No. 23-35294

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF WASHINGTON, et al.,

Plaintiffs-Appellees,

v.

U.S. FOOD & DRUG ADMINISTRATION, et al.,

Defendants-Appellees,

v.

STATE OF IDAHO, et al.,

Movants-Appellants,

On Appeal from the United States District Court
for the Eastern District of Washington

SUPPLEMENTAL BRIEF FOR FEDERAL APPELLEES

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The Supreme Court's recent decision in *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. __, 2024 WL 2964140 (U.S. June 13, 2024), reinforces what was already clear from existing precedent: Movants have not established standing to challenge the elimination of the in-person dispensing requirement.

ARGUMENT

1. Movants describe as their "strongest basis" for standing (Oral Arg. 3:09) the theory that FDA's elimination of the in-person dispensing requirement for mifepristone will cause "'increased risk to … women and unborn children'"; that the allegedly increased risk will lead to "'additional medical care expenses, including emergency care'"; and that "'some of'" those "'additional medical care expenses'" will be "'borne by [States] through Medicaid expenditures.'" Opening Br. 19 (quoting 2-ER-82 ¶ 54, which addresses harm to Idaho); *see* 2-ER-86–87 ¶ 79 (similar allegation as to South Carolina).

As our principal brief explained, that theory was already irreconcilable with the Supreme Court's observation in *United States v. Texas*, 599 U.S. 670 (2023), that when a federal law or policy "has produced only" "indirect effects on state revenues or state spending," the State's claim of economic injury from the federal law or policy is "attenuated." *Id.* at 680 n.3. This Court has long recognized that, "[t]o satisfy the causality element for Article III standing, … '[t]he line of causation between the defendant's action and the plaintiff's harm must be *more* than attenuated.'" *Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1141 (9th Cir. 2013) (emphasis added).

Alliance reiterates and elaborates these principles. It reaffirms that standing "'"is ordinarily substantially more difficult to establish"'" when plaintiffs seek to challenge "the government's 'unlawful regulation (or lack of regulation) of *someone else*,'" because plaintiffs in such cases "may have more difficulty establishing causation—that is, linking their asserted injuries to the" challenged action or inaction. 2024 WL 2964140, at *7. And it explains that "[t]he causation requirement precludes" not just standing theories based on "speculative links," "where it is not sufficiently predictable how third parties would react to government action or cause downstream injury to plaintiffs," but also theories based on "attenuated links," "where the government action is so far removed from its distant (even if predictable) ripple effects that the plaintiffs cannot establish Article III standing." *Id.* "Without the causation requirement," *Alliance* notes, "courts would be 'virtually continuing monitors of the wisdom and soundness' of government action," undermining "'"the Framers' concept of the proper—and properly limited—role of the courts in a democratic society."'" *Id.* at *6, *8.

In this case, the "links" between movants' asserted economic harms and the challenged FDA action are both too "speculative" and too "attenuated" to establish standing. Start with the problem of attenuation. *Alliance* recognizes that even when a government action has "predictable" as opposed to speculative effects on a party other than the subject of the action, those effects still cannot establish standing if they are "attenuated"—that is, if "the government action is" too "far removed from its distant … ripple effects" on the plaintiffs. 2024 WL 2964140, at *7. And as the Supreme

Court noted in *Texas*, that is precisely the case for the sort of economic harm that movants assert here. "[I]n our system of dual federal and state sovereignty, federal policies frequently generate indirect effects on state revenues or state spending." *Texas*, 599 U.S. at 680 n.3. If any such "peripheral costs … create[d] a cognizable Article III injury for the State to vindicate in federal court," then state standing would be virtually "boundless," "'mak[ing] a mockery … of the constitutional requirement of [a] case or controversy.'" *Arizona v. Biden*, 40 F.4th 375, 386 (6th Cir. 2022). The Supreme Court has sometimes allowed States to establish standing on the basis of *direct* economic injuries, such as a threatened "loss of congressional seats and federal funding," *Murthy v. Missouri*, 2024 WL 3165801, at *13 n.8 (U.S. June 26, 2024) (discussing *Department of Commerce v. New York*, 588 U.S. 752 (2019)), but such injuries are far different from the sorts of incidental downstream costs asserted here and in *Texas*.

This Court's decision in *California v. Azar*, 911 F.3d 558 (9th Cir. 2018), is not to the contrary. In that case, where States challenged rules expanding the set of employers who were exempt from the Affordable Care Act's contraceptive coverage requirement, the plaintiff States asserted a strikingly more direct link between the challenged rules and the economic harm they claimed they would suffer under the rules. "The agencies' own regulatory impact analysis … estimate[d] that" tens of thousands of "women nationwide [would] lose some coverage" under the rules, and—crucially—the analysis "identifie[d] … state and local programs 'provid[ing] free or subsidized contraceptives'" as "'significantly diminish[ing]' the impact of the expanded exemptions." *Id.* at 572. In

other words, the agencies "assumed that state and local governments [would] bear additional economic costs" that followed directly from the challenged rules. *Id.* Whether or not the Court was correct to conclude that the plaintiff States had standing in that case, and whether or not that holding would survive the Supreme Court's more recent decisions, it provides no support for movants' attempt to establish standing on the basis of far more attenuated economic harms.

The speculativeness of movants' asserted injuries is equally problematic: It is far from "sufficiently predictable," *Alliance*, 2024 WL 2964140, at *7, whether FDA's elimination of the in-person dispensing requirement for mifepristone will affect movants' Medicaid expenditures. Even assuming that women who use mifepristone are likelier to visit an emergency room or urgent-care center when they receive the mifepristone by mail rather than in person, 2-ER-82 ¶ 54, and even assuming States might bear Medicaid costs for some such visits, that does not come close to establishing that the elimination of the in-person dispensing requirement is likely to increase any State's overall Medicaid expenditures, because the elimination of the in-person dispensing requirement is likely to have all sorts of other effects on Medicaid expenditures. It might, for example, reduce the number of women who elect or require surgical abortions in place of medication abortions, or who carry unwanted pregnancies to term. Movants have made no effort to account for all of those other potential effects in explaining why they think the elimination of the in-person dispensing requirement would cause an overall increase in Medicaid costs.

2. Although *Alliance* is principally relevant to movants' theory of standing based on economic harm—which, again, movants characterize as their "strongest" theory (Oral Arg. 3:09)—*Alliance*'s brief discussion of third-party standing also sheds light on movants' asserted sovereign or quasi-sovereign "interest in protecting their citizens from unsafe pharmaceuticals" (Reply Br. 6).

As *Alliance* explains, "[t]he standing doctrine serves to protect the 'autonomy' of those who are most directly affected so that they can decide whether and how to challenge the defendant's action." 2024 WL 2964140, at *5. Thus, even in the "narrow" circumstances where litigants are permitted "to assert the legal rights of others," "'the litigants themselves still must have suffered an injury in fact, thus giving them a sufficiently concrete interest in the outcome of the issue in dispute.'" *Id.* at *12 n.5.

This Court's and the Supreme Court's decisions on state standing are consistent with that principle. States can sometimes establish standing on the basis of "a quasi-sovereign interest in the health and well-being … of [their] residents *in general*." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982) (emphasis added). But standing on that basis is a form of "*parens patriae*" standing, *id.*, and *parens patriae* suits cannot be brought "'against the Federal Government,'" *Haaland v. Brackeen*, 599 U.S. 255, 294-295 (2023) (quoting *Snapp*, 458 U.S. at 610 n.16). And in any event, States can establish that form of standing only by alleging "more … than injury to an identifiable group of individual residents," *id.*; the injury must be sufficiently general to affect the State *itself*. Cases in which States have been allowed to sue on this basis have

involved "the abatement of public nuisances, such as global warming, flooding, or noxious gases." *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 970 (9th Cir. 2009), *abrogated on other grounds by Bond v. United States*, 564 U.S. 211 (2011). States have quasi-sovereign interests of their own at stake in such cases because they have "'an interest independent of'" their residents' interests in the environment within their borders. *California v. Trump*, 963 F.3d 926, 936 (9th Cir. 2020); *see also, e.g.*, *Paxton v. Dettelbach*, __ F.4th __, 2024 WL 3082331, at *5 (5th Cir. June 21, 2024) (State has no quasi-sovereign interest in challenging government action unless the action "implicate[s] the State's *own* interests in addition to and 'apart from the interests of particular private parties'" (quoting *Snapp*, 458 U.S. at 607)).

Here, by contrast, movants are alleging only "injury to an identifiable group of individual residents," *Snapp*, 458 U.S. at 607—namely, women who might take mifepristone that is dispensed by mail rather than in person. That is no more a quasi-sovereign interest than any other interest States might assert in an action affecting some number of their citizens. And as *Alliance* notes, parties cannot "assert the legal rights of others" unless they have "'themselves … suffered an injury in fact.'" 2024 WL 2964140, at *12 n.5. Movants have not.

3. As *Alliance* underscores, the defects in movants' theories of standing are irremediable. If the Court believed that movants could attempt to establish standing on some other theory, the proper disposition of this appeal would nonetheless be to affirm the denial of the motion to intervene. There is no basis to permit the

amendment of a pleading that movants were properly denied the ability to file, and any attempt by movants to assert an alternative basis for standing in a successive motion to intervene would raise issues not fit for resolution by this Court, including whether any such motion would be timely in light of the progress of the litigation. Movants are of course free to pursue their claim in an independent action.

CONCLUSION

The district court's denial of intervention should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s) No. 23-35294

I am the attorney or self-represented party.

This brief contains 1,680 **words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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