No. 18-15242

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN DIABETES ASSOCIATION,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE ARMY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California
The Honorable Lucy H. Koh, District Judge
Case No. 16-CV-04051-LHK

BRIEF OF IMPACT FUND, *et al.*, AS AMICI CURIAE SUPPORTING APPELLANT AMERICAN DIABETES ASSOCIATION AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 29(a)(4)(A) and 26.1 of the Federal Rules of Appellate Procedure, Amici Curiae Impact Fund, *et al.*, disclose that the following Amici are nonprofit corporations with no parent corporations or stock owned by any publicly held corporation:

- AARP
- AARP Foundation
- Animal Legal Defense Fund
- Bay Area Legal Aid
- Civil Rights Education and Enforcement Center
- Impact Fund
- Law Foundation of Silicon Valley
- Legal Aid Association of California
- Legal Aid at Work
- Legal Aid Foundation of Los Angeles
- Legal Services for Prisoners with Children
- National Women's Law Center
- Public Interest Law Project
- Southern Poverty Law Center
- Worksafe, Inc.

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INTEREST OF AMICI CURIAE[1]

Pursuant to Federal Rule of Appellate Procedure 29(a), Impact Fund and 14 additional non-profit legal and advocacy organizations ("Amici") respectfully submit this brief in support of Plaintiff-Appellant American Diabetes Association (the "Association") and urge the Court to reverse the district court's order concluding that the Association lacks direct organizational standing to challenge the policies of the Department of the Army governing care provided to children with diabetes.

The **Impact Fund** is a non-profit legal foundation that provides strategic leadership and support for impact litigation to achieve economic and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for civil rights impact litigation across the country. Through its work, the Impact Fund seeks to use and support impact litigation to achieve social justice for all communities.

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Amici certify that this brief was not authored, in whole or in part, by either party's counsel; no party or party's counsel contributed money to fund the preparation or submission of the brief; and they know of no person who contributed money that was intended to fund preparing or submitting the brief. All parties have consented to Amici's submission of this brief.

nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, **AARP Foundation**, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness. In the course of their legal advocacy activities, AARP and AARP Foundation also represent entities, usually not-for-profit groups, that assert claims of importance to older persons and whose standing to make such claims is premised in whole or part on the doctrine of "organizational standing," which is the subject of this amicus brief. *See, e.g.*, *Fair Housing Justice Center v. Cuomo*, No. 18-cv-3196 (S.D.N.Y. April 11, 2018) (Complaint).

The **Animal Legal Defense Fund ("ALDF")** is a national nonprofit organization of lawyers, law students, and individual supporting members committed to protecting the lives and advancing the interests of animals through the legal system. ALDF advances this mission by providing public education through outreach efforts, working to strengthen animal protection laws through legislation, encouraging the government entities to enforce existing animal protection laws, and bringing civil lawsuits—including civil rights claims—against government and private entities. ALDF sometimes suffers a drain of

organizational resources as a consequence of others' illegal activity and possesses a significant interest in its ability to continue challenging such illegal activity in civil courts.

Bay Area Legal Aid is the largest nonprofit law firm serving the seven Bay Area counties in Northern California. Bay Area Legal Aid provides free legal representation to low-income clients on a broad range of issues, including domestic violence prevention, housing preservation and homelessness prevention, improving income security, removing barriers to employment, consumer law, immigration law, and providing holistic support and legal representation for formerly incarcerated individuals and homeless or at-risk youth.

The **Civil Rights Education and Enforcement Center ("CREEC")** is a national nonprofit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC's efforts to defend human and civil rights in court often require the organization to file suit directly as a plaintiff based on organizational standing. CREEC lawyers have extensive experience with the requirements for organizational standing and believe the arguments in this brief are essential to realize the full promise of that doctrine and its critical importance to enforcing civil rights statutes.

The **Law Foundation of Silicon Valley** is a nonprofit corporation based in San José, California focused on advancing the rights of under-represented individuals and families in Santa Clara County through legal services, strategic advocacy, and educational outreach. The Law Foundation serves more than 10,000 low-income individuals and families each year. Part of the Law Foundation's mission includes protecting the civil rights of individuals and groups in Santa Clara County who are underrepresented in the civil justice system through class action and impact litigation. To further its mission, the Law Foundation has undertaken strategic litigation on behalf of organizational plaintiffs, including on behalf of fair housing organizations, to ensure that low-income people have equal rights to acquire and maintain safe, decent, and affordable housing.

Legal Aid Association of California ("LAAC") is a statewide membership association of nearly 100 non-profit public interest law organizations, all of which provide free civil legal services to low-income persons and communities throughout California. The mission of LAAC (which is itself a non-profit corporation) is to provide an effective and unified voice for its members on issues of concern to the statewide justice community. Many of LAAC's member organizations use organizational standing to protect the civil rights of low-income Californians.

Legal Aid at Work is a non-profit public interest law firm founded in 1916 whose mission is to protect, preserve, and advance the rights of individuals from traditionally under-represented communities. Legal Aid at Work has represented low-wage clients in cases involving a broad range of issues, including discrimination on the basis of race, gender, age, disability, sexual orientation, gender identity, gender expression, national origin, and pregnancy. Legal Aid at Work has appeared numerous times in federal and state courts, both as counsel for plaintiffs and in an amicus curiae capacity, to promote the interests of clients faced with discrimination. Legal Aid at Work has a strong interest in ensuring that organizational plaintiffs continue to enforce civil rights laws.

The **Legal Aid Foundation of Los Angeles ("LAFLA")** is a nonprofit organization that provides civil legal aid to address issues facing poor and low-income communities in Los Angeles County. In addition to representing individuals, LAFLA frequently represents community-based organizations that are working to address these issues, including representing these organizations in lawsuits in federal court.

Legal Services for Prisoners with Children ("LSPC") advocates for the release of incarcerated people, the restoration of civil and human rights to the currently and formerly incarcerated, and the reunification of families and communities impacted by mass incarceration. LSPC's advocacy on behalf of

people with criminal convictions and their families takes a range of forms, including serving as an organizational plaintiff in impact cases against institutions and agencies that harm the populations it serves. Fighting for the civil rights of vulnerable people is LSPC's "ordinary business." If LSPC was required to show that resources used to advocate for the civil rights of people with convictions were outside its "ordinary program costs" or that the value of those resources satisfied some quantitative minimum, it would be chilled in its ability to use the full capacity of the legal system to fight for justice.

The **National Women's Law Center ("NWLC")** is a non-profit legal organization that has been working since 1972 to advance and protect women's legal rights. NWLC focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination. Because gender discrimination is a severe threat to women's and other marginalized individuals' full equality, NWLC has worked to secure equal treatment and opportunity in all aspects of society through enforcement of the Constitution and laws prohibiting discrimination and has filed or participated in numerous amicus briefs in state and federal courts in cases involving gender discrimination.

The **Public Interest Law Project** is a California non-profit corporation providing advocacy support, technical assistance, and training to local legal services offices throughout California on issues related to housing, government benefits, civil rights and community redevelopment. PILP is frequently called on to assist in litigation directed at obtaining significant changes in governmental policies, laws, and actions. The availability of organizational standing to redress the frustration of organizational mission or diversion of resources has been crucial to the successful and comprehensive resolution of many of these actions. The standing resulting from this harm must be broadly construed and is critical to ensure full access to justice for the less fortunate. A narrow and overly quantitative analysis of the diversion-of-resources prong is inconsistent with the well-established breadth of organizational standing.

Founded in 1971, the **Southern Poverty Law Center ("SPLC")** is one of the nation's leading civil rights organizations and is dedicated to fighting hate and bigotry and to seeking justice for vulnerable members of our society. Over its 47-year history, SPLC has represented numerous organizations seeking to assert standing to protect the rights of vulnerable populations, and has also served as an organizational plaintiff itself. SPLC recognizes that litigation by civil rights organizations (in the role of "private attorneys general") has been critical to ensuring compliance with a host of civil rights laws.

Worksafe, Inc. is a California-based non-profit organization dedicated to promoting occupational safety and health through education, training, and advocacy. Worksafe advocates for protective worker health and safety laws and effective remedies for injured workers through the legislature and courts. Worksafe is also a Legal Support Center funded by the State Bar Legal Services Trust Fund Program to provide advocacy, technical and legal assistance, and training to the legal services projects throughout California that directly serve California's most vulnerable low-wage workers. Worksafe has an interest in the outcome of this case because it actively represents workers in cases involving occupational health and safety issues.

Amici respectfully submit this brief to highlight the genesis and historical application of the federal standing requirement and the critical importance of direct organizational standing to the enforcement of our civil rights laws.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article III of the U.S. Constitution grants federal courts the limited power to decide cases and controversies. The Constitution does not permit courts to rule on generalized complaints without real or threatened injury to the complaining party; to do so would usurp authority granted to other branches of the federal government. Courts must determine that a justiciable dispute exists in each case,

such that federal jurisdiction is warranted. This determination is the standing inquiry.

Because the standing inquiry is intended to distinguish cases and controversies from the general law-making power granted to Congress in Article II, it requires no specific amount of injury – only the existence or threat of some identifiable injury. In a nutshell:

> Has the plaintiff "'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction"?

Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982) (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))). For standing purposes, injury is like a light switch. A plaintiff has either alleged an identifiable injury or she has not. This is a qualitative analysis with a low quantum threshold, a standard described by this Court as requiring only "minimal" injury and by the Seventh Circuit as "rather undemanding." *Preminger v. Peake*, 552 F.3d 757, 763 (9th Cir. 2008); *Family & Children's Ctr. Inc. v. Sch. City of Mishawka*, 13 F.3d 1052, 1058 (7th Cir. 1994).

This appeal requests review of a district court ruling that departed from this long-standing precedent in three ways. First and most importantly, the district court erred by applying a quantitative threshold for injury sufficient to establish direct organizational standing. It went beyond identifying an alleged injury to

considering its magnitude, a factor that is not part of the standing inquiry. Second, it evaluated the magnitude of that injury *relative* to the size of the Association's overall operations. Third, the district court discounted resources that the Association expended in response to the Army's challenged conduct but in a manner consistent with its normal activities, contrary to the precedent of this Circuit.

Creating a new quantitative standard for what constitutes *sufficient* injury to establish standing departs from the intent of Article III and the precedent of the Supreme Court and the Ninth Circuit, and threatens to mire the standing inquiry in factual debates and vague standards. Such a result could undermine civil rights enforcement. Amici respectfully request that this Court reverse the district court's ruling dismissing the claims of the American Diabetes Association for lack of direct organizational standing.

ARGUMENT

I. U.S. Supreme Court and Ninth Circuit Precedent Require Only the Allegation of a Concrete and Demonstrable Injury to Establish Standing.

The U.S. Supreme Court has consistently applied a standing analysis that focuses on whether the complaining party has alleged specific harm, rather than whether the alleged harm meets any minimum quantum threshold. Existence of

injury is the threshold question to determine whether a complaint belongs before a judicial body or a legislative one.

More than 30 years ago, the Supreme Court ruled that standing required only that "[i]njury is alleged with particularity, so there is not present the abstract question raising problems under Art. III of the Constitution." *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972). In *Trafficante*, two individual tenants of an apartment complex filed a lawsuit alleging that their landlord racially discriminated against nonwhites in violation of the Fair Housing Act. *Id.* at 206-07. The two tenants did not allege that they had been discriminated against, that the nature of their housing had changed in any way, or that they had suffered any financial harm as a result of the landlord's actions. Rather, "the alleged injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations." *Id.* at 209-210. The Court held this allegation was a cognizable injury that placed the dispute within the jurisdiction of the federal court. *Id.* at 212.

The same standing analysis applies to organizations. *See Havens Realty Corp.*, 455 U.S. at 378 (instructing courts to "conduct the same inquiry as in the case of an individual" when assessing organizational standing). A decade after *Trafficante*, in *Havens Realty*, the Court analyzed the standing of organizational plaintiff Housing Opportunities Made Equal ("HOME") in a lawsuit alleging

discriminatory housing practices. *Id*. at 366. HOME was a nonprofit organization with the mission "to make equal opportunity in housing a reality in the Richmond Metropolitan Area." *Id.* at 368. "Its activities included the operation of a housing counseling service, and the investigation and referral of complaints concerning housing discrimination." *Id.* The complaint alleged "that the steering practices of Havens had frustrated the organization's counseling and referral services, with a consequent drain on resources." *Id.* at 369. The Court held, "If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services . . . , there can be no question that the organization has suffered injury in fact." *Id.* at 379. It contrasted the "concrete and demonstrable injury" alleged by HOME with "simply a setback to the organization's abstract social interests" alleged in an earlier case and found insufficient to establish standing. *Id.* (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)).[2]

[2] In *Sierra Club v. Morton*, organizational plaintiff Sierra Club alleged only a generalized public interest in the real estate development that it challenged. The Court wrote, "The Club apparently regarded an allegation[] of individualized injury as superfluous, on the theory that this was a 'public' action involving questions as to the use of natural resources, and that the Club's longstanding concern with and expertise in such matters were sufficient to give it standing as a 'representative of the public.'" *Sierra Club*, 405 U.S. at 736. The high court concluded that "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem" was not enough to establish standing. *Id.* at 739.

The Court's focus on the allegation of a concrete and demonstrable injury for standing has remained consistent through the subsequent decades. *See, e.g.*, *Bank of Am. Corp. v. City of Miami*, — U.S. —, 137 S. Ct. 1296, 1302 (2017) (constitutional standing for purposes of Article III requires that a plaintiff "show an 'injury in fact' that is 'fairly traceable' to the defendant's conduct and 'that is likely to be redressed by a favorable judicial decision.'" (quoting *Spokeo, Inc. v. Robins*, 578 U.S. ——, ——, 136 S.Ct. 1540, 1547 (2016)); *Spokeo, Inc.*, 136 S. Ct. at 1545 ("As we have explained in our prior opinions, the injury-in-fact requirement requires a plaintiff to allege an injury that is both 'concrete *and* particularized.'" (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–181 (2000) (emphasis in *Spokeo*))).

The Ninth Circuit has applied the Supreme Court's framework for evaluating standing, focusing its inquiry on the presence or absence of allegations of a concrete and particularized injury, rather than the size or extent of the alleged injury. *See, e.g.*, *El Dorado Estates v. City of Fillmore*, 765 F.3d 1118, 1121 (9th Cir. 2014) (plaintiff's "alleged injury consist[ing] of the expenses incurred through unreasonable delays and extra legal conditions imposed by the City . . . . is a concrete and particularized injury . . . ."); *Smith v. Pacific Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (allegation that disability group "has had (and, until the discrimination is corrected, will continue) to divert its scarce resources

from other efforts to promote awareness of – and compliance with – federal and state accessibility laws . . . . [is sufficient to show] a 'diversion of resources' . . . ."); *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) ("We hold that Fair Housing of Marin has direct standing to sue because it showed a drain on its resources from both a diversion of its resources and frustration of its mission"); *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1991) ("The allegation that the EOIR's policy frustrates [the organizational plaintiff's] goals and requires the organization to expend resources in representing clients they otherwise would spend in other ways is enough to establish standing.").

The threshold standing inquiry is whether there is a justiciable dispute that places the issue within the purview of Article III courts, rather than an abstract interest that is properly addressed by Congress. Evidence regarding the degree of actual or threatened injury may become relevant at later stages of the legal proceedings with regard to available relief, but it is not determinative of standing. *See Havens Realty Corp.*, 455 U.S. at 379 n. 21 ("Of course HOME will have to demonstrate at trial that it has indeed suffered impairment in its role of facilitating open housing before it will be entitled to judicial relief.").

II. Article III Standing Requires Only an "Identifiable Trifle."

As described above, Article III's standing requirement is like a light switch; the required injury is either alleged or not. The Supreme Court has held that an "identifiable trifle" is sufficient to show injury and establish standing. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973). In *SCRAP*, the Court rejected the government's argument to "limit standing to those who have been 'significantly' affected by agency action," believing such a test would be "fundamentally misconceived." *Id.* After noting that the purpose of "injury in fact" is to "distinguish a person with a direct stake in the outcome of a litigation – even though small – from a person with a mere interest in the problem," the Supreme Court reiterated that even minimal injury can serve that purpose:

> We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax . . . . [W]e see no reason to adopt a more restrictive interpretation of 'adversely affected' or 'aggrieved.' . . . 'The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.'

Id. (citations omitted).

The Ninth Circuit has applied *SCRAP* in its own decisions involving standing. For example, in *Council of Insurance Agents & Brokers v. Molasky-Arman*, this Court found that an insurance agent challenging a "countersignature"

Nevada statute had standing based on allegations of minimal harm. 522 F.3d 925 (9th Cir. 2008). The Nevada Commissioner of Insurance argued that standing should be denied because the impact of the statute on the plaintiff was "only minor, as [the plaintiff] ha[d] no personal contact with the countersigning resident agents and that the only additional burden placed on her is having her staff mail the policies to obtain the resident agents' signatures." *Id.* at 932. Citing to *SCRAP*, the Court rejected this argument and held that the plaintiff's injury was sufficient because it was "'concrete,' 'actual,' and amounts to more than an 'identifiable trifle.'" *Id.*; *see also Preminger v. Peake*, 552 F.3d 757, 763 (9th Cir. 2008) ("The injury may be minimal.").

Several other circuits have relied on *SCRAP* to establish an undemanding standard for individual and organizational standing. Last year, the Fifth Circuit found a nonprofit organization focused on voter outreach and civic engagement had standing based on allegations of additional time and effort explaining provisions of a Texas voter law to limited English proficient voters. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610-612 (5th Cir. 2017). The Fifth Circuit noted that the organization's injury "was not large. But the injury alleged as an Article III injury-in-fact need not be substantial; 'it need not measure more than an "identifiable trifle."' This is because 'the injury in fact requirement under Article III is qualitative, not quantitative, in nature.'" *Id.* at 612 (citations omitted); *see*

also Family & Children's Ctr. Inc. v. Sch. City of Mishawka, 13 F.3d 1052, 1058 (7th Cir. 1994) ("[T]he Article III standing requirements are rather undemanding."); *Public Interest Research Grp. of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 71 (3d Cir. 1990) ("[I]njuries need not be large, an 'identifiable trifle' will suffice."); *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987) ("There is no minimum quantitative limit required to show injury; rather, the focus is on the qualitative nature of the injury, regardless of how small the injury may be."); *Conservation Council of N. Carolina v. Costanzo*, 505 F.2d 498, 501 (4th Cir. 1974) ("The claimed injury need not be great or substantial; an 'identifiable trifle', if actual and genuine, gives rise to standing.").

The "undemanding" standing inquiry serves the purpose of ensuring only cases and controversies proceed before the court; weighing the magnitude of the injury does not.

III. The District Court Erred By Applying a Quantitative Threshold.

In the present case, the American Diabetes Association's amended complaint alleges a concrete and particularized harm. The complaint identifies a series of intake calls and organizing meetings triggered by the Army's policies on providing child care to children with diabetes, including one call received by the Association's Legal Advocate Program in the weeks between the June 2017

change in policy and the filing of the amended complaint.[3] Excerpts of Record ("ER") 122-23 ¶¶ 74, 75. Under *Trafficante*, *Havens Realty*, and other rulings previously discussed, the diversion of Association resources to address the Army's policies is sufficient to establish standing.

The decision below departs from the existing standard by requiring that an organization's alleged harm meet a quantitative threshold. The district court wrote: "An organization's diversion of resources must be significant enough to have 'perceptibly impaired' [its] ability to carry out [its] mission[]." Order Granting Motion to Dismiss Without Prejudice ("Order") at ER 018 (citations omitted). Finding it undisputed that the Army's policy frustrates the Association's mission, the court framed the issue as "whether the Association has diverted enough resources to perceptibly impair the Association's ability to carry out its mission." *Id*. The district court altered the inquiry from simply identifying the *presence* of harm to weighing whether there is *enough* harm.

[3] The district court's opinion rests heavily on the distinction between the harms to the Association under the old policy and the harms to the Association under the new policy. In the court's view, "any injury based on providing assistance to families affected by the Old Policy is moot." Order at ER 019. Amici agree with the Association's view that a defendant cannot wipe out the harm to a plaintiff by changing its policy in a manner that does not cure its discriminatory defects, an issue that is also on appeal. *See* Appellant's Opening Brief, Part III. However, even if the Court affirms the district court's ruling that it may only weigh the harm allegedly caused by the new policy, the requirement for minimal injury is still met here.

The district court cited *Valle del Sol Inc. v. Whitting* for the proposition that the diversion of resources must reach a quantitative threshold. 732 F.3d 1006 (9th Cir. 2013). However, *Valle del Sol* does not support this approach. In *Valle del Sol*, the court analyzed whether the action of the defendant "perceptibly impaired" the organization's ability to carry out its mission but, in so doing, considered only whether there *was* a diversion of resources, not the *magnitude* of that diversion. Finding that its mission had been frustrated and its resources diverted in response to the defendant's actions, the court ruled the organization had standing. *Id.* at 1018. Nowhere did the court establish a specific threshold of diverted resources necessary to demonstrate perceptible impairment.

The district court appeared to read "perceptibly impaired" to require the Association to allege more than the mere existence of an injury. But the Supreme Court has used the term "perceptibly impaired" synonymously with "injury in fact" and "concrete and demonstrable injury" and in contrast to mere interest in a particular issue. *Havens Realty Corp.*, 455 U.S. at 379, *supra* at 12. At least a decade ago, the Ninth Circuit adopted the standard set forth in *Havens Realty*. *See American Fed'n of Gov't Emps. Local 1 v. Stone*, 502 F.3d 1027, 1032-33 (9th Cir. 2007) ("As the Supreme Court has held, actions that 'perceptibly impair[ ]' an organization's ability to carry out its mission impose a 'concrete and demonstrable' injury in fact.") (citing *Havens Realty Corp.*, 455 U.S. at 379).

"Perceptible impairment," as the term is used by the Supreme Court and the Ninth Circuit, is not a heightened standard. Rather, it is synonymous with the "undemanding" requirement that plaintiffs identify concrete and demonstrable injuries in order to avail themselves of the federal court system. The Association need only allege an injury to satisfy the injury-in-fact standing requirement, and it has done so here.

IV. The District Court Further Erred By Comparing the Alleged Harm to the Association's Resources and By Holding Ordinary Program Costs Cannot Establish Standing.

In addition to improperly requiring a quantitative threshold for alleged harm, the district court erred in at least two more ways in reaching the conclusion that the Association lacks direct organizational standing. First, the district court evaluated the alleged harm relative to the Association's overall operations, and on that basis concluded it was too small to establish standing. Second, the district court concluded that the alleged harm was part of the Association's "ordinary program costs" or "typical activities," and therefore could not establish standing. The court's analysis is flawed on both points and should be reversed.

A. The direct organizational standing inquiry does not include a harm-to-resources comparison.

The decision below departed from the standard for direct organizational standing by evaluating the alleged harm in relation to the organization's overall operations. Order at ER 020. The court placed the Association's June 26, 2017

intake call in the context of its 485,000 members, $150 million in assets, and the Legal Advocate Program's nearly 2,000 yearly contacts. *Id.* In doing so, the court found that "adding one contact to an annual total that approaches 2,000 [does not] perceptibly impair[] the Association's ability to carry out its mission." *Id.*

The district court cited no precedent to support its comparative injury reading. The two cases it relied upon address an unrelated argument discussed *infra* in Part III.B. Moreover, as explained above, such a reading conflicts with the purpose of standing – to distinguish cases and controversies from generalized concerns. *See Havens Realty Corp.*, 455 U.S. at 378-79; *American Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652, 656 (7th Cir. 2011) ("The magnitude, as distinct from the directness, of the injury is not critical to the concerns that underlie the requirement of standing. . .").

Practical considerations further counsel against implementing a harm-to-resources comparison. It would force courts to apply a higher bar to larger organizations, even though the very same diversion of resources by a smaller counterpart might be sufficient to establish standing. A local chapter with a smaller staff and budget would be more likely to identify sufficient harm than its national office asserting the same injury. In addition, a harm-to-resources comparison would require courts to determine when the ratio between harm and resources reaches a threshold where the harm is sufficient to satisfy standing. Such

an analysis would lead to inconsistent results and would be a significant departure from well-established standing precedent.

Requiring courts to weigh harm in light of a party's resources also has implications beyond organizational standing. In individual cases, such an inquiry would require different showings of harm by plaintiffs based on their relative wealth and resources. Far from serving as a tool of prudent gatekeeping, investigating relative harm subverts equality before the law and excludes plaintiffs who have the right to be heard in court. Article III standing should not vary based upon the relative wealth or resources of the litigant.

B. Diversion of resources in a manner consistent with an organization's "ordinary business" establishes standing.

In holding that the Association was not "perceptibly impaired," the court cited rulings from the D.C. and Third Circuits and quoted language indicating that "ordinary program costs" or "typical activities" cannot confer standing. *See* Order at ER 020. This is not the standard in the Ninth Circuit. In addition, the cited cases are factually distinguishable from this case.

An organization that has alleged that it diverted resources to specifically respond to the defendant's conduct has standing in Ninth Circuit, even it expended those resources in a manner consistent with its typical activities. In *National Council of La Raza v. Cegavske*, the court pointed out that "[p]laintiffs have not alleged that they are simply going about their 'business as usual,' unaffected by the

[defendant's] conduct," where the organization used resources to register someone to vote who would have already been registered if the defendant had complied with the National Voter Registration Act. 800 F.3d 1032, 1040-41 (9th Cir. 2015). The court found the organization had been injured because those diverted resources "would have been spent on some other aspect of their organizational purpose." *Id.* at 1040. The court then characterized its earlier decision in *Fair Housing Council of San Fernando Valley v. Roommate.com LLC,* 666 F.3d 1216, 1219 (9th Cir. 2012) as "holding that plaintiff organizations have standing to sue to stop a roommate-matching website from discriminating because they undertook a campaign against discriminatory advertising, *even though their ordinary business includes investigating and raising awareness about housing discrimination.*" *National Council of La Raza,* 800 F.3d at 1041 (emphasis added).

The cases upon which the district court relied did not establish a standard contrary to that of the Ninth Circuit. Rather, the unique facts of those cases – facts not present here – dictated the outcome. The district court cited *National Taxpayers Union, Inc. v. United States* and quoted language that an organization "cannot convert its ordinary program costs into an injury in fact." Order at ER 020 (quoting *National Taxpayers Union, Inc.*, 68 F.3d 1428, 1434 (D.C. Cir. 1995)). In *National Taxpayers Union*, the organizational plaintiff challenged an allegedly unconstitutional increase in maximum federal estate and gift tax rates. 68 F.3d at

1434. The D.C. Circuit held that the alleged harm of "expend[ing] resources to educate its members and others regarding Section 13208" was not sufficient to establish standing because the expenditures were entirely consistent with the organization's narrow purpose – to monitor the government's tax policies. *Id.* It was not a *diversion* of resources. The court explained:

> Unlike the injury alleged in *Havens Realty*, where the defendant's practices "perceptibly impaired" the plaintiff's ability to provide counseling and referral services for low- and moderate-income homeseekers, . . . , Section 13208 has not forced NTU to expend resources in a manner that keeps NTU from pursuing its true purpose of monitoring the government's revenue practices.

Id. Because the government's passage of Section 13208 did not require National Taxpayers Union to undertake any additional activities that it would not otherwise have undertaken, the organization was not injured and did not have standing.

Similarly, the district court cited *Blunt v. Lower Merion School District* for the proposition that "'additional expenditures . . . consistent with [an organization's] typical activities' do not confer standing." Order at ER 020 (quoting *Blunt*, 767 F.3d 247, 286 (3d Cir. 2014)). However, like National Taxpayers Union, the organizational plaintiff had a narrow mission focused on monitoring the defendant school district, so there were no new or additional expenditures required as a result of the school district's actions. The court concluded, "Because it is targeted at [the school district], all of [the organization's] resources would necessarily have been spent on [school district]-related projects,"

therefore the expenditures did not establish standing. *Blunt*, 767 F.3d at 286. In reaching this outcome, the Third Circuit contrasted the broad mission of the organizational plaintiff in *Havens Realty* (HOME's work was to "promote equality in the Richmond area overall and its interests thus went far beyond monitoring the specific actions at issue in the *Havens* case") with the narrow purpose of the organization before it ("[the organization] is targeted only at [the school district], so its very purpose was to expend resources to educate the public regarding the [school district's] behavior"). *Id.* at 285. The former constituted a diversion of resources that provided standing; the latter did not.

In the present case, the Association's true purpose is not monitoring the Army or its child care policies. It is pursuing a broad mission "[t]o prevent and cure diabetes and to improve the lives of all people affected by diabetes."[4] The Army's actions forced the Association to use resources to counsel a member family about the Army's policy, an activity that it would not otherwise have undertaken in pursuit of its mission. The Supreme Court's decision in *Havens Realty* and this Court's decision in *National Council of La Raza* demonstrate that where a defendant's conduct demands time and attention that otherwise would

[4] American Diabetes Association website, www.diabetes.org (last visited June 27, 2018).

have been devoted to other matters, there is a diversion of resources and standing is appropriate. That is the case here.

V. A Broad View of Standing is Critical to Civil Rights Enforcement.

A broad interpretation of standing is particularly critical in the civil rights context because, as the Supreme Court has noted, civil rights laws require "private litigation [to] secur[e] broad compliance with the law." *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968). In *Doran v 7-Eleven, Inc.*, 524 F.3d 1034 (9th Cir. 2008), this Court recognized that "[t]he Supreme Court has instructed us to take a broad view of constitutional standing in civil rights cases, especially where, as under the ADA, private enforcement suits 'are the primary method of obtaining compliance with the Act,'" *id.* at 1039-40 (quoting *Trafficante*, 409 U.S. at 209).

Statutes like the Civil Rights Act of 1964, the Fair Housing Act, and the Americans with Disabilities Act, among others, were drafted with the intention to eradicate discrimination, and courts interpret standing under those laws with that intent in mind. *See, e.g.*, *Trafficante*, 409 U.S. at 211 ("Since HUD has no enforcement powers . . . , the main generating force must be private suits in which, . . . , the complainants act not only on their own behalf but also 'as private attorney generals in vindicating a policy that Congress considered to be the highest priority.' . . . It serves an important role in this part of the Civil Rights Act of

1968 . . . ."); *Doran*, 524 F.3d at 1047 ("We do not believe Congress could have intended such a constricted reading of [standing under] the ADA which could render the benefits it promises largely illusory.").

Organizations are critical to ensuring compliance with civil rights laws and eradicating discrimination. Organizational plaintiffs frequently shine a light on civil rights violations harming disempowered, marginalized communities:

- National Council of La Raza, Las Vegas NAACP, and Renosparks NAACP were held to have standing to sue Nevada state officials for violating the National Voting Registration Act by not making voter registration available to poor people or people with disabilities. *National Council of La Raza v. Cegavske*, 800 F.3d 1032, 1046 (9th Cir. 2015).

- The United Food and Commercial Workers International Union, the Asian Chamber of Commerce of Arizona, and the Service Employees International Union were held to have standing to challenge an Arizona statute that made it a criminal offense to conceal, harbor, shield, or transport unlawful aliens. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013).

- Fair Housing Councils of San Fernando Valley and San Diego had standing to challenge Roommate.com for violating the Fair Housing Act by steering site users according to their sex, sexual orientation, and family status. *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1218-19 (9th Cir. 2012).

- Disability Rights Action Committee had standing to sue Pacific Properties and Development Corporation for violation of the Fair Housing Amendments Act by constructing a building with "inaccessible doorways, pathways, and thermostats." *Smith v. Pacific Props. & Dev. Corp.*, 358 F.3d 1097, 1099, 1106 (9th Cir. 2004).

- Fair Housing of Marin, a community organization, was held to have standing to challenge a property owner for discriminating against black

prospective tenants in violation of the Fair Housing Act, Civil Rights Act of 1866, and the California Fair Employment and Housing Act. *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002).

- El Rescate Legal Services was held to have standing to sue the Executive Office of Immigration for failing to provide adequate translation services for deportation and exclusion hearings in violation of the Immigration and Nationality Act. *El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1991).

The cases discussed in this brief demonstrate the value of direct organizational standing. Violations of civil rights laws can go unaddressed because victims do not know their rights, fear the consequences of reporting unlawful behavior, or are limited to small individual remedies. Direct organizational standing allows affected organizations to stand alongside, or in place of, individual plaintiffs and ensure the enforcement of our nation's civil rights laws.

Organizational plaintiffs play a critical role in civil rights litigation and must be afforded an equal opportunity to establish standing under the analysis set forth by the Supreme Court. A quantitative and comparative standing inquiry departs from the precedent of the Court and this circuit, inhibits organizations' ability to participate in the legal process, and may permit civil rights violations to go unaddressed.

CONCLUSION

The American Diabetes Association has properly alleged sufficient injury to establish Article III standing under the precedent of the Supreme Court and this circuit, and should be allowed to proceed as an organizational plaintiff. Amici respectfully urge the Court to reverse the district court's ruling that the American Diabetes Association did not have direct organizational standing to challenge the Department of the Army's 2017 child care policy under the Americans with Disabilities Act.

Dated: June 29, 2018

Respectfully submitted,

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