No. 25-10651

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CARROLL INDEPENDENT SCHOOL DISTRICT,
Plaintiff-Appellee

v.

UNITED STATES DEPARTMENT OF EDUCATION; LINDA MCMAHON, SECRETARY, U.S. DEPARTMENT OF EDUCATION; KIMBERLY RICHEY, IN HER OFFICIAL CAPACITY AS ASSISTANT SECRETARY FOR CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF EDUCATION; UNITED STATES DEPARTMENT OF JUSTICE; PAMELA BONDI, U.S. ATTORNEY GENERAL; HARMEET DHILLON, IN HER OFFICIAL CAPACITY AS ASSISTANT ATTORNEY GENERAL FOR THE CIVIL RIGHTS DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE,
Defendants-Appellees

VICTIM RIGHTS LAW CENTER; JANE DOE; A BETTER BALANCE,
Movants-Appellants

On Appeal from the United States District Court
for the Northern District of Texas
Case No. 4:24-cv-00461
The Honorable Reed C. O'Connor

REPLY BRIEF OF MOVANT-APPELLANT A BETTER BALANCE

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INTRODUCTION

After thousands of words of briefing, it's still unclear why either party in this case opposes ABB's effort to intervene. Neither claims to be injured by the 2024 Rule's protections for pregnant and postpartum students or voices any objection to them. The Government advances no argument against reviving the pregnancy-related provision, and Carroll Independent School District does so only half-heartedly. Yet both insist that ABB shouldn't be allowed to pick up the defense of that provision where the Government left off. In doing so, the Government and Carroll rely on an unduly narrow read of standing precedent. Unlike the parties, ABB has a stake in this fight.

ARGUMENT

I. ABB has standing

A. ABB has standing because the vacatur impairs its core activities and drains its resources

1. ABB has suffered an injury-in-fact

1. ABB's mission is to "protect the rights" of "pregnant, parenting, and caregiving workers and students." ROA.4915 (¶ 2). Because of the vacatur, ABB must spend more time with each student-caller to provide her potentially helpful legal information—that is, to support her in

"protect[ing] her rights." *Id.*; *see* OpeningBr.20-23. For that reason, ABB must otherwise limit its services, including by providing legal representation to fewer callers. *See* OpeningBr.23-24. So, the vacatur "perceptibly impair[s]" ABB's "services," *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 395 (2024) (citation omitted), and consequently "drains … the organization's resources," *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

That's an injury-in-fact. *Id.*; *Nairne v. Landry*, 151 F.4th 666, 680 (5th Cir. 2025); OpeningBr.19-27. *Havens* held that such an injury "constitutes far more than simply a setback to the organization's abstract social interests," 455 U.S. at 379, foreclosing the Government's characterization of ABB's similar injury as simply a "conflict with an organization's social and policy goals," Gov'tBr.26.

Recently, the Supreme Court reaffirmed that a forced diversion of resources may support standing. *See Bost v. Ill. State Bd. of Elections*, 146 S.Ct. 513, 519 (2026). *Bost* "acknowledged that election rules that 'require [a candidate] to expend additional resources' can support standing." Gov'tBr.21 n.7 (quoting *Bost*, 146 S.Ct. at 519). Concurring, Justice Barrett emphasized that a plaintiff may have standing "not only

when a law directly imposes costs on a plaintiff" but also when a plaintiff must "reasonably incur costs to mitigate or avoid the substantial risk of a harm." *Bost*, 146 S.Ct. at 524 (Barrett, J., concurring) (citation modified); *see id.* at 534 (Jackson, J., dissenting) (similar).

The Government says election expenditures differ from the diversions in this case because "candidates 'have an obvious personal stake in how the result is determined and regarded,'" and rule violations may "'cause them particularized and concrete harm.'" Gov'tBr.21 n.7 (quoting *Bost*, 146 S.Ct. at 520). That's a misread: *Bost* explained those stakes and harms allow for additional theories of standing *beyond* diversions of resources. *See* 146 S.Ct. at 519-20. Regardless, the Government is wrong that ABB has "no comparable interest." Gov'tBr.21 n.7. ABB has an "obvious [organizational] stake" in the pregnancy provision. *Id.* (quoting *Bost*, 146 S.Ct. at 520); *see* OpeningBr.20-24.

2. Ultimately, the Government acknowledges that an organization may have standing when it's "been forced to divert resources." Gov'tBr.22. But, echoing the district court, it asserts that such forced diversions are sufficient only if an organization diverts "resources [away] from its routine organizational functions" toward new and "differ[ent]"

activities. *Id.* at 22, 24. Carroll gestures at a similar argument (at 33). ABB has already explained why that's wrong: Under this Court's precedent, an organization may have standing if, as here, the challenged action "frustrates and complicates" its "*routine* … activities," requiring the organization to divert more resources to them and "reduce the number of people" it assists. *Louisiana Fair Hous. Action Ctr., Inc. v. Azalea Garden Props., L.L.C.*, 82 F.4th 345, 354 (5th Cir. 2023) ("*LaFHAC*") (citation modified) (emphasis added); *see* OpeningBr.33-37. Neither party advances a meaningful counterargument.

The Government pins its position (at 24) to *Deep South Center for Environmental Justice v. EPA*, 138 F.4th 310 (5th Cir. 2025). But the language it quotes acknowledges this Court's long-stated rule that "a cognizable diversion of resources must 'detract *or* differ from [the organization's] routine activities.'" Gov'tBr.24 (emphasis added) (quoting *Deep S.*, 138 F.4th at 320). The Government inexplicably excludes from the rule diversions that "detract." *Id.*

Carroll, for its part, misses (at 33) the distinction between an organization whose daily operations remain the same and one, like ABB, whose activities become more resource-intensive, and so must narrow its

services and assist fewer people. *See* OpeningBr.33-35. The former won't have an injury-in-fact; the latter will. *See id.*; *LaFHAC*, 82 F.4th at 354. Carroll asserts that *Alliance* "rejected a theory of injury based on a law making the organization's 'efforts more costly by requiring it to spend extra time and money on those efforts.'" CarrollBr.23 (quoting *Tenn. Conf. of the NAACP v. Lee*, 105 F.4th 888, 905 (6th Cir. 2024) ("*Lee I*"). But *Alliance* didn't address that question, and the Sixth Circuit case Carroll quotes said no such thing: The quoted language comes from a description of the plaintiff's claim, not from *Alliance*, and the Sixth Circuit didn't resolve whether such a theory might suffice. *See Lee I*, 105 F.4th at 905.

3. Despite acknowledging that a forced resource diversion may suffice, the Government asserts that *Alliance* "limit[ed] *Havens* to its facts." Gov'tBr.25 (quoting *Deep S.*, 138 F.4th at 319). But when the Supreme Court means to limit a case in that way, it says so. *See*, *e.g.*, *Jefferson v. City of Tarrant*, 522 U.S. 75, 83 (1997). *Alliance* did not. That's why this Court and others have continued, post-*Alliance*, to apply *Havens* and recognize organizational standing in cases similar, but not identical, to it. *See, e.g.*, *Nairne*, 151 F.4th at 680-82; *Immigrant Defs. L.*

Ctr. v. Noem, 145 F.4th 972, 987-89 (9th Cir. 2025); *Republican Nat'l Comm. v. N.C. State Bd. of Elections*, 120 F.4th 390, 397 (4th Cir. 2024).

The Government's reliance on *Deep South*'s dicta about *Alliance* is misplaced. As ABB has explained, that case's broad language about *Alliance*—sweeping far beyond the facts before it—is non-binding. *See* OpeningBr.31 n.1. Indeed, the Government acknowledges that *Deep South*'s holding didn't depend on the decision's analysis of *Alliance*. *See* Gov'tBr.17 (noting *Deep South* recognized the plaintiff "lacked standing" "[e]ven without *Alliance*").

"[T]he rule of orderliness does not apply" to past "dicta." *Martinelli v. Hearst Newspapers, L.L.C.*, 65 F.4th 231, 240 (5th Cir. 2023). Accordingly, *Nairne* is good law even if it conflicts with the non-binding portions of *Deep South*. *Deep South* and *Nairne* are compatible for the same reason *Alliance* and *Havens* are: An organization cannot spend its way into standing through voluntary issue advocacy but is injured by conduct that perceptibly impairs its core activities. *See* OpeningBr.27-32.

4. ABB is like the organizational plaintiff in *Havens* and dissimilar to those in *Alliance* and *Deep South*, who engaged in voluntary policy advocacy against policies they disliked. Those organizations could've

chosen to "do[] 'nothing.'" OpeningBr.34 (quoting *LaFHAC*, 82 F.4th at 357 (Ho, concurring)). That inaction may have come at the cost of their "'abstract social interests,'" but that has "never sufficed to confer standing." *Deep S.*, 138 F.4th at 318 (quoting *Havens*, 455 U.S. at 379).

By contrast, because the vacatur directly interferes with ABB's helpline, ABB cannot carry on as it did before. *Contra* CarrollBr.31. The vacatur "compel[s]" ABB "to take [] action," Gov'tBr.23 (quoting *Deep S.*, 138 F.4th at 319-20), by forcing it to choose between two bad options: It can spend more time with each student-caller—a drain on ABB's resources that requires it to reduce the depth and breadth of its services to others—or it can shut down its helpline services for students. OpeningBr.20-24. Either way, the vacatur "directly affect[s] and interfere[s] with [ABB's] core business activities." *Alliance*, 602 U.S. at 395; *see also Noem*, 145 F.4th at 988 (holding organization was injured when it had to expend additional resources "[t]o avoid abandoning a core constituency").

ABB is like the booksellers and fuel producers in Carroll's brief (at 26-27). Carroll acknowledges that a bookseller has standing if it must choose between "selling to schools" or "meet[ing] the law's conditions for

those sales" because they are "injured either way," even though "they have a choice." CarrollBr.26. Likewise, "[f]or fuel producers, staying in business is in some sense voluntary, but avoiding decreased demand by shutting down would be an injury-in-fact." *Id.* at 27 (citation modified). The same goes for ABB. It's "in some sense voluntary" for ABB to maintain its student helpline, but "shutting [it] down would be an injury-in-fact." *Id.* (citation modified).

The Government (at 28) is right that the plaintiff in *Deep South* engaged in direct services. But that plaintiff, unlike ABB, didn't contend that the challenged policy interfered with those services. *See Deep S.*, 138 F.4th at 318. Rather, it had diverted resources away from its direct services so it could engage in voluntary policy advocacy—a self-inflicted injury. *Id.* at 317.

5. The Government is wrong that "*Alliance* explained[] the critical fact of *Havens* is that '[the defendant] had provided [the organizational plaintiff's] black employees false information about apartment availability." Gov'tBr.16 (quoting *Alliance*, 602 U.S. at 395). Rather, *Alliance* said that the "[c]ritical[]" fact was that the plaintiff "not only was an issue-advocacy organization, but also operated a housing counseling

service,"—unlike the pure issue advocacy organizations in *Alliance*. 602 U.S. at 395; *accord Fair Hous. Ctr. of Metro. Detroit v. Singh Senior Living, LLC*, 124 F.4th 990, 992 (6th Cir. 2025).

Indeed, the *Havens* defendant's lying to an employee couldn't have been the plaintiff's injury. The organization dispatched employees as testers, posing as renters, "to determine whether [the defendant] practiced racial steering." *Havens*, 455 U.S. at 368. The provision of false information to a Black tester helped prove that practice. *See id.* Because the defendant gave accurate information to white testers, the organization knew the information provided to the Black tester was wrong, so wasn't actually misled by it. *See id.* As a result, the false information didn't itself interfere with the organization's ability to counsel clients. *Contra* Gov'tBr.16; CarrollBr.27. The organization's claim instead stemmed from "a continuing violation manifested in a number of incidents," including steering of real renters. *Havens*, 455 U.S. at 381. Were that not true, the organization's claim would've been time-barred; the provision of false information to the Black tester fell outside the statute of limitations. *See id.*

Accordingly, the organization's injury wasn't its receipt of false information *qua* its receipt of false information, but rather the "perceptibl[e] impair[ment]" of the organization's "ability to provide counseling and referral services" to renters because of the defendants' racial steering practices. *Alliance*, 602 U.S. at 395 (quoting *Havens*, 455 U.S. at 379).

Standing in *Republican National Committee v. North Carolina State Board of Elections* also didn't turn on a special rule for informational injuries. *Contra* CarrollBr.28-29. The plaintiffs had standing because a state election board's "inaction" required them to "divert significantly more of their resources into combatting election fraud," which "frustrated their organizational and voter outreach efforts." 120 F.4th at 396-97 (citation modified).

So, contrary to the parties' suggestion, an organization won't have standing only if it suffers an injury akin to the receipt of false information. Nor is that limitation required to avoid providing every organization "standing to challenge … conduct" that's "inconsistent with the mission to which it [i]s committed," Gov'tBr.25: If an organization can show only "a setback to [its] abstract social interests," rather than a

"perceptib[le] impair[ment]" of its core activities, it will lack an injury-in-fact, *Havens*, 455 U.S. at 379.[1]

6. The vacatur does not, as the Government claims, "further[] [ABB's] mission" by requiring it to spend longer assisting each student-caller. Gov'tBr.10 (citation modified). ABB's mission isn't to spend time and other resources on callers. It's to "protect the rights" of "pregnant, parenting, and caregiving workers and students." ROA.4915 (¶ 2). Because of the vacatur, ABB must limit its services, including by representing fewer callers. OpeningBr.23-24. Helping more people protect their rights would further ABB's mission. Helping fewer of them, at greater length but without better results, doesn't. *See LaFHAC*, 82 F.4th at 355 (explaining that, in *Havens* and *OCA-Greater Houston*, organizations "sufficiently alleged impairment of [their] mission because [they] could assist fewer individuals"). It's flat wrong, then, that the vacatur doesn't "negative[ly] [a]ffect [ABB's] ability to advocate, counsel, or operate its helpline." *Tennessee*, 2026 WL 524773, at *5.

[1] The district court decision denying ABB's intervention in *Tennessee v. McMahon* wrongly relied on the Government's misreading of *Havens*. *See* No. 2:24-cv-00072, 2026 WL 524773, at *5 (E.D. Ky. Feb. 25, 2026), *appeal docketed*, No. 25-5205 (6th Cir. Mar. 12, 2025).

If the Government were right, the organization in *Havens* wouldn't have had standing. The defendant's racial steering practices provided more opportunities for the organization to "investigat[e] … discrimination" and "counsel[]" home-seekers, *Havens*, 455 U.S. at 368; the more discrimination, the more the organization had to do. But, like ABB, that organization's mission wasn't to advocate for the sake of advocacy. So, the defendant's frustration of the plaintiff's activities, and the resultant resource diversion, established standing. *Id.* at 379.

Despite that rule, *Havens* didn't turn "every law firm in the country … into a standing-creation machine." *Tennessee*, 2026 WL 524773, at *7. That's because, even without the new standing restrictions the Government and Carroll propose, law firms face a range of obstacles to standing when challenging laws that affect their practice. The parties' cases demonstrate as much. In *Habeas Corpus Resource Center v. U.S. Department of Justice*, for example, law offices lacked standing because their self-inflicted "injuries" were voluntary litigation tactics designed to avoid only speculative future harm. 816 F.3d 1241, 1250 (9th Cir. 2016). (Those organizations didn't analogize to—or even cite—*Havens*. *See* Br. of Habeas Corpus Resource Center at 53-71, *Habeas*, 816 F.3d 1241 (No.

14-16928), Dkt. No. 31-1. They didn't argue that the regulations reduced the number of people they could serve by making it more resource-intensive for them to represent clients. *See id.*)

The limitation on voluntary injuries will pose a particular obstacle for law firms that don't seek to serve all comers in the way ABB's helpline does, since those firms can select their clients to avoid organizational injury. *See* OpeningBr.32. Plus, most private law offices exist to make money, so they won't be injured if each representation requires more billable hours.

Organizations of course won't have standing every time they "expend[] their resources on behalf of individuals for whom they are advocates." *Ass'n for Retarded Citizens of Dallas v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994) ("*ARC*") (holding organization lacked standing "where the only resources 'lost' [were] the legal costs" of litigating the instant lawsuit).[2] That doesn't mean, as Carroll contends (at 23), that standing is foreclosed where an impairment of an organization's core activities forces it to spend

[2] Carroll (at 23) quotes *ARC* but leaves out the rest of the sentence, which cabins the quoted language to facts like the *ARC* plaintiff's. *See* 19 F.3d at 244.

additional resources on behalf of the population it serves—as was the case in *Havens*, *see* 455 U.S. at 379. Similarly, ABB doesn't argue that it has standing whenever it "take[s] measures to protect [its] clients' rights or alter [its] litigation strategy." Gov'tBr.28 (quoting *Habeas*, 816 F.3d at 1250). Rather, it demonstrates the vacatur "make[s] it more difficult [and] costly for [ABB] to conduct its [helpline] operations," requiring it to limit its services. *LaFHAC*, 82 F.4th at 357 (Ho, J., concurring). That's an injury-in-fact—and there's no exception that excludes legal organizations from that general rule.

7. ABB has already explained that *Alliance*'s "mere illumination" of *Havens* "is insufficient" to abrogate circuit precedent such as *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017). *United States v. Petras*, 879 F.3d 155, 164 (5th Cir. 2018); *see* OpeningBr.28-30. The Government's contrary assertion (at 20) overreads *Alliance* to foreclose standing that depends, in any part, on a diversion of resources. *Alliance* made clear "that organizations cannot spend their way into standing by *voluntarily* using resources." *Tenn. Conf. of the NAACP v. Lee*, 139 F.4th 557, 565 (6th Cir. 2025) ("*Lee II*") (citation modified) (emphasis added); *see* OpeningBr.27-29. But it didn't disturb long-standing law that a

plaintiff may have standing where the defendant *forces* the plaintiff to spend "additional time and resources" by "frustrat[ing] the organization's normal … activities." *Nairne*, 151 F.4th at 681-82; *see supra* pp. 2-3. Indeed, as explained above (at 3), the Government agrees that an organization may, under some circumstances, have standing when it "has been forced to divert resources." Gov'tBr.22.

8. The Government (at 26-27) and Carroll (at 30-31) suggest ABB couldn't have standing unless the vacatur wholly prevented it from engaging in its core activities. But ABB has already explained why that's wrong, and neither party has any answer. *See* OpeningBr.37. As Carroll itself later explains, "an 'impairment' that is less-than-complete[] but 'perceptible' could create standing, as in *Havens*." CarrollBr.34 (citation modified); *see Noem*, 145 F.4th at 988 (explaining organization had standing because it "had to expend [additional] resources" "to *continue* carrying out its core activities" (emphasis added)). Unsurprisingly, then, neither of the Government's out-of-circuit decisions—one of which has been vacated—supports its position. *See Wisconsin Voter All. v. Millis*, 166 F.4th 627, 637 (7th Cir. 2026) (explaining organizational standing turns on involuntary "disruptions"—not foreclosures—of "operations");

S.C. State Conf. of the NAACP v. S.C. Dep't of Juv. Just., 165 F.4th 858, 865-66 (4th Cir. 2026) (holding organization lacked standing because its resource diversion was "unilateral and uncompelled"), *reh'g en banc granted*, No. 25-1032, 2026 WL 710241 (4th Cir. Mar. 13, 2026).

2. ABB has established causation and redressability

1. Carroll is wrong (at 31-32) that, as a matter of law, ABB's injury isn't caused by the vacatur. It says that, if ABB's callers lack information about their rights and who, at the school, can help them with accommodations, that's not because of the vacatur, but instead because schools are failing to comply with another part of Title IX's operative regulations. That's wrong, especially on summary judgment.

Earlier regulations, applicable post-vacatur, require each school to inform students only that it "does not discriminate on the basis of sex," and that they may contact an identified Title IX coordinator with "inquiries about the application of Title IX." 34 C.F.R. § 106.8 (2020). Such generic notifications haven't been effective in ensuring pregnant and postpartum students know about their rights and how to exercise them. *See, e.g.*, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed.

Reg. 33,474, 33,551 (Apr. 29, 2024); OpeningBr.9-10; AmicusBr.10-12. That's why the 2024 pregnancy provision required that, when a student disclosed a pregnancy or related condition, her school must "promptly provide[] [her] with the Title IX Coordinator's contact information" and specifically "inform [her] that the Title IX coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access." 34 C.F.R. § 106.40 (2024).

The pregnancy provision would require ABB to spend less time providing this information to students for the very reason the Department adopted the new notice requirement: It provides pregnant students better and more targeted help exercising their rights than did preexisting regulations. At minimum, a trier of fact could conclude ABB's account of causation is correct, which is all that's necessary on summary judgment. *Anaya v. Traylor Bros., Inc.*, 478 F.3d 251, 253 (5th Cir. 2007); *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (explaining a putative intervenor must demonstrate standing "with the manner and degree of evidence required" by the relevant stage of litigation).

Carroll also speculates (at 32) that perhaps ABB's injuries aren't caused by the vacatur because maybe its student-callers aren't disclosing

their pregnancies to their schools, and so wouldn't prompt the notice provision even if it were in effect. But ABB's evidence demonstrates otherwise. *See* ROA.4919-24 (¶¶ 19, 26-27, 30, 32) (describing students who called ABB after disclosing pregnancies or related conditions to their schools, including at least one who learned about Title IX's protections for the first time from ABB). That stands in sharp contrast to Carroll's one cited case (at 32), in which the plaintiff-organization provided no examples of individuals who were affected by the challenged policy and thus required help. *Lee II*, 139 F.4th at 567.

2. Carroll argues, without support, that ABB's injuries aren't caused by the vacatur because, even in its absence, some students might not be entitled to "[r]emote instruction" or "reschedul[ing] an exam" as reasonable modifications. CarrollBr.31. Even if that were true, it wouldn't defeat causation. The Rule, for the first time, provided pregnant and postpartum students an independent right to reasonable modifications and named remote instruction and rescheduled exams as two specific examples. OpeningBr.8, 11; 34 C.F.R. § 106.40 (2024). The intended, and "predictable," result of that protection would be that student-callers could more successfully advocate for those

accommodations from their schools armed only with the regulation—making ABB's helpline calls faster and more effective. *S. Texas Env't Just. Network v. Texas Comm'n on Env't Quality*, 165 F.4th 356, 367 (5th Cir. 2026) (explaining causation only requires "a predictable link between [the challenged conduct] and the [plaintiff's] alleged injuries").

Plus, a jury or court could find that one or more of ABB's specifically identified student-callers would've been entitled to those accommodations under the Rule. Consider the caller who had to take a leave of absence because her school refused to reschedule an exam scheduled for her due date. *See* OpeningBr.21. To a trier of fact, adjusting that exam date might seem reasonable.

Besides, ABB's injuries don't relate only to remote instruction and rescheduled exams. Some derive from the vacatur of the Rule's requirement of other modifications, like lactation breaks, that Carroll doesn't argue might not be reasonable for some students. *See* ROA.4921-23 (¶¶ 24-29). Others derive from the vacatur of absolute rights the Rule mandates regardless of reasonableness, such as the provision of lactation space. OpeningBr.22. And some derive from the vacatur of the Rule's requirement that schools inform students of their rights. *Id.*

B. ABB has standing based on its procedural injury

In arguing that ABB doesn't have standing based on its procedural injury, the Government and Carroll fail to acknowledge, or defend, the full course of conduct that constitutes the Government's "rulemaking-by-collusive-acquiescence." *Arizona v. City & Cnty. of S.F.*, 596 U.S. 763, 766 (2022) (Roberts, J., concurring, joined by Thomas, Alito, & Gorsuch, JJ.) (citation omitted). The Government hasn't only failed to appeal from the judgments against it. It's also "opposed efforts by other interested parties … to carry on the defense of the Rule." *Id.* at 766.

And it's done so to secure a new administration's preferred policy without notice-and-comment rulemaking. *See*, *e.g.*, U.S. Dep't of Educ., Dear Colleague Letter 1-2 (Jan. 31, 2025), https://perma.cc/FEQ5-93Q4 (asserting the President's disagreement with parts of the Rule is "fatal to it"). With its collusive conduct in this litigation, the Government executed the President's directive that the Department and "Attorney General" "coordinate[] … to ensure [the Rule] does not have effect." Exec. Order No. 14201, 90 Fed. Reg. 9279 (Feb. 11, 2025). If the Government had declined to continue its defense of the Rule merely due to resource

limitations, *see* Gov'tBr.31, it wouldn't make sense for it to participate in this appeal.

ABB of course has no general procedural right to engage with the Justice Department's decisions about whether to notice appeals in its cases. But it does have a right to participate in the process of rescinding a regulation. OpeningBr.38-39. The Government violated that right with its rulemaking-by-collusive-acquiescence, an attempted end run around the required process. *See id.* at 39-40.

The Government disagrees (at 33-34) with this Court's holding that "the concrete interest analysis is subject to a looser standard than [a traditional Article III] economic injury analysis." *Nat'l Infusion Ctr. Ass'n v. Becerra*, 116 F.4th 488, 503 (5th Cir. 2024). This Court doesn't have to address that issue because ABB has an injury-in-fact. *See supra* Part I.A.1. But, regardless, the Government cannot wish away this Court's precedent because it thinks it conflicts with earlier Supreme Court case law. *See, e.g.*, *Barber v. Johnson*, 145 F.3d 234, 237 (5th Cir. 1998) (explaining a panel must follow circuit precedent "[e]ven if persuaded that [it] is inconsistent with" an earlier Supreme Court opinion). The Government's alternative read of *Becerra*—that the line in question

concerns causation, not the nature of the interest—isn't plausible: That line comes from a paragraph about the "concrete interest analysis," and the Court turned to causation in the next paragraph. 116 F.4th at 503. And neither party argues that ABB cannot meet *Becerra*'s lower standard.

II. ABB is entitled to mandatory intervention

Only Carroll disputes that ABB is entitled to mandatory intervention. Conceding that the existing parties don't adequately protect ABB's interests, Carroll argues that ABB's motion was untimely and that ABB lacks a legal interest in upholding the Rule's pregnancy provisions. Both arguments fail.

A. ABB's intervention motion was timely

ABB moved to intervene before the deadline to appeal, shortly after learning the Government would no longer represent its interests. OpeningBr.44-46. The timing of ABB's intervention won't prejudice the parties, ABB will face substantial prejudice if intervention is denied, and unique circumstances warrant intervention. *Id.* at 46-47.

1. ABB couldn't have intervened "many months" before the Government switched sides

1. Timeliness is measured "from the time [the intervenor] became aware that his interest would no longer be protected by the existing parties." *Rotstain v. Mendez*, 986 F.3d 931, 937 (5th Cir. 2021). The Supreme Court recently reaffirmed that's the right standard; the clock doesn't start, as Carroll says, when the representation merely "*may* be inadequate." CarrollBr.37 (citation omitted); *see Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 279-80 (2022).[3] Either way, ABB satisfies the standard.

Before the Government stopped defending the Rule, ABB would've faced two presumptions that the Government was an adequate representative because (1) ABB and the Government shared the same "ultimate objective" and (2) this Court especially assumes government litigants sufficiently represent movants with aligned interests. *Edwards*, 78 F.3d at 1005. Once the Government switched sides and failed to notice

[3] That aligns with this Court's longstanding articulation of the timeliness test. *See, e.g.*, *Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996); *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994). For its alternative formulation, Carroll quotes discussion of the separate fourth factor of the Rule 24(a) test. CarrollBr.23 (quoting *La Unión del Pueblo Entero v. Abbott*, 29 F.4th 299, 308 (5th Cir. 2022)).

an appeal from a judgment against the Rule, ABB quickly moved to intervene. OpeningBr.44.

2. Carroll argues that the Government's representation was always inadequate because ABB's interests in upholding the pregnancy provisions have always been "less broad than those of the governmental defendants." CarrollBr.37 (citation omitted). Carroll didn't raise this argument below, so forfeited it. *See Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021).

Regardless, "[t]he general notion that the [Government] represents 'broader' interests at some abstract level is not enough" to show inadequate representation. *Daggett v. Comm'n on Governmental Ethics & Election Pracs.,* 172 F.3d 104, 112 (1st Cir. 1999); *accord Texas v. United States*, 805 F.3d 653, 663 (5th Cir. 2015) ("*Texas I*"). To overcome the presumptions of adequate representation, ABB would've had to show "adversity of interest, collusion, or nonfeasance on the part of the existing party." *Edwards*, 78 F.3d at 1005. A broader interest won't be an adverse interest unless the proposed intervenor identifies "specific conduct" demonstrating as much. *Louisiana v. Burgum,* 132 F.4th 918, 923 (5th Cir. 2025); *accord Texas I*, 805 F.3d at 662-63.

So, representation may be inadequate when an existing party pursues a legal strategy that "is uniquely favorable to their [broader] interests while placing those of the [proposed intervenor] in jeopardy." *Guenther v. BP Ret. Accumulation Plan*, 50 F.4th 536, 547 (5th Cir. 2022). This can occur, for example, if broader interests lead a party to a position on jurisdiction that conflicts with the movant's. *See La Unión*, 29 F.4th at 308; *Brumfield v. Dodd*, 749 F.3d 339, 346 (5th Cir. 2014). In the absence of such a concrete showing, this Court routinely denies intervention premised on general assertions of broader party interests. *See, e.g.*, *AbbVie, Inc. v. Murrill*, 166 F.4th 528, 548 (5th Cir. 2026); *Hopwood v. Texas*, 21 F.3d 603, 605-06 (5th Cir. 1994); *Veasey v. Perry*, 577 F.App'x 261, 263 (5th Cir. 2014).

Carroll hasn't shown that any divergence in the scope of ABB's interests and the Government's had a "concrete effect" on the case. *Texas I*, 805 F.3d at 662. In its earlier defense of the Rule, the Government used the same argument ABB advances here—severability—to "carry out the ultimate objective." *La Unión*, 29 F.4th at 308.

3. Carroll says (at 37-39) that the latest ABB could've intervened was during summary judgment briefing when the Government advanced

severability arguments that had been unsuccessful previously. "Differences of opinion regarding an existing party's litigation strategy or tactics … do not rise to an adversity of interest" sufficient to overcome the presumption of adequate representation. *Guenther*, 50 F.4th at 543. And representation doesn't "become[] inadequate whenever the representative is unsuccessful in urging a position." *Com. of Pa. v. Rizzo*, 530 F.2d 501, 506 (3d Cir. 1976); *see Staley v. Harris Cnty*, 160 F.App'x 410, 413 (5th Cir. 2005) (denying intervention motion filed after unfavorable decision, since movant and losing party shared goal).

2. The existing parties won't suffer prejudice from any delay

The timing of ABB's intervention won't prejudice the existing parties because there was no delay. OpeningBr.46. Even if there were, Carroll would be wrong that allowing ABB to present its argument on appeal "would prejudice Carroll by requiring it to relitigate the judgment." CarrollBr.40. Carroll "can hardly contend that its ability to litigate the issue [is] unfairly prejudiced simply because an appeal … was brought by [ABB], rather than by one of the original [defendants]." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977). Besides, the "[prejudice] factor is concerned only with the prejudice caused by the

applicants' delay, not that prejudice which may result if intervention is allowed." *Edwards*, 78 F.3d at 1002. The inconvenience Carroll identifies "would have arisen regardless of whether [ABB] sought to intervene" earlier. *Ross v. Marshall*, 426 F.3d 745, 756 (5th Cir. 2005).

Carroll also won't suffer prejudice by having to "address [ABB's] unique arguments for the first time on appeal." CarrollBr.40. ABB doesn't advance new arguments; it presents a narrower version of the severability argument made below. *See infra* Part IV.B. Moreover, the Supreme Court and this Court have directly rejected the idea that an intervenor's desire to pursue on appeal an "issue … that had not been raised" below "would prejudice" plaintiffs. *Cameron*, 595 U.S. at 281; *accord Gen. Land Off. v. Trump*, No. 24-40447, 2025 WL 1410414, at *5-6 (5th Cir. May 15, 2025). Plus, severability is "a pure question of law" reviewed *de novo*, *Seila L. LLC v. CFPB*, 591 U.S. 197, 233 (2020) (plurality opinion), so Carroll didn't need to develop the record below to counter ABB's argument.[4]

[4] Seven justices concluded the law in *Seila Law* was severable. 591 U.S. at 232-238, 261.

3. Unusual circumstances support timeliness

The circumstances here are unusual: The district court vacated the entire Rule without addressing severability, and the Government's about-face left ABB's interests unrepresented. OpeningBr.47. Carroll responds (at 40) only that ABB forfeited this argument. However, ABB argued below that its intervention was timely, ROA.4903-05, and arguments on appeal "need not be identical" if the "gravamen of the argument" was presented to the district court, *United States v. Nesmith*, 866 F.3d 677, 679 (5th Cir. 2017).

B. ABB has substantial interests in part of the Rule

Carroll doesn't dispute that an Article III injury-in-fact establishes a sufficient interest to intervene under Rule 24(a). *See* OpeningBr.47-48. ABB has suffered an injury-in-fact and therefore satisfies this intervention factor. *See supra* Part I.A.1.

III. The Court should grant ABB permissive intervention

Alternatively, the Court should permit ABB to intervene under Rule 24(b). ABB's motion was timely and identifies common questions of law or fact with the existing action, and ABB's intervention won't prejudice the parties. OpeningBr.51-53. Carroll's argument to the

contrary is wrong for the same reasons it's wrong about mandatory intervention. *See supra* Part II.A.1, II.A.2.

IV. The unchallenged pregnancy provision is severable

Carroll doesn't dispute it carries the burden to overcome the presumption of severability, which requires showing that the pregnancy provision cannot function independently or that the Department didn't intend for the Rule to be severable. *See* OpeningBr.54-55. Carroll demonstrates neither. Carroll errs, too, in contending that the Government forfeited severability.

A. Carroll hasn't overcome the presumption of severability

1a. Carroll has no answer to this Court's and the Supreme Court's cases stating that an express severability clause "dispels any doubt" regarding an agency's intent. *Nat'l Ass'n of Mfrs. v. U.S. SEC*, 105 F.4th 802, 816 (5th Cir. 2024); *accord Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 624 (2020) (plurality opinion); *see* OpeningBr.55-57.[5]

Carroll hasn't cited any controlling cases holding that lawmakers intended for a law with a severability clause to be non-severable. Carroll's contention that an express severability clause is "an aid merely,"

[5] Seven justices concluded the law in *Barr* was severable. 591 U.S. at 614.

CarrollBr.54, comes from a district court decision that this Court held was wrong precisely because the district court "unduly ignore[d]" a law's severability clause. *Texas v. United States*, 126 F.4th 392, 419 (5th Cir. 2025) ("*Texas II*"). Carroll's other cited cases (at 56) concern laws without severability clauses. And in one of those cases, the Court severed the law anyway. *United States v. Booker*, 543 U.S. 220, 248 (2005).[6]

1b. Carroll doesn't explain how the Department's cost-benefit analysis is relevant to its intent regarding severability, much less why it should override the severability clauses. It would be "impossible" for agencies to run cost-benefit analyses for "every permutation for how a rule may someday be severed." ROA.1757. So, an agency's failure to do so doesn't indicate it intends for the rule to be non-severable—especially when it's expressly said the opposite.

Besides, the Department's analysis here didn't, as Carroll says, justify the Rule's "high costs based on benefits expected from implementing the gender-identity provisions." CarrollBr.56. The

[6] In the *Booker* passage Carroll quotes, the Court explained it shouldn't "engraft" a constitutional requirement onto sentencing guidelines, and that it would instead "sever[] and excis[e]" parts of the guidelines. 543 U.S. at 246-48.

Department identified a range of benefits the Rule would provide. 89 Fed. Reg. at 33,861. Addressing gender identity-based discrimination was only one; protecting pregnant students was another. *Id*. The Department didn't indicate that gender identity-related provisions solely or especially justified the Rule's costs.

1c. Nor is Carroll right to suggest that the unremarkable fact that the Department "did not promulgate the[] provisions independently" says the Department didn't intend for the Rule to be severable. CarrollBr.57. Severability doctrine exists to excise illegal provisions from a single rule or law. Treating the bundling of provisions as a reason to deny severability would defeat the purpose of the doctrine.

2. Carroll has no answer to ABB's explanation as to how the pregnancy provision can function on its own. *See* OpeningBr.58-64. Carroll asserts only that the "gender identity" provisions that the district court held unlawful are "intertwined with" and "contaminate the pregnancy provision." CarrollBr.54, 57 (citation omitted). But "gender identity" appears nowhere in § 106.40. That provision provides rights based on whether a student is pregnant or has a related condition, not based on their gender identity.

Even if the inclusion of "gender identity" in § 106.2's definition of sex discrimination somehow "carried over" and broadened the pregnancy provision's application, the pregnancy provision could still function independently. CarrollBr.55. Excising the gender-identity provision would simply cause the pregnancy provision to function more narrowly. *See, e.g.*, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504-06 (1985) (severing unlawful language from statutory definition and allowing remainder of law to operate under narrower definition).

ABB has already explained why it's irrelevant if, as Carroll contends without evidence, the provisions held unlawful were "at the [Rule's] heart," CarrollBr.55 (citation omitted): This Court has unambiguously held such reasoning "'says nothing about whether' the rest of the law could function without it." OpeningBr.60 (quoting *Texas II*, 126 F.4th at 419).

Similarly irrelevant is Carroll's assertion that ABB "has not always thought" that the pregnancy provision could operate independently. CarrollBr.57. That's also inaccurate: ABB's suggestion, in its comment on the proposed rule, that the pregnancy provision use gender-neutral language doesn't speak to severability.

3. Carroll says it's "not this court's job" to "rewrite" the Rule. CarrollBr.56 (citations omitted). But severability "manifests the Judiciary's respect for [lawmakers'] role by keeping courts from unnecessarily disturbing a law apart from invalidating the provision that is unconstitutional." *Barr*, 591 U.S. at 627 (plurality opinion). This Court should revive the pregnancy provision as the Department wrote it.

B. Carroll's forfeiture argument is wrong

The Government's severability briefing below—which included over a dozen pages of argument citing caselaw and the record—preserved the issue for appeal. *See* ROA.1710-11, 1715-16, 1745-46, 1754-1758, 4813, 4834-36; *see also Med. Ctr. Pharmacy v. Mukasey*, 536 F.3d 383, 393 n.21 (5th Cir. 2008) (explaining party preserved severability argument where it "stated its position … , made an argument … , and cited relevant authority").

Carroll's wrong (at 54) that the Government inadequately briefed the severability of the pregnancy provision specifically. The Government asked the court to retain all provisions of the Rule beyond those held unlawful. ROA.1758. It listed the pregnancy provision as its first "specific example[]" of parts of the Rule that had "nothing to do with gender

identity or the challenged provisions" and could function independently. ROA.1751. And it explained the Rule's severability clauses "remove[d] any doubt that the Department" intended remaining provisions, including "lactation accommodations," to go into effect if other parts of the Rule were invalidated. ROA.1755. That preserved ABB's arguments about revival of the pregnancy provision and of the Rule more broadly–even if ABB's briefing doesn't look exactly like the Government's below. *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("[P]arties are not limited to the precise arguments they made below.").

Also, severability is a purely legal question. *Seila L.*, 591 U.S. at 233 (plurality opinion). So, if the Government hadn't raised it below, this Court could still "review that issue for plain error." *United States v. Marek*, 238 F.3d 310, 315 (5th Cir. 2001); *see Booker*, 543 U.S. at 245 (reaching severability for first time on appeal).

CONCLUSION

The Court should reverse the final judgment as to 34 C.F.R. § 106.40.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this reply brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on April 2, 2026. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,488 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32.2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32.1 and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Century Schoolbook font.

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