2020-1321

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.,
Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent.

Petition for Review Pursuant to 38 U.S.C. § 502

SUPPLEMENTAL EN BANC BRIEF FOR RESPONDENT

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SUPPLEMENTAL EN BANC BRIEF FOR RESPONDENT

Pursuant to the Court's order dated September 15, 2020, respondent, the Secretary of Veterans Affairs, respectfully submits this supplemental brief to address whether petitioner, the National Organization of Veterans' Advocates, Inc. (NOVA), has standing.

ARGUMENT

To establish Article III standing to challenge final agency action, a petitioner must demonstrate that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the [agency]; and (3) it is

likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560-61 (1992)). Organizations, like any petitioner, bear the burden of demonstrating that they have standing to challenge each agency action at issue. *Lujan*, 504 U.S. at 561; *see O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' *as the result of the challenged statute or official conduct*." (emphasis added) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)). This burden applies regardless of whether the Government has yet questioned standing. *See Fuji Photo Film Co., Ltd. v. Int'l Trade Comm'n*, 474 F.3d 1281, 1289 (Fed. Cir. 2007) ("Because Article III standing is jurisdictional, this court must consider this issue sua sponte even if not raised by the parties.").

As explained below, the allegations in NOVA's Petition For Review (petition), Dkt. 1-2, are insufficient to establish NOVA's standing, necessitating its recent submission of evidence. However, the evidence that NOVA submitted is insufficient to demonstrate that it has associational or organizational standing.

I. NOVA Cannot Rely On The Petition's Allegations To Demonstrate Standing

The mandate of *Phigenix* is clear—a petitioner challenging final agency action "must supplement the record to the extent necessary to explain and

substantiate its entitlement to judicial review" unless its standing is "self-evident" from the record. *Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168, 1173 (Fed. Cir. 2017) (quoting *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002)). NOVA argues that its standing is self-evident because (1) the Court previously afforded it associational standing in *Disabled American Veterans v. Gober*, 234 F.3d 682, 689 (Fed. Cir. 2000) (*DAV*), and (2) the Department of Veterans Affairs (VA) has not yet challenged NOVA's standing in this case. Dkt. 89 at 6-7. This is incorrect.

A petitioner's standing is "self-evident" when it is "an object of the action (or forgone action) at issue." *Phigenix*, 845 F.3d at 1173 (citations and internal quotation marks omitted). NOVA has not, and cannot, contend that it is "an object" of the knee provisions at issue because they govern how VA regional offices adjudicate certain benefits claims *from veterans*. NOVA instead repeats the allegations from the petition, to the effect that it has standing "for essentially the same reasons this Court expressly held that NOVA had standing" in *DAV*. Dkt. 1-2 at 5-6; Dkt. 89 at 8-9. NOVA's reliance on *DAV* is understandable given the standard that panel applied to find that NOVA had associational standing, but unsubstantiated allegations are no longer sufficient to establish standing in this Court. *See Phigenix*, 845 F.3d at 1173 ("Taken together, an appellant must either identify . . . record evidence sufficient to support its standing to seek review or, if there is none because standing was not an issue before the agency, submit

additional evidence to the court of appeals, such as by affidavit or other evidence.") (citations and internal quotations marks omitted).[1]

Moreover, even if unsubstantiated allegations could suffice to establish standing, NOVA's allegations would not. Having been afforded associational standing to challenge a VA regulation twenty years ago does not provide NOVA with standing to challenge every VA action. Petitioners must demonstrate an injury in fact that is fairly traceable to the challenged agency action, and that is likely to be redressed by a favorable judicial decision, to establish standing. *Lujan*, 504 U.S. at 560-61. NOVA's associational standing in *DAV* says nothing about whether it, or any of its members, can satisfy the requirements for standing in this case. NOVA must demonstrate standing anew every time it seeks to challenge an agency action; that the Court previously afforded NOVA associational standing does not lead ineluctably to standing in every case.

As to NOVA's second contention of self-evident standing—that "VA's failure to contest the factual basis for NOVA's standing" establishes standing because "a factual 'allegation' in a pleading" can be deemed admitted if not

[1] NOVA's reliance on *Eastern Paralyzed Veterans Associations, Inc. v. Secretary of Veterans Affairs*, 257 F.3d 1352, 1356 (Fed. Cir. 2001), does not show otherwise, as that decision predates *Phigenix*, which established the evidentiary burden a petitioner in this Court must now satisfy to establish that it has standing to challenge final agency action. *See Phigenix*, 845 F.3d at 1172 ("In the nearly thirty-five years since the court's inception, we have not established the legal standard for demonstrating standing in an appeal from a final agency action.").

denied—it is wrong several times over. Dkt. 89 at 7. First and foremost, "standing to litigate cannot be waived or forfeited." *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). Moreover, even if we could admit jurisdictional facts, this Court is not a trial court, and NOVA's petition did not trigger a requirement in the Federal Rules for us to admit or deny its allegations. The Court in *Phigenix* adopted the summary judgment burden of production for standing, but did not adopt any associated trial court rules or procedures. Unless we do not challenge NOVA's standing in our merits brief, it rings hollow for NOVA to argue that we have admitted anything alleged in the petition. And, even if we could have challenged standing in our filings to date (Dkts. 45 & 78, both of which responded to Court orders), because the Court has now questioned NOVA's standing *sua sponte*, NOVA must meet its burden. *Phigenix*, 845 F.3d at 1173.

Consequently, because NOVA's standing is not self-evident, it "'carries a burden of production' with respect to standing that is 'similar to that required at summary judgment.'" *Shrimpers and Fisherman of RGV v. Texas Comm'n on Envtl. Quality*, 968 F.3d 419, 143-44 (5th Cir. 2020) (quoting *Sierra Club v. EPA*, 793 F.3d 656, 662 (6th Cir. 2015)). To meet this burden, NOVA must submit admissible evidence of its standing. *Phigenix*, 845 F.3d at 1173-74. Although NOVA has now submitted evidence, as explained in the next two sections, that evidence does not establish NOVA's associational or organizational standing.

II. NOVA Does Not Have Associational Standing

An association may establish standing to challenge agency action on behalf of its members by demonstrating that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *United Food and Commercial Workers v. Brown Group, Inc.*, 517 U.S. 544, 553 (1996) (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). The first two prongs of this test are "grounded on Article III as an element of 'the constitutional requirement of a case or controversy,'" *id.*, 517 U.S. at 554-55 (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)), and it is precisely these two prongs that NOVA has not demonstrated.

A. NOVA's Members Do Not Have Standing To Sue On Their Own

The first requirement for associational standing is that the association's members have standing to sue on their own. To establish such standing, NOVA must show that at least one member has suffered an injury in fact, that the injury is fairly traceable to the challenged agency action, and that it is likely the injury will be redressed by a favorable decision. *Laidlaw*, 528 U.S at 180-81. NOVA argues, based upon newly-submitted declarations, that six of its members have standing to challenge the knee provisions on their own, but closer inspection of the arguments

and declarations reveal that none of NOVA's members have the requisite standing.

1. Veteran Status Alone Does Not Establish Standing

NOVA argues that because six of its members are veterans, it satisfies the first prong of associational standing under *DAV*. Dkt. 89 at 8; *see e.g.*, Attig Decl. ¶ 7. But veteran status alone is not enough; to establish standing, a veteran must demonstrate a concrete injury in fact that is traceable to the knee provisions, and that the injury will be redressed by a favorable decision. *Laidlaw*, 528 U.S. at 180-81. *DAV* should not be read to hold that veteran status alone is sufficient.

Nor should the Court endorse *DAV's* relaxed approach to the injury-in-fact requirement. *See DAV*, 234 F.3d at 689 (finding injury in fact based on veterans' "valid concerns about the effect of the rules on their ability to challenge a [board] decision" in the future). The injury-in-fact requirement is not satisfied by mere "concerns," valid or not, about the future.[2] *See Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("Allegations of possible future injury do not satisfy the requirements of Art[icle] III. A threatened injury must be 'certainly impending' to

[2] The *DAV* panel relied upon *Laidlaw* to justify its injury-in-fact determination, but the *Laidlaw* Court held that petitioner demonstrated its members' injury in fact by proving that their activities had been curtailed due to pollution *and* concerns about pollution, not just that they had concerns. *Laidlaw*, 528 U.S. at 181-84 (differentiating the injury in fact proven from "conclusory allegations" and "'some day' intentions"). There was nothing speculative about the injury in *Laidlaw*, and the *DAV* panel erred by narrowly focusing on the Court's reference to "reasonable concerns." *DAV*, 234 F.3d at 689.

constitute an injury in fact.") (citations omitted); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2008) ("there [must be] a 'substantial risk' that the harm will occur"); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) ("When we have used the adjective concrete, we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'") (citation omitted). The panel in *DAV* should have required more before finding the first prong of associational standing satisfied; at a minimum, it should have required an allegation that a NOVA member was facing an imminent, substantial threat of having the challenged regulation applied to them.

2. NOVA's Members Do Not Have Standing Based On Their Knee Injuries Or Knee Disability Claims

NOVA argues next that three of its members "are directly injured by" the knee provisions, and will directly benefit from a decision invalidating them. Dkt. 89 at 8-9. This argument, and the evidence upon which it builds, does not withstand scrutiny. Mr. Cianchetta, a veteran and attorney, alleges that he had partial knee replacement surgery in September 2020, and that his eventual knee disability rating, assuming service connection, will be affected by Section III.iv.4.A.6.a's interpretation of DC 5055. Cianchetta Decl. ¶¶ 6-9. But, as Mr. Cianchetta candidly admits, he filed his disability compensation claim on September 16, 2020, well over nine months after NOVA filed the petition. *Id.* ¶ 7. Standing is determined as of the time the action is brought. *See Smith v. Sperling*,

354 U.S. 91, 93 n.1 (1957); *see also Laidlaw*, 528 U.S. at 180 ("[W]e have an obligation to assure ourselves that [petitioner] had Article III standing *at the outset of the litigation*.") (emphasis added). Mr. Cianchetta would not have had standing to challenge Section III.iv.4.A.6.a in January of this year.

Mr. Regis, another veteran and attorney, declares that he has a right knee claim pending at a VA regional office that is likely to be affected by Section III.iv.4.A.6.d. Regis Decl. ¶¶ 6-9. We need not parse whether application of the knee provision to Mr. Regis's claim is "certainly impending," however, because Mr. Regis has not demonstrated that his claim was pending adjudication at the regional office when NOVA filed the petition on January 3, 2020. Mr. Regis states that the board remanded his claim on February 26, 2020, Regis Decl. ¶ 6, and the board is not bound to follow the Manual. 38 C.F.R. § 20.105. Thus, Mr. Regis has not demonstrated a real threat that VA would have applied Section III.iv.4.A.6.d to his claim when the petition was filed; the asserted injury in fact arose when the board remanded his claim to the regional office in February. Regis Decl. ¶ 6.

Finally, Mr. Tangen declares that he received a 10 percent rating for knee disability in September 2018, and that if NOVA's challenge to Section III.iv.4.A.6.d is successful, he "will be able to seek and obtain a more favorable disability rating." Tangen Decl. ¶¶ 5-6. Mr. Tangen does not assert that he has a pending claim for increased rating, however, and he does not allege that Section

III.iv.4.A.6.d is preventing him from filing such a claim. Mr. Tangen's declaration does not demonstrate, therefore, any pending harm from Section III.iv.4.A.6.d. At best, Mr. Tangen expresses concern that VA would deny a hypothetical claim for increased rating in the future, but when a petitioner claims standing based on a threat of future injury, "it is not enough that the future injury is reasonably likely to occur—the 'threatened injury must be certainly impending.'" *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 865 (6th Cir. 2020) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)); *Whitmore*, 495 U.S. at 158 ("[a]llegations of possible future injury" are not sufficient). With only a hypothetical claim and decision, Mr. Tangen's asserted injury in fact is far from "certainly impending."[3]

3. NOVA's Members Do Not Have Standing To Protect Their Fees

Lastly, NOVA argues that it "has many attorneys who are adversely affected by the Knee Rules because those rules diminish the contingency fees they will be able to earn, and the business they will be able to retain, by representing veterans in disability proceedings before VA." Dkt. 89 at 10-11. In support, NOVA points to declarations from members who claim to have suffered such pecuniary injury. *See* Andrews Decl. ¶¶ 5-6; Hood Dec. ¶¶ 6-7; Tangen Decl. ¶ 7.

[3] Without a "continuing violation or the imminence of a future violation," VA's application of the knee provision to his claim in 2018 does not demonstrate his standing because it would not be redressable by the prospective relief NOVA seeks. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 108 (1998).

Even accepting that such harm can satisfy Article III's injury-in-fact requirement,[4] these attorneys do not have standing because they are not in the zone of interests protected by the provisions at issue. *See Ass'n of Data Processing Service Orgs. v. Camp*, 397 U.S. 150 (1970); *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987) ("In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to . . . the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (the zone of interests test "applies to all statutorily created causes of action").

NOVA does not explain how its attorney members are arguably within the

[4] There is good reason to doubt whether an attorney can show injury in fact based on the application of an agency interpretation to a client's benefits claim. In *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), the Court found that a law firm could establish injury in fact under the doctrine of third-party standing because the challenged action prevented the firm from collecting a fee to which they were "almost certainly" entitled. *Caplin*, 491 U.S. at 623 n.3. There is no similar certainty of recovery reflected in the declarations submitted by NOVA's members. *See, e.g.*, Andrews Decl. ¶ 5; *see Abbott Labs. v. Gardner*, 387 U.S. 136, 153-54 (1967) ("It is of course true that cases in this Court dealing with the standing of particular parties to bring an action have held that a possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action."). It is also unclear whether *Caplin's* injury-in-fact analysis applies outside of the third-party standing context in which it arose; we do not understand NOVA to be asserting third-party standing here. *See Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 40 (1976) (an association "can establish standing only as [a] representative[] of those of their members who have been injured in fact, and thus could have brought suit in their own right").

zone of interests of 38 U.S.C. § 1155, 38 C.F.R. § 4.71a, or the knee provisions, which concern the benefits that disabled veterans can receive, not the contingency fees that their attorneys can receive. In *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990), the Court explained the zone of interests test by describing a company contracted to transcribe an agency's recordings, which would "assuredly" lose business if the agency failed to comply with a statutory provision requiring "on the record" hearings. But, "since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be 'adversely affected within the meaning' of the statute" and would lack standing. *Id.* Attorneys, like the transcription service, may receive lower fees because of the knee provisions, but those provisions, and their underlying statutes and regulations, were "obviously enacted to protect the interests of" veterans, "and not those of the" attorneys. *Id.*

NOVA, therefore, does not have associational standing because it has not demonstrated that any of its members would have had standing to sue on their own.

B. NOVA's Petition Is Not Germane To Its Purpose

To establish associational standing, NOVA must also establish that the petition is germane to its purpose. "*Hunt's* second prong is complementary to the first, because it raises an assurance that the association's litigators will themselves have a stake in the resolution of the dispute, and thus be in a position to serve as

the defendant's natural adversary." *United Food*, 517 U.S. at 545. NOVA has not satisfied this second prong of the associational standing test.

The petition is not germane to any of the five "purposes" stated in Article II of NOVA's by-laws. Rauber Decl. Exhibit A. NOVA's stated purposes are to: (1) "develop . . . a better understanding of federal veterans' benefits law and procedure"; (2) "develop and encourage high standards of service and representation for all persons seeking [veterans] benefits"; (3) "conduct . . . courses of study for the benefit of its members and others desiring to represent persons seeking [veterans] benefits"; (4) "provide opportunity for the exchange of experience and opinions through discussion, study, and publications"; and, (5) "do all and everything related to the above . . . ." *Id.* NOVA's stated purposes are focused, naturally, on ensuring that its members, as advocates, offer quality, informed representation to veterans seeking benefits from VA. Yet none of these purposes is served by or related to the petition. Invalidating the knee provisions will not help NOVA develop its members' understanding of veterans' benefits laws, or develop standards of service and representation for veterans. Nor will invalidating the knee provisions help NOVA conduct courses of study or boost NOVA's efforts to provide opportunities to its members to exchange experiences and opinions. Invalidating the knee provisions will instead serve only one purpose directly relevant to NOVA's members—increasing their contingency fees. Yet

NOVA, according to its by-laws, does not exist to increase its members' compensation. NOVA has not demonstrated, therefore, that the petition is germane to its stated purposes, and does not have associational standing.

III. NOVA Does Not Have Organizational Standing

In the alternative, NOVA contends that it has organizational standing, which requires a demonstration of (1) injury in fact, (2) causation, and (3) redressability. *See Laidlaw*, 528 U.S. at 180-81. To satisfy the injury-in-fact requirement, NOVA must demonstrate an impairment of its ability to advance its purposes, combined with a "consequent drain on the organization's resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

NOVA argues that the knee provisions "frustrate [its] purpose and mission." Dkt. 89 at 14. Yet, as explained above, none of NOVA's purposes are plausibly impaired by the knee provisions. And, demonstrating an organization's injury in fact requires more than showing "a setback to the organization's abstract social interests." *Havens*, 455 U.S. at 379; *see Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (noting that otherwise, "there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization, however small or short-lived"). NOVA thus cannot demonstrate "a direct conflict between" the knee provisions and its "*mission*." *Nat'l Treas. Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996) (finding a mere effect on an

organization's lobbying efforts, without direct conflict with the organization's mission, insufficient to establish an injury in fact). NOVA remains free to pursue its stated purposes unfettered by the knee provisions.

NOVA also complains that it expended resources to "draft[] and circulate[] summaries of the" knee provisions for its members, and has "devoted . . . . resources to hosting multiple Continuing Legal Education and other trainings that provide information about the Manual since the Knee Rules took effect." Dkt. 89 at 15. Even if these expenditures suffice to demonstrate a "drain on the organization's resources," *Havens*, 455 U.S. at 379,[5] it is unclear how the knee provisions *caused* these expenditures, which NOVA voluntarily undertook, nor how invalidating the provisions will redress the alleged harm. NOVA's cursory treatment of organizational standing leaves these questions unanswered. In all respects, therefore, NOVA has not demonstrated its organizational standing.

CONCLUSION

For these reasons, we respectfully request that the Court find that NOVA does not have associational or organizational standing, and dismiss the petition.

[5] Expenditures made in the ordinary course of an organization's operation do not suffice under *Havens*. *See Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995).

Respectfully submitted,

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September 29, 2020

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 29th day of September, 2020, a copy of the foregoing "SUPPLEMENTAL EN BANC BRIEF FOR RESPONDENT" was filed electronically. The filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/Eric P. Bruskin

CERTIFICATE OF COMPLIANCE

Respondent's counsel certifies that this brief complies with the Court's September 15, 2020 order (Dkt. 87) because it does not exceed 15 pages, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2).

/s/Eric P. Bruskin
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