

RECORD NO. 19-2222

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

CASA DE MARYLAND, INC., *et al.*,

Plaintiffs – Appellees,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, *et al.*,

Defendants – Appellants.

On Appeal from the United States District Court
for the District of Maryland

**BRIEF OF AMICI CURIAE NATIONAL FAIR HOUSING ALLIANCE,
INC., AND HOUSING OPPORTUNITIES MADE EQUAL OF VIRGINIA
IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR
REHEARING AND REHEARING *EN BANC***

Lila Miller
Sasha Samberg-Champion
Tara Ramchandani
RELMAN COLFAX PLLC
1225 19th Street NW, Suite 600
Washington, DC 20036
(202) 728-1888
(202) 728-0848 (fax)
Counsel for Amici

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 19-2222

Caption: CASA DE MARYLAND, INC., et al., Plaintiffs, v. Donald J. TRUMP

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Fair Housing Alliance, Inc. _____
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? YES NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Lila Miller

Date: 09/16/2020

Counsel for: National Fair Housing Alliance, Inc.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 19-2222

Caption: CASA DE MARYLAND, INC., et al., Plaintiffs, v. Donald J. TRUMP

Pursuant to FRAP 26.1 and Local Rule 26.1,

Housing Opportunities Made Equal of Virginia ("HOME")

(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO
2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
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Signature: /s/ Lila Miller

Date: 09/16/2020

Counsel for: HOME

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INTERESTS OF AMICI CURIAE¹

Amicus curiae National Fair Housing Alliance, Inc. (“NFHA”) is a national consortium of private, non-profit fair-housing organizations, state and local civil rights groups, and individuals dedicated to ending housing discrimination. Housing Opportunities Made Equal of Virginia (“HOME”), is a non-profit fair housing agency and NFHA member.

Amici work to eradicate discrimination and ensure equal housing opportunities for all through leadership, education and outreach, membership services, public policy initiatives, advocacy, and enforcement. As part of their enforcement activities, Amici participate in federal and state court fair housing litigation. On the front line in the fight against housing discrimination, Amici regularly rely on organizational standing to vindicate civil rights. Amici thus have a strong interest in ensuring that the panel’s incorrect holding that an organization has standing only where it can show a threat to its ability to function is vacated. And, as the organizational plaintiff in the bedrock case on organizational standing, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), HOME stands in a unique

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief. In addition, pursuant to Appellate Rule 29(a)(4)(E), Amici certify that no party’s counsel authored this brief in whole or in part, that no party or party’s counsel contributed money intended to fund the preparation or submission of the brief, and that no person (other than Amici, Amicus NFHA’s members, and Amici’s counsel) contributed money intended to fund the preparation or submission of the brief.

position to address how the panel’s decision eviscerates the organizational standing doctrine and will drastically curtail much-needed enforcement of the Fair Housing Act (“FHA”).

SUMMARY OF ARGUMENT

This Court should rehear the divided panel’s erroneous determination that Plaintiff CASA de Maryland (“CASA”) lacks Article III standing.² The majority reached this result by holding that an organizational plaintiff has an injury-in-fact only when the challenged conduct jeopardizes the organization’s “ability to function.” Op. at 24. This misconception of organizational standing both ignores Fourth Circuit precedent and distorts *Havens*, the foundational Supreme Court decision on this topic. The majority’s unheard-of test so misreads *Havens* that Amicus HOME—the same organizational plaintiff whose injury-in-fact the Supreme Court recognized in *Havens*—would not have had standing under it in *Havens* itself. It is therefore unsurprising that the majority created a circuit split: No other circuit employs the majority’s existential-threat standard.

This unacknowledged circuit split was entirely unnecessary; because the individual plaintiffs have standing, the majority’s adjudication of CASA’s standing

² Amici take no position regarding plaintiffs’ request that this Court also rehear the panel’s determination that the Department of Homeland Security’s Rule is a permissible interpretation of the Immigration and Nationality Act’s public charge provision, 8 U.S.C. § 1182(a)(4)(A).

was superfluous. The consequences of the majority’s constriction of long-established organizational standing caselaw are dire for fair housing enforcement, which often relies on litigation by organizations whose missions, constituents, and resources are affected by discrimination. Accordingly, Amici respectfully request that the Court correct the majority’s unfounded determination of CASA’s organizational standing.

ARGUMENT

I. The Majority’s Decision Fundamentally Misunderstands Binding Fourth Circuit and Supreme Court Precedent

The majority’s decision wrongly holds that an organization has an Article III injury-in-fact only when it demonstrates that the challenged conduct creates a threat to the organization’s very existence: “Organizational injury, properly understood, is measured against a group’s ability to operate as an organization, not its theoretical ability to effectuate its objectives in its ideal world.” Op. at 24. In the majority’s view, the defendant must “ha[ve] directly impaired the organization’s ability to operate and to function.” *Id.* at 25. Although the majority attempts to shoehorn this novel approach into preexisting precedent, it is irreconcilably distinct from prior Fourth Circuit and Supreme Court caselaw, which require an organization to show only that the challenged conduct causes “perceptibl[e] impair[ment]” to its mission-related activities, not *total* impairment. *Havens*, 455 U.S. at 379.

Consistent with *Havens*, this Court’s cases until now all hold that a perceptible impairment to an organization’s activities is sufficient to confer Article III standing, and none imposes the existential-threat requirement dictated by the majority in this case. For example, in *Lane v. Holder*, this Court applied *Havens* to hold that “[a]n organization may suffer an injury in fact when a defendant’s actions impede its efforts to carry out its mission.” 703 F.3d 668, 674-75 (4th Cir. 2012). As Judge King explained in dissent in this case, the *Lane* plaintiff did not meet this threshold of pleading a “perceptible impairment” to its existing mission-related activities because it “did not allege that the new law impaired its organizational mission.” Dissent at 78. Absent allegations of such an impairment, an expense alone was insufficient to confer standing. *Lane*, 703 F.3d at 675. Notably, *Lane* speaks of organizational standing in terms of “imped[iments to] efforts,” not ability to survive. *Id.*

Similarly, in *White Tail Park, Inc. v. Stroube*, this Court rejected a district court’s finding that a challenged statute would have to “prohibit” the organization’s activities to inflict a constitutionally cognizable injury. 413 F.3d 451, 460 (4th Cir. 2005). *Stroube* determined that a statute banning nudist summer camps for juveniles absent parental presence injured the plaintiff-organization by “reducing the size of the audience for its message of social nudism.” *Id.* at 461.

Reduction of audience alone was adequate to satisfy Article III; a wholesale threat to the organization’s operations was not required.

Most recently, in *Maryland Shall Issue, Inc. v. Hogan*, this Court reiterated that an organization has standing if it shows that the challenged conduct “perceptibly impaired its activities” and it “expended resources as a result.” 963 F.3d 356, 362 (4th Cir. 2020). The plaintiff in *Hogan* failed to allege either a perceptible impairment to its activities *or* a resulting expenditure of resources. *Id.* Rather it “at most” alleged “a setback to its social interests,” and thus did not have standing. *Id.* at 363 (citation and internal quotation marks omitted). *Hogan*, too, described organizational standing without reference to or consideration of the organization’s overall ability to function.

Despite this clear and uniform precedent, the majority radically revised *Havens*, wrongly stating that the Supreme Court “cast HOME’s injury in terms of its ability to function.” Op. at 24. Not so. *Havens* held that Amicus HOME had standing because the challenged steering practices “perceptibly impaired HOME’s ability to provide counseling and referral services for low-and moderate-income homeseekers.” 455 U.S. at 379. The Supreme Court further explained that “[s]uch concrete and demonstrable injury to the organization’s activities—with the consequent drain on the organization’s resources—constitutes far more than simply a setback to the organization’s abstract social interests.” *Id.* Nowhere did the

Supreme Court address whether the Defendants' conduct imperiled HOME's ability to function.

Tellingly, the impairment to Amicus HOME's counseling and referral services affected *just one* of the organization's many activities, not its overall survival. As this Court explained in the underlying decision, HOME's activities included not only counseling/referral services, but also investigating and referring discrimination complaints, investigating housing providers, and taking steps to eliminate discriminatory housing practices. *Coles v. Havens Realty Corp.*, 633 F.2d 384, 385 (4th Cir. 1980). An impairment to HOME's counseling/referral services, the first activity, was alone sufficient to confer standing in *Havens*. Yet under the majority's misconception of organizational standing, this would not have been enough. While purporting to apply *Havens*, the majority pronounced an entirely new, restrictive standard that would have yielded a different outcome in *Havens* itself.

II. The Majority Needlessly Created a Circuit Split

Given that the panel reinterpreted *Havens* as well as this Circuit's own precedent, it is unsurprising that not a single other circuit employs the existential-threat standard imposed by the panel. Every other circuit to have considered organizational standing has followed *Havens*'s straightforward mandate. For example:

- *New York v. Dep’t of Homeland Sec.*, 969 F.3d 42, 10 (2d Cir. 2020)

(“An organization need only show a ‘perceptible impairment’ of its activities in order to establish injury in fact.”)
- *Fair Hous. Rights Ctr. in Se. Pa. v. Post Goldtex GP, LLC*, 823 F.3d 209, 214 (3rd Cir. 2016) (finding standing where organization’s “mission to eradicate housing discrimination [was] frustrated because it has had to divert resources in order to investigate and prosecute the alleged discriminatory practices in this case”)
- *A.C.O.R.N. v. Fowler*, 178 F.3d 350, 360 (5th Cir. 1999) (an organization is “entitled to sue on its own behalf ha[s] it proven a ‘drain on its resources’ resulting from counteracting the effects of the [challenged practice]” (citation omitted))
- *Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 576 (6th Cir. 2013) (finding standing where organization “had to divert its resources, its staff time and energy to identify the [discrimination] and then to bring the [it] to the attention of the appropriate authorities”)
- *Cook Cty. v. Wolf*, 962 F.3d 208, 219 (7th Cir. 2020) (finding standing where conduct “caused organizations to divert their limited resources from core programs to ameliorating the effects of the law”)

- *ACORN Fair Hous. Inc. v. Greystone Dev., Ltd. Co.*, 160 F.3d 433, 434 (8th Cir. 1998) (“A fair housing organization satisfies this requirement where it ‘devotes significant resources to identify and counteract’ a defendant’s unlawful practices.” (citation omitted)).
- *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (en banc) (finding standing where the challenged “policy frustrate[d] the organization’s goals and require[d] the organization ‘to expend resources in representing clients they otherwise would spend in other ways.’” (citation omitted))
- *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008) (finding standing where the “average costs” of the organization’s activities “increase[d],” which caused its “noneconomic goals [to] suffer”)
- *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011) (describing organizational standing as “diversion of resources to programs designed to counteract the injury to [organization’s] interest in promoting fair housing”)

These representative cases all agree that, under *Havens*, an organization has standing when it shows that its mission was frustrated by a perceptible impairment

to its activities and that it diverted resources to address that harm in response. To the extent there is variation among the other circuits, it is in the margins.

In ignoring the abundance of authority on organizational standing, the majority failed to acknowledge, let alone grapple with, the analytical fissure that it created with the Supreme Court and all other circuits. Indeed, without any precedent in which to ground its reasoning, the majority cited a *dubitante* opinion of the D.C. Circuit as if it were binding law in that circuit. Op. at 23 (citing *People for the Ethical Treatment of Animals v. Dep’t of Agric.*, 797 F.3d 1087, 1099 (D.C. Cir. 2015) (Millett, J., *dubitante*)). The actual precedential opinion in that case confirmed the organization’s standing because the defendant’s “inaction injured its interests and, consequently, [it] has expended resources to counteract those injuries.” *People for the Ethical Treatment of Animals*, 797 F.3d at 1094. Even Judge Millett’s *dubitante* opinion does not support the panel’s existential-threat framework; it instead framed its case-specific critiques around extending Article III standing to challenge “what the defendant has not done to a third party.” *Id.* at 1101.

The majority’s unfounded departure from the test that has been employed for decades by this circuit and every other is all the more egregious because there was no need to take up organizational standing in the first place. The majority separately determined that the individual plaintiffs have standing. It therefore

should have proceeded to the merits without addressing CASA’s standing, as is this Court’s practice. *See, e.g., CASA de Maryland v. Dep’t of Homeland Security*, 924 F.3d 684, 701 (4th Cir. 2019) (explaining that, because one plaintiff had standing, “[w]e consequently need not consider whether the other Plaintiffs have standing.”); *see also* Dissent at 76 n.2. This Court’s intervention is therefore imperative, even if only to eliminate this unnecessary holding.

III. If Left Intact, the Majority’s Decision Will Profoundly Diminish Enforcement of the Fair Housing Act

The panel’s narrowing of organizational standing may be gratuitous for this case, but it will have far-reaching consequences for fair housing enforcement. If the majority’s standing decision remains intact, it will dramatically blunt the ability of fair housing organizations like Amici to challenge discriminatory conduct that impairs their missions and activities and undermines the goals of the FHA. This enforcement vacuum will harm those most in need of assistance: victims of housing discrimination.

Amici’s work illustrates the critical role that organizational plaintiffs play in rooting out and eliminating discrimination. Because of their mission-related activities—including, for example, consumer counseling, eviction and foreclosure prevention, investigations, and monitoring—Amici are able to detect systemic conduct in ways that individual borrowers and renters cannot. Amici’s capacity to synthesize information across violations and victims permits them to discern when

an instance of discrimination is part of a larger pattern, which is often apparent only once a critical mass of harm has been revealed. Amici's access to investigative resources is also integral to enforcement: Not only are individuals generally unable to discern how their experiences fit into a broader scheme, but even if they could, most lack the information and capital necessary to challenge systemic conduct. Discriminatory practices often discourage individuals from even applying for housing, preventing them from gaining the relevant information. For just that reason, Amici use testers to reveal discriminatory advertisements, steering practices, and policies, as Amicus HOME did in *Havens*.

Organizations like Amici are thus essential to identifying and dismantling structural discrimination, and the tangible harm of such discrimination is often only remediable when organizations themselves have standing to sue. Organizational injuries, and thus organizational remedies, are different from those of individual victims of discrimination. While individuals may seek to redress their own injuries, organizational plaintiffs are harmed by, and thus may seek to rectify, aggregate harm. This is the difference between making one unit accessible for a specific individual with disabilities and making the whole complex accessible; between correcting the wrongful denial of one loan and ensuring that a financial institution will make credit available to an entire community; between granting an exception to the policy and enacting a new policy. In the context of the FHA, a

statute designed “not only to address direct discrimination but also to reshape in meaningful ways the landscape of American cities,” *City of Oakland v. Wells Fargo & Co.*, No. 19-15169, 2020 WL 5035815, at *8 (9th Cir. Aug. 26, 2020), the value of correcting aggregate harm cannot be overstated. In fact, it is the only way to fully realize the FHA’s broad remedial purpose.

The majority has gutted the fair housing enforcement role that organizations like Amici have occupied for decades by baselessly requiring an organization to demonstrate an existential threat to have Article III standing. In a world where fair housing organizations are essential to redressing aggregate harm under the FHA and where the FHA itself plays an essential “continuing role in moving the Nation toward a more integrated society,” *Tex. Dep’t of Hous. & Cnty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 547 (2015), the absence of organizational enforcement will entrench stratification, segregation, and discrimination. This Court must not allow the majority to deconstruct a statutory framework that has “been rightfully lauded as one of the greatest achievements of the civil rights movement.” *City of Oakland*, 2020 WL 5035815, at *2. Accordingly, the majority’s resolution of CASA’s standing must be corrected.

CONCLUSION

This court should grant the plaintiffs’ petition for rehearing by the panel or en banc.

/s/ Lila Miller
Lila Miller
Sasha Samberg-Champion
Tara Ramchandani
RELMAN COLFAX PLLC
1225 19th Street NW, Suite 600
Washington, DC 20036
Tel: (202) 728-1888
Fax: (202) 728-0848

*Counsel for Amici NFHA, Inc.
and HOME of Virginia*

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 19-2222

Caption: CASA DE MARYLAND, INC., et al., v. TRUMP

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(s) Lila Miller

Party Name Amici NFHA, Inc., and HOME

Dated: 09/18/2020

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/s/ *Lila Miller*

Lila Miller