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
(The Honorable Paul W. Grimm)

BRIEF OF *AMICUS CURIAE* PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC. IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITION FOR REHEARING *EN BANC*

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- 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.)
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- 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.)
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No. 19-2222 Caption: CASA de Maryland, Inc. v. Trump

Pursuant to FRAP 26.1 and Local Rule 26.1,

People for the Ethical Treatment of Animals, 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/ Adam B. Abelson Date: September 21, 2020

Counsel for: People for the Ethical Treatment of Animals, Inc.

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INTERESTS OF *AMICUS CURIAE*[1]

People for the Ethical Treatment of Animals, Inc. ("PETA") is a Virginia non-stock corporation and a federally registered 501(c)(3) tax-exempt animal protection charity. Since its founding in 1980, PETA has worked to establish and protect the rights of all animals, including those protected by the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531−1544. With more than 6.5 million members and supporters, PETA is the world's largest animal rights organization. PETA is guided by the principles that animals are not ours to experiment on, eat, wear, or use for entertainment.

This case presents an issue of substantial importance to PETA: whether an organization has standing to challenge a defendant's violations of federal law where those violations have "perceptibly impaired [the organization's] ability" to engage in "activities" in furtherance of its chartered mission. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The Supreme Court held in *Havens* that "there

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), PETA certifies that no counsel for a party authored the brief in whole or in part, and no person or entity other than PETA made a monetary contribution intended to fund the preparation or submission of the brief.

can be no question" that such an organization "has suffered injury in fact." *Id.*

The panel majority's opinion is irreconcilable with *Havens*, as petitioner CASA de Maryland, Inc. ("CASA") correctly explains. Doc. 115 at 6–9. It is also irreconcilable with the separation of powers. The panel majority's erroneous interpretation of *Havens* thwarts Congressional intent to confer citizen standing to the full extent permitted by the Constitution, in statutes such as the ESA (which, on occasion, PETA sues to enforce), or the Fair Housing Act (the "FHA," at issue in *Havens*).

The role of organizations like PETA in enforcing the ESA illustrates aptly the *CASA* panel majority's subversion of Congressional intent. Congress enacted the ESA to protect endangered and threatened animals, but animals themselves have never been held to have standing to sue under that statute. In order to ensure the ESA's enforcement, Congress authorized "[c]itizen suits," through which "any person may commence a civil suit on his [or her or its] own behalf" to, among other things, enjoin violations of the statute. 16 U.S.C. § 1540(g)(1). It is precisely such a citizen-suit provision—sometimes known as a "private attorney general" provision, *see, e.g.*, *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972)—that was before the Supreme Court in *Havens*.

But the importance to preserving *organizational* standing under the ESA is even more critical to protecting Congressional intent than under the FHA; unlike animals protected by the ESA, humans protected by the FHA generally can themselves secure judicial review to enforce federally protected rights. The procedural posture here is a case in point: despite holding that CASA lacks standing, the panel still reached the merits through the individual plaintiffs' claims. The upshot of the panel majority's reasoning, if taken literally, would be that, in a case without such individual co-plaintiffs with an independent injury in fact, federal rights could remain not only unenforced but unadjudicated. And individual plaintiffs frequently do not have the knowledge and resources necessary to investigate, counteract, or litigate ESA violations.

SUMMARY OF ARGUMENT

If left to stand, the panel majority's organizational standing test—limiting the pool of organizational plaintiffs to those that have suffered "operational harm" that "directly impairs" the organizations' "ability . . . to function," Op. at 25-26—would bar from the courthouse organizations that have suffered a cognizable injury under the well-established test articulated in *Havens*, thwarting Congressional intent, and infringing on separation of powers.

The core question for Article III standing is whether a plaintiff has a sufficient "personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction." *Havens*, 455 U.S. at 378-79 (quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977)). In holding that CASA did not suffer a cognizable Article III injury, the panel majority fashioned an unprecedented organizational standing test that requires "direct[] impair[ment]" of an organization's "ability to operate and to function." Op. at 25. This heightened standard fundamentally conflicts with the *Supreme Court*-recognized diversion-of-resource injury that, as with both CASA and the plaintiff in *Havens* itself, directly and perceptibly frustrates an organization's mission.

In violating these precedents to construct its heightened organizational standing test, the panel majority infringes on separation-of-powers principles. Congress intended to grant organizations standing to sue under the ESA to the full extent permitted by the Constitution.

The newly devised test risks excluding such organizations that have suffered an injury in fact cognizable under *Havens* from enforcing federal law.

Finally, the panel majority's analysis of *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012), also conflicts with Supreme Court precedent and decisions in the D.C. Circuit, which appear to have guided the panel majority's discussion of "voluntary 'budgetary choices.'" *See* Op. 22−23.

ARGUMENT

I. The Panel Majority's Unprecedented Narrowing of Organizational Standing Is Incompatible with *Havens.*

The panel majority's conclusion that CASA's mission-impairment and diversion-of-resource injury was "not cognizable . . . because no action by the defendant has directly impaired the organization's *ability to operate and to function*," Op. 25 (emphasis added), cannot be reconciled with *Havens*.

As the Supreme Court held in *Havens*, an organizational plaintiff has standing to sue on its own behalf if the defendant's unlawful conduct "perceptibly impaired" the organization's "ability" to engage in *"activities" in furtherance of its mission*, and thereby caused a "drain on the organization's resources." *Havens*, 455 U.S. at 379 (emphasis added).

The plaintiff in *Havens*, Housing Opportunities Made Equal ("HOME"), had standing because (1) its mission was to "make equal opportunity in housing a reality in the Richmond Metropolitan Area," 455 U.S. at 368; (2) it furthered that mission through various "activities," including "the operation of a housing counseling service, and the investigation and referral of complaints concerning housing discrimination," *id.*; and (3) the defendants' "racial steering practices," in alleged violation of the FHA, "perceptibly impaired" its ability to engage in those "activities" by forcing it to redirect "significant resources" toward "identify[ing] and counteract[ing]" the defendants' illegal practices, *id.* at 379.

As the Supreme Court held, there was "no question" that so long as an organization's mission-advancing "activities" are "impaired" in some "perceptibl[e]" way by a defendant's conduct, the federal courts have Article III jurisdiction. *Id.* The panel majority here opined that "[o]rganizational injury . . . is measured against a group's ability to *operate* as an organization, not its theoretical ability to *effectuate* its objectives in its ideal world" and that "nothing in the Rule directly impairs CASA's ability to provide . . . services to immigrants." Op. 24–25. But as Judge King correctly explained in dissent, it was precisely the perceptible impairment of HOME's "*activities*" in furtherance of its mission that constituted Article III injury. *Havens*, 455 U.S. at 379; Op. at 78 (King, J., dissenting). HOME, like CASA, continued to *operate* as an organization despite being forced to divert disproportionate resources toward addressing the defendant's allegedly illegal, mission-impairing conduct.

The panel majority's novel "ability to operate and . . . function" standard goes well beyond the "distinct and palpable injury" requirement to invoke the jurisdiction of a federal court. *See Lane*, 703 F.3d at 672. So far beyond, in fact, that the onerous standard appears nowhere in any Article III jurisprudence. The panel majority did not cite a single case that supports its novel standard. The only case it did cite, *Whitmore v. Arkansas*, 495 U.S. 149, 155–156 (1990), addressed third party standing to challenge the death sentence of a capital defendant who waived his right to appeal; it says nothing about mission-impairment injury, let alone supports the panel majority's novel "operate and . . . function" test for organizational standing. *See* Op. at 25.

II. The Panel Majority's Decision Infringes on Separation of Powers by Thwarting Congressional Intent That ESA Protections Be Enforced Through the Federal Courts.

In adopting the ESA, "Congress intended endangered species to be afforded the highest of priorities." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978). The statute is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Id.* at 180. Because the ESA's objectives could not be achieved without enforcement by private persons, including non-profit organizations, "[c]itizen involvement [is] encouraged by the [ESA], with provisions allowing interested persons" to "bring civil suits" to "force compliance with any provision of the Act." *Id.* at 180−81 (internal citations omitted). The ESA specifically allows "any person" to commence a civil suit, 16 U.S.C. § 1540(g)(1)(A), an "authorization of remarkable breadth when compared with the language Congress ordinarily uses." *Bennett v. Spear*, 520 U.S. 154, 164–65 (1997). *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) ("[C]ongress has the power to define injuries . . . that will give rise to a case or controversy where none existed before.”).[2]

As the Supreme Court has explained, the “obvious purpose” of the ESA’s citizen-suit provision, in expanding standing to the full extent permitted under Article III, is to “encourage enforcement by so-called ‘private attorneys general’” of the environment—“a matter in which it is common to think all persons have an interest.” *Bennett*, 520 U.S. at 164−66. As with similar legislation, the ESA’s citizen-suit provision was included as “an essential tool by which to remedy the . . . problem of the enforcing agencies’ inability to control the huge number of violations of the environmental legislation.” Lynwood P. Evans, *Bennett v. Spear: A New Interpretation of the Citizen-Suit Provision*, 20 Campbell L. Rev. 173, 184 (1997). Indeed, “[w]ithout citizen-suit provisions many violators would go unpunished” because of the government’s under-enforcement and lack of resources. *Id.* at 185. This is underscored by the fact that meritorious ESA citizen suits are adjudicated after the government

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[2] The citizen-suit provision is so broad, in fact, that the Court held that “any person” should be construed to include environmentalists and even those asserting overenforcement of the ESA. *Bennett,* 520 U.S. at 166.

declines to act, despite being notified of conduct ultimately proven to violate the ESA at least sixty days before the suit is filed. *See* 16 U.S.C. § 1540(g)(2)(A).

Organizations like PETA play a crucial role in effecting Congress's protective intent under the ESA. Unlike other statutes with citizen-suit provisions, the animals who are most directly harmed by the acts the ESA protects have never been held to have standing to enforce the federal protections on their own behalf.[3] And because individual (human) plaintiffs frequently do not have sufficient resources, knowledge or experience to investigate, counteract, and litigate ESA violations, organizations are uniquely positioned to act as "private attorneys general"—and thereby vindicate important Congressional policies and advance the public interest in protecting federally-protected animals from mistreatment and death. *See Bennett*, 520 U.S. at 165; *see also Fox v. Vice*, 563 U.S. 826, 833 (2011) (noting that a private attorney general

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[3] *See Hawaiian Crow ('Alala) v. Lujan*, 906 F. Supp. 549, 552 (D. Haw. 1991) (holding that crow did not have standing to sue under the ESA, but granting human plaintiffs standing to sue on the crow's behalf).

provision allows citizens to "vindicat[e] a policy that Congress considered of the highest priority.").

Some may read the panel's focus on an organization's "ability to *operate*," Op. 24, as implying that only organizations that cannot function at all in the absence of relief have standing to enforce federal rights. That suggestion not only is irreconcilable with *Havens* as discussed above, but also "infring[es]" separation of powers by "refusing to decide concrete cases that Congress wants adjudicated." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 164 (4th Cir. 2000). In the ESA context, the panel majority's misreading of *Havens* undermines Congressional intent in two related ways: by causing under-enforcement of the ESA's substantive protections of listed animals, and by restricting organizations' access to federal courts under the ESA's citizen-suit provision. Ironically, this would result in a perverse scenario where financially viable organizations, funded by the pooled donations of individuals who support their missions, would be unable to challenge wrongful conduct that impairs their missions, and instead leave that important task to individuals—most of whom lack the very resources needed to affirmatively mount that challenge. In that scenario, made possible only by the panel majority's decision, Congress's objective of ensuring ESA enforcement through private parties would be considerably undermined.

III. *Lane v. Holder* Is Plainly Distinguishable.

In violating Supreme Court precedent and subverting separation of powers and Congressional intent, the panel majority takes refuge in *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012). But CASA's injuries are entirely distinguishable from the alleged injury in *Lane*.

In *Lane*, the Second Amendment Foundation's ("SAF's") only claim of organizational harm was that its "resources [were] taxed by inquiries into the operation and consequences of interstate handgun transfer provisions." *Lane,* 703 F.3d at 675. Unlike CASA, SAF did not allege that the legislation at issue frustrated or impaired its efforts to carry out its mission or programs. *See, e.g.*, Appellants' Br. at 33, *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012) (No. 11-1847); Appellants' Reply Br. at 19–20, *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012) (No. 11-1847); First Am. Compl., *Lane v. Holder*, No. 1:11-503 (E.D. Va. May 27, 2011) (alleging nothing about mission impairment or diversion of resources). Indeed, SAF made no showing that the challenged laws made fulfilling its mission more difficult, or required the organization to take any action that it might otherwise not have had to take. *See* Appellants' Br. at 33, *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012) (No. 11-1847).

In the absence of any allegation that SAF's mission was impaired by the challenged legislation, *Lane* cited language from a D.C. Circuit opinion and concluded that SAF's decision to respond to questions regarding the challenged laws was merely a "budgetary choice[]," *Lane,* 703 F.3d at 675 (quoting *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994)). Seizing on this language, the panel majority here focused on the purported "voluntariness" of CASA's budgetary decisions. Op. 22−23.

This analysis is overly simplistic, and ignores that, in some sense, organizations' expenditures are always voluntary, including those the Supreme Court held sufficed in *Havens*. Indeed, in *Fair Employment Council* itself, the D.C. Circuit held that the plaintiff housing organization *had* adequately pled standing, and explained that "'there c[ould] be *no question* that the organization ha[d] suffered injury in fact'" if the challenged conduct "made the Council's overall task more difficult"—for example, by "reduc[ing] the effectiveness of any given level of outreach efforts." 28 F.3d at 1276 (quoting *Havens,* 455 U.S. at 379) (emphasis added). And as the D.C. Circuit made even clearer in a post-*Fair Employment Council* opinion, the touchstone for standing is not "the voluntariness or involuntariness of the plaintiffs' expenditures," but rather whether the organization "undertook the expenditures in response to, and to counteract, the effects of the defendants' alleged [unlawful activity]." *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011).

CONCLUSION

For the foregoing reasons, PETA urges this Court to rehear the panel's decision in this case *en banc*.

Date: September 21, 2020
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Respectfully submitted,

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I hereby certify that this brief complies with the type-volume limitation of Appellate Rules 32 and 29(b)(4) because it contains 2,553 words, excluding the parts of the brief exempted by Rule 32(f). The undersigned has relied upon the word count feature of the word processing system in preparing this certificate. The brief has been prepared in proportionally spaced Century Schoolbook font, point size 14, using Microsoft Office 2016, Version 16.0.4849.1000 (32-bit).

/s/ Adam B. Abelson
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I HEREBY CERTIFY that on this 21st, day of September, 2020, I caused copies of the foregoing Brief of *Amicus Curiae* People for the Ethical Treatment of Animals, Inc. In Support of Plaintiff-Appellees' Petition for Rehearing *En Banc* to be served on all counsel of record through the ECF system.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

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