of "an involuntary material burden" on an organization's "established core activities"); *cf. Centro,* 868 F.3d at 110 (organization had standing because its pre-existing work to meet with day laborers was made "more costly" by the challenged ordinance).

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to certify that their programs were nondiscriminatory). Accordingly, True Colors United has spent, and will continue to spend, staff time on briefings that "emphasize that, despite the lack of any enforcement, service providers are still subject to the non-discriminations provisions specific to the Runaway and Homeless Youth grant programs." JA44-45 (¶87).

So too here. The "complexities" introduced by the Notice have "required [Plaintiffs] to change [their] educational outreach" in a "time-intensive" manner, *New York v. DHS*, 969 F.3d at 61, which in turn "diverts [Plaintiffs'] resources away from [their] other current activities," *Conn. Parents Union*, 8 F.4th at 173.

B. The Notice Removed the 2016 Grants Rule as an Educational Tool.

The Notice also impairs True Colors United and SAGE's educational work by eliminating their ability to rely on the 2016 Grants Rule as an important educational tool.

As alleged in the Complaint, True Colors United regularly "relied upon the 2016 Grants Rule," as a "tool" to "educate service providers about the importance of not discriminating against LGBTQ youth." JA42 (¶83); *see also* JA19 (¶14). The Notice therefore "adversely affects one of [True Colors United's] activities" by making it less effective. *Conn. Parents Union*, 8 F.4th at 173; *Centro*, 868 F.3d at 110 (organization's activities were perceptibly impaired where it "face[d] increased difficulty in" performing its core activity).

Prior to the Notice, True Colors United "presented information on the federal prohibitions against . . . discrimination" in the 2016 Rule and

"engaged in interactive question-and-answer sessions to help providers understand what discrimination looks like in practice, as well as its negative impacts on LGBTQ youth." JA42-43 (¶83).

By announcing that HHS will not enforce those federal protections, the Notice prevents True Colors United from using the 2016 Grants Rule to persuade service providers of the need to make their "services . . . safe and supportive for LGBTQ youth[.]" *Id.* Further, "the Notice of Nonenforcement signals that providers do not need to improve their services for LGBTQ youth," and—for some providers—it "serves as an explicit invitation to discriminate." *Id.*

Similarly, SAGE "relied upon the 2016 Grants Rule to help ensure that service providers did not discriminate against LGBTQ older people," JA46 (¶91), and supported providers by educating them on both the need for and how to provide nondiscriminatory services, JA19-20 (¶16). The Notice made this work less effective by "signal[ing] to service providers that they may discriminate against LGBTQ older people with impunity," JA46 (¶91), and "diminish[ing] . . . providers' obligation to accommodate LGBTQ older people's needs," JA47 (¶93). This in turn makes providers

more likely to discriminate and less likely to be receptive to SAGE's training on nondiscriminatory services and cultural competency. *See id.*

Because True Colors United and SAGE "face[] increased difficulty" in teaching providers the importance of not discriminating, the Notice "has impeded . . . [their] ability to carry out [their] responsibilities," which by itself is sufficient to establish standing. *Centro*, 868 F.3d at 110 (internal quotations omitted).

Beyond that, both True Colors United and SAGE have been forced to "divert . . . resources away from [their other] current activities" to "respon[d] to the [Notice]." *Id.* at 111. "In the absence of the 2016 Grants Rule's anti-discrimination protections" being enforced, both True Colors United and SAGE have diverted, and will continue to divert, hundreds of hours of staff time to "obtain[ing] state-level protections" that will "replace the defunct federal standards." JA43 (¶84); *see also* JA46 (¶91) (discussing SAGE's diversion of staff time towards the same). In addition, SAGE has had to spend valuable staff time "encouraging [providers] to continue to meet [LGBTQ older people's unique] needs despite the rollback of HHS's non-discrimination protections." JA47 (¶93).

As "expenditures [that] are . . . reasonably necessary to continue" Plaintiffs' efforts to teach service providers the importance of nondiscriminatory services, *Conn. Parents Union*, 8 F.4th at 174, these diverted resources by themselves are enough to "satisfy the injury prong," *id.* at 173.

II. The District Court Misapplied This Court's Precedent.

The district court's holding that Plaintiffs did not allege a perceptible impairment of their activities—and thus lacked standing—is wrong for two primary reasons. First, the district court mistakenly found that Plaintiffs did not suffer an involuntary material burden on their core activities. Second, the district court misconstrued this Court's precedent when it held that Plaintiffs' activities were not impaired because Plaintiffs continue to engage in the same activities.

A. The District Court Failed to Acknowledge Plaintiffs' Allegations That They Suffered an Involuntary Material Burden on Their Core Activities.

The district court erred in concluding that Plaintiffs' allegations did not establish an involuntary material burden. That error was grounded in the misapplication of the cases on which the court relied: *Centro de la Comunidad* and *Connecticut Parents Union*.

Notwithstanding the district court's assertion to the contrary, Plaintiffs are similarly situated to the plaintiff in *Centro de la Comunidad*. Just as the plaintiff in that case "face[d] increased difficulty" and costs "in meeting with . . . [day] laborers" as a result of the challenged ordinance (which dispersed the laborers), 868 F.3d at 110, Plaintiffs here have found it more difficult and costly to educate service providers and program participants as a result of the Notice (which introduced complexity and removed an important educational tool). *See supra* pages 29-32.

And just like the Plaintiff in *Centro*, Plaintiffs in this case have been forced to spend resources "to combat activity that harms [their] core activities." *Centro*, 868 F.3d at 111 (internal quotation marks omitted). Namely, Plaintiffs have spent valuable staff time making costly changes to their education program to address the complexity, *see supra* pages 29-32, and have had to pursue state-level protections to replace the training tool removed by the Notice, *see supra* pages 33-35. Contrary to the district court's conclusion, JA68 (quoting *Centro*, 868 F.3d at 110), these "reactions" were "taken to 'continue'" Plaintiffs' prior services. Plaintiffs have therefore suffered "a perceptible impairment of [their] activities"

and were forced to divert resources "from [their] other current activities to advance [their] established organizational interests." *Centro*, 868 F.3d at 110.

The district court was also wrong to analogize Plaintiffs in this case to the plaintiff in *Connecticut Parents Union*. There, a parent advocacy group did not suffer an involuntary material burden because it failed to "identify any restrictions on its ability to perform the core activities" in which it previously engaged. 8 F.4th at 175. Here, by contrast, the Notice imposed restrictions on Plaintiffs' ability to perform its core educational activities by (1) eliminating enforcement of a clear standard, as discussed above, *supra* pages 29-31, and (2) removing a critical tool to True Colors United's and SAGE's efforts to teach service providers that it is important to not discriminate and how to provide inclusive services, *supra* pages 33-35.

Accordingly, unlike in *Connecticut Parents Union*, Plaintiffs standing does not rely on "categorically new activities." JA68 (citing 8 F.4th at 173-74). Rather, the education work impacted by the Notice was part of Plaintiffs' "daily operations" prior to the Notice. *See supra* pages

13-15 (citing JA17 (¶10), JA18-19 (¶¶13-14), JA19-20 (¶¶15-17), JA42-43 (¶83)). The education work was therefore a preexisting "core activity."[7]

Nor were Plaintiffs' expenditures incurred "at their own initiative." JA68 (quoting *Conn. Parents Union*, 8 F.4th at 173-74). Instead, those expenditures were necessary to continue Plaintiffs' preexisting education work, *see supra* pages 29-31, and to persuade service providers of the necessity of providing nondiscriminatory services and how to provide inclusive services, *see supra* pages 33-35.

Because these "expenditures [were] reasonably necessary to continue an established core activity," Plaintiffs' post-Notice education work constitutes a direct response to an involuntary material burden imposed by the Notice and is sufficient to confer standing under this Court's precedent. *See Conn. Parents Union*, 8 F.4th at 174 & n.26

[7] Indeed, the district court's own opinion acknowledges that "each organization plainly *continues* in the same educational activities . . . it previously undertook." JA69 (emphasis added). Likewise, the opinion notes that "[e]ach Plaintiff here claims that, because of the Notice of Non-Enforcement, it will be forced to . . . *reform*[] and *adjust*[] their [sic] outreach services[.]" JA66 (emphasis added). Such outreach and education work could only be *continued*, *reformed*, and *adjusted* because Plaintiffs were providing those services in the first place.

(recognizing analogous injuries); *New York v. DHS*, 969 F.3d at 60-61 (same).

B. *Havens Realty* Precludes the District Court's Conclusion That Plaintiffs' Activities Were Not Impaired Because Plaintiffs Still Engage in Those Activities.

The district court also erred in concluding that Plaintiffs' activities were not perceptibly impaired by the Notice "since each organization plainly continues in the same educational activities . . . it previously undertook." JA69. That conclusion is contrary to established law.

This Court rejected just such an argument two years ago in *Moya v. United States Department of Homeland Security*, in declining to find that a plaintiff lacked standing because it "has been able to continue performing [its prior] activity, albeit with less efficiency and success." 975 F.3d at 130 (internal quotations omitted). The Court explained that such a view is contrary to "the cases we are bound to follow." 975 F.3d at 130.

Indeed, as the Supreme Court's decision in *Havens Realty*—the seminal organizational standing case—makes clear, an organization need not cease its activities altogether to demonstrate that those activities have been impeded. In *Havens Realty*, the Plaintiff

organization suffered a cognizable injury based on the impairment to its ability to provide its fair housing counseling and referral services. 455 U.S. at 369. The challenged racial steering practices made the plaintiff's work more time-consuming, but did not stop it altogether. *Id.* at 379.

Consistent with *Havens*, this Court has found standing where the challenged act "necessitated costly changes to [an organization's] programs" or led to an "*increased demand* for [its] services"—instances in which the organization continued to engage in the activities impaired by the challenged act. *Conn. Parents Union*, 8 F.4th at 174 & n.26 (emphasis added). *See also, e.g.*, *Moya,* 975 F.3d at 129-30 (organization had standing where challenged conduct made its ongoing immigration services more time-intensive); *Centro,* 868 F.3d at 110 (organization had standing where challenged law made its ongoing efforts to organize day laborers "more costly"); *Nnebe*, 644 F.3d at 157 (taxi-driver union had standing where challenged action forced it to spend more time assisting its members). So too with Plaintiffs—the fact that they continue in their prior activities does not defeat their standing.

In reaching a contrary conclusion, the district court's single paragraph of analysis fails to cite *any* caselaw. Nor could it have. As

demonstrated above, this Court's precedent requires plaintiff organizations "to allege only 'some perceptible opportunity cost' from the 'expenditure of resources that could be spent on other activities.'" *Moya*, 975 F.3d at 130 (quoting *Nnebe*, 644 F.3d at 157, and citing *Havens Realty*, 455 U.S. at 379)); *Conn. Parents Union*, 8 F.4th at 173 (same). In fact, the district court acknowledges as much elsewhere in its opinion, noting that "[u]nder Second Circuit authority, a diversion of resources for injury purposes may be to activities already part of an organization's usual services." JA65 (citing *Moya*, 975 F.3d at 130).

Plaintiffs have met this burden. They have alleged in detail that the Notice has made their pre-existing work more time-consuming and less effective, resulting in a diversion of resources away from their other activities. *See supra* pages 29-35. Such injuries "are sufficient under [Second Circuit] precedents to establish injury in fact." *Moya*, 975 F.3d at 129-30 (finding standing where the challenged rule required the plaintiff to spend "twice as much time servicing clients," causing a "diversion of resources" away from its other activities).

CONCLUSION

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

Date: August 26, 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)(A) because, excluding parts of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 7893 words.

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Dated: August 26, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of August 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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