CASE NO. 18-35868

In the United States Court of Appeals
For the Ninth Circuit

SOUTHCENTRAL FOUNDATION
Plaintiff-Appellant,

v.

ALASKA NATIVE TRIBAL HEALTH CONSORTIUM
Defendant-Appellee,

Appeal from the United States District Court
for the District of Alaska
The Honorable Timothy M. Burgess, Presiding

APPELLANT'S REPLY BRIEF

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I.
INTRODUCTION

Defendant-Appellee Alaska Native Tribal Health Consortium ("ANTHC") violated Section 325 of Public Law 105-83 ("Section 325") and injured Plaintiff-Appellant Southcentral Foundation ("SCF") when ANTHC (1) delegated the full power of the ANTHC Board to the ANTHC Executive Committee and (2) erected barriers to the information that SCF could obtain. The creation of the Executive Committee infringed SCF's right to govern ANTHC by allowing a subset of the Board to make binding decisions, in express violation of the right of each member of the Board to "cast one vote." Section 325(b). And ANTHC's informational barriers took away SCF's ability to exercise its governance and participation rights in a meaningful manner, as it is well established that effective corporate oversight requires relevant corporate information. These were concrete and particularized injuries because they took away rights that Congress granted to SCF in Section 325.

ANTHC offers several responses to SCF's straightforward argument. Its primary response is that its actions could not have injured SCF because Section 325 does not endow SCF with any rights—governance, informational, or otherwise. This argument is incorrect and cannot be squared with the text, history, and purpose of Section 325. Congress wanted ANTHC to "draw on the existing expertise of the Alaska Native regional health entities" in order to ensure

"experienced" "management and control" over the new Consortium. 2ER-45. There is no way to read Congress' words in a way other than as establishing governance rights for SCF and the other regional health entities. ANTHC's actions deprived SCF of these rights, which caused SCF concrete and particularized harm.

ANTHC's other arguments also fail. As to the Executive Committee claim, SCF did not forfeit this claim, it is not moot, and SCF's injury is more than a bare procedural violation. As to the informational claim, ANTHC is incorrect that the deprivation is insufficiently concrete for standing.

ANTHC's actions infringed SCF's Congressionally-mandated right to meaningfully participate in the governance of ANTHC, and, thus, injured SCF. The District Court erred by not recognizing SCF's injuries as legally cognizable. This Court should reverse the District Court's order and allow this case to move forward. Alternatively, the Court should vacate the District Court's order and remand with instructions to permit SCF to amend its complaint to add its designated Directors as plaintiffs.

II.
ANTHC FUNDAMENTALLY MISINTERPRETS SECTION 325

A. Section 325 Grants SCF Substantive Governance Rights

ANTHC's primary argument is that its actions did not injure SCF because Section 325 does not endow SCF with any substantive governance rights. *See* Answering Brief ("AB") 24-35 (no informational right); 51 (no right concerning

the Executive Committee). This argument fails because it rests on a gross misinterpretation of Section 325.

Section 325 was "addressing the issue of governance" of the new Consortium. 2ER-45.[1] Congress wanted to "draw on the existing expertise of the Alaska Native regional health entities now managing extensive regional health networks in Alaska" in order "to ensure efficient, experienced Alaska Native management and control" over ANTHC. 2ER-45. In other words, Congress envisioned that SCF and the other regional health entities would participate in ANTHC's governance. Congress accomplished this by requiring each regional health entity to appoint a "representative" to ANTHC's Board in order to "participat[e] in the Consortium." Section 325. Congress intended for ANTHC to be an inclusive, transparent consortium that would be accountable to all of the Alaska Native people that it serves. This is why Section 325(b) provides that ANTHC will be governed "by consensus whenever possible," and Senator Stevens explained that ANTHC would "provide[] for representation of all recognized Native entities in Alaska," 2ER-47.

[1] While the Senate Report often spoke in terms of governance of the Alaska Native Medical Center ("ANMC"), it is clear from Section 325, which addresses ANTHC's governance, that Congress was focused on how the new Consortium would be organized and governed.

Importantly, Congress wanted the "new *consortium*" itself, not just the Consortium's Board, to be "made up of representatives of each of Alaska's regional Native health entities." 2ER-45 (emphasis added). And that makes sense, as it is the regional health entities that, in Congress' view, had extensive experience managing healthcare for Alaska Native people in Alaska. Congress wanted the regional health entities to exercise "management and control" over ANTHC because it did not want to provide hundreds of millions of dollars to an organization that may lack sufficient healthcare experience or robust accountability.

This is the only interpretation that makes sense given the context in which ANTHC, SCF, and the other regional health entities. ANTHC serves the same Alaska Native population that SCF and the other regional health entities serve: in general, SCF and the other regional health entities provide primary healthcare in their respective regions, and they rely on ANTHC to deliver certain specialty and hospital-based healthcare to their regional populations. SER-53. Congress created an inclusive structure for ANTHC so that the regional health entities and other tribes and tribal entities providing healthcare in Alaska all could have a say in how the specialty and hospital services provided by ANTHC would be managed. This was especially important because Section 325 limited the ability of the regional health entities to provide the care that would now be provided by ANTHC. *See*

Section 325(c); *cf. Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 991 (9th Cir. 1999) ("Section 325 effected a general restructuring of the means for delivery of health services to Alaska Natives . . . .").

In short, Congress created a structure whereby the regional health entities are represented on ANTHC's Board by designated Directors, and act through such designated Directors to exercise "management and control" over ANTHC.

B. ANTHC's Interpretation of Section 325 Fails

ANTHC raises a number of arguments in response to this straightforward interpretation of Section 325. All rest on illogical readings of isolated words or phrases in Section 325. None is availing.

1. The Participation Right Referenced in Section 325 Is a Governance Right

First, Section 325 does not provide, as ANTHC argues, that SCF's right to participate in the Consortium refers to SCF's right to participate in ANTHC's provision of statewide health services. AB 26. The clause in Section 325(a) concerning "provi[sion of] all statewide health services" describes the programs and services that ANTHC is authorized to provide under a compact and funding agreement pursuant to Public Law 93-638. The regional health entities are entitled to form a consortium, and that consortium is permitted to enter into agreements under Public Law 93-638 "to provide all statewide health services" that had been

provided to Alaska Native people by the Indian Health Service ("IHS") through ANMC and the Alaska Area Office of the IHS.

In contrast, the provision in Section 325(a) regarding "participating in the Consortium" concerns participating in the Consortium's governance by appointing a representative to the ANTHC Board. It states that each "'regional health entity' shall maintain that status for purposes of participating in the Consortium only so long as it operates a regional health program" for the IHS. The "status" referenced here concerns the ability of a regional health entity to appoint a "representative" to the Consortium's Board. In other words, so long as a regional health entity operates a regional health program (as those terms are defined), it can appoint a "representative" to the ANTHC Board. This interpretation is consistent with Section 325's legislative history: Congress wanted to draw on the experience of the regional health entities operating health programs in Alaska, and if an entity stopped operating a health program, then it would have little interest in ANTHC's governance, and little expertise to offer.

2. ANTHC's Interpretation of "Persons" Is Unfounded

Second, ANTHC argues that because Section 325(b) uses the word "persons" to refer to the members of ANTHC's Board, Congress intended that the Directors themselves would be "solely responsible" for governing ANTHC, AB 34, and there is "no way" to read Section 325 as endowing SCF or the other

regional health entities with any governance rights, AB 29. SCF is not arguing that Congress intended that the regional health entities themselves sit on the ANTHC Board. Rather, consistent with Section 325's text and legislative history, Congress intended for the regional health entities to govern ANTHC through their "representatives"—their designated Directors. That is what SCF meant when it alleged that it had a right to govern ANTHC directly.

ANTHC's narrow interpretation of "persons" not only ignores the remainder of Section 325 but also ignores its legislative history, which expressly states that the regional health entities themselves would have a role in governing ANTHC. "Statutory language cannot be construed in a vacuum," and courts must look at the "text and context of the statute as a whole" when interpreting it. *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quotation marks omitted). Reading the text and context of Section 325 together strongly indicates that Congress wanted the regional health entities to govern ANTHC through the "representative" "persons" whom they would designate as ANTHC Directors.

3. ANTHC Misinterprets Section 325's Legislative History

Third, ANTHC claims that Congress' primary concern was efficiency, and that allowing regional health entities to have input into ANTHC Board decision-making would be inefficient. AB 29-30. In fact, allowing the entities that have the knowledge and experience of managing the healthcare of their local Alaska Native

populations to have input into how ANTHC should manage specialty and hospital care for those same populations promotes efficiency, because it ensures that both ANTHC and the regional health entities have the information and perspectives they need to make informed decisions about how the statewide healthcare services provided by ANTHC are funded and delivered. SCF's interpretation of Section 325 is consistent with the efficiency that Congress envisioned.[2]

ANTHC also argues, unconvincingly, that Congress wanted no more than to allow the regional health entities to select designated Directors in a manner of their own choosing, not to have the regional health entities actually participate in governing ANTHC through their designated Directors. AB 33-34. This is not the case. As ANTHC concedes, "Congress did not dictate how those persons would be

[2] ANTHC attempts to raise certain "practical" hurdles to greater involvement from the regional health entities in ANTHC governance, arguing that greater transparency would change the nature of discussion at Board meetings, and may pose problems for discussion of information subject to attorney-client privilege. AB 30. This is the tail wagging the dog: just because there might be some information that, on rare occasion, may not be able to be shared does not mean that ANTHC can thwart clear Congressional intent and exclude the regional health entities from ANTHC Board decision-making entirely. In any event, these and many of ANTHC's other "facts" do not derive from SCF's complaint, but ANTHC's version of events, and are generally inappropriate for consideration, on a motion to dismiss. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (quotation marks omitted).

chosen." AB 34. There is no guarantee that the individuals who sit on the ANTHC Board would have all of the expertise needed to run a complex healthcare organization with a budget of hundreds of millions of dollars. By explicitly involving the regional health entities in ANTHC's governance, Congress did not think it was leaving whether ANTHC would be under "experienced Alaska Native management and control" to chance. And it certainly did not think that the designated Directors, without input from their designating entities, would be "solely responsible for governing ANTHC." AB 34. There is no support in Section 325 or its history for this interpretation.

4. ANTHC's Interpretation of Section 325 Reduces Accountability in Order to Promote the Self-Interests of ANTHC's Management

ANTHC advances its strained interpretation of Section 325 not because it furthers good corporate governance, but because it allowed its President, Andy Teuber, to raise his compensation from $110,000 to over $1,000,000 (after promising Board members retroactive pay). *See* Opening Brief ("OB") 12. By reducing accountability—narrowing who can make decisions[3] and then hiding information relating to those decisions from regional health entities—ANTHC is

[3] ANTHC argues that despite Section 325's requirements, the ANTHC Board is free to delegate powers to committees, even if they violate Section 325. AB 51 n.27. ANTHC cites no authority for the proposition that it can, by private agreement, circumvent Congressional design. No organization can engage in acts that the law prohibits.

reduced to an organization that primarily serves its own executives and not the tens of thousands of Alaska Native people that rely on it for healthcare.

This flies in the face of Congress' design. Congress was not interested in the narrow self-interests of ANTHC's executives. Its interest was the opposite: to create a transparent, representative consortium that explicitly required the regional health entities to participate in "management and control" through their designated Directors. There is no way to square ANTHC's interpretation of Section 325 with Congress' goal. It is not plausible that Congress wanted to establish a consortium to spend hundreds of millions of dollars in federal funds to serve Alaska Native people, that is not accountable to the participants in the consortium who serve the same populations.

5. SCF Is Seeking to Enforce Section 325, Not Undo It

ANTHC consistently uses a straw man for rhetorical effect: in its view, SCF's notion of having a "representative" on ANTHC's Board would mean that "every single one of the more than 200 represented entities" would have "a right to govern directly," which would undermine Congress' command that ANTHC be governed by a Board of Directors. AB 33. In ANTHC's view, SCF wants to do away with the ANTHC Board because SCF is obsessed with control over ANTHC.

AB 1.[4] While SCF has vociferously argued that Congress wanted it and the other regional health entities to have a meaningful role in ANTHC's governance, it has never advocated ignoring the governance model that Section 325 created. If SCF prevails, ANTHC would still be governed by a Board of Directors, and SCF's designated Director would still have only one of the Board's fifteen votes. That would not change.

What would change is that SCF's designated Director would be able to consult with SCF to ensure that she understands SCF's perspective and can bring all of the expertise that SCF can offer to bear on ANTHC decision-making. SCF's interpretation of Section 325, and, in turn, its standing to bring this suit, does not depend on the all-or-nothing proposition that ANTHC advances. As long as SCF is entitled to more input and information than ANTHC gave it, it was injured when ANTHC took away *all* input over decisions made by the Executive Committee and withheld information critical to ANTHC's governance, as SCF has alleged in its complaint.

[4] ANTHC dredges up an out of context example from over 20 years ago to argue that SCF wants to do away with ANTHC's conflict of interest rules. AB 13. This example is absent from SCF's complaint, irrelevant, and disputed. As SCF stated to the District Court and in its opening brief, it is not seeking to circumvent ANTHC's conflict of interest policy. OB 17 n.3.

C. In Other Contexts, ANTHC Readily Admits That It Is Governed by the Regional Health Entities

ANTHC has long recognized that the regional health entities represented on its Board have the right to participate in its governance. As explained in SCF's complaint, ANTHC has stated in the Alaska Tribal Health Compact, a binding agreement with the Department of Health and Human Services, that it "was organized and is *controlled by* the Alaska Native tribes and tribal organizations which are represented on its Board of Directors." 2ER-114 (emphasis added). ANTHC has also stated that it is a "not-for-profit Tribal health organization *managed by* Alaska Native Tribal governments and their *regional health organizations*." *Id.* (emphasis added). And Mr. Teuber stated in a sworn declaration to the District Court that "ANTHC exists to fulfill the United States' promise to promote self-governance and to enable hundreds of tribes and [regional health entities] to effectively participate in collectively managing our health system, on equal footing with each other . . . ." SER-106.[5] It is disingenuous for ANTHC to state, when convenient, that it is controlled, managed and governed by

[5] Although ANTHC ultimately "waived" sovereign immunity for this lawsuit, 4ER-242-43, ANTHC apparently has argued elsewhere that the tribal entities represented on the ANTHC Board exercise sufficient control over ANTHC for it to avail itself of the sovereign immunity of those same tribal entities. *See Barron v. Alaska Native Tribal Health Consortium*, 373 F. Supp. 3d 1232, 1240 (D. Alaska 2019) (holding that ANTHC was entitled to sovereign immunity, in part, because "control over the ANTHC's ownership and management" is vested "in representatives of the Alaska Native tribes").

the tribal entities represented on its Board, but to argue here that SCF does not have such rights and therefore was not injured when ANTHC infringed them.

III.
ANTHC INJURED SCF WHEN IT CREATED THE EXECUTIVE COMMITTEE THAT COULD EXERCISE THE POWER OF THE FULL ANTHC BOARD

In addition to its argument that Section 325 does not grant SCF any rights, ANTHC argues that SCF cannot proceed on its Executive Committee claim for three reasons: because (1) SCF forfeited this claim; (2) this claim is moot; and (3) this claim is a bare procedural violation that is not justiciable. None of these arguments has merit.

A. SCF Did Not Forfeit This Claim

ANTHC erroneously argues that SCF forfeited this claim by not sufficiently raising it to the District Court. AB 46-49. Forfeiture is "the failure to make the timely assertion of a right." *United States v. Olano*, 507 U.S. 725, 733 (1993); *accord United States v. Scott*, 705 F.3d 410, 415 (9th Cir. 2012). ANTHC's argument fails because (1) SCF repeatedly and forcefully raised this claim below; (2) forfeiture applies to claims, not arguments; (3) even if the Court were to conclude that SCF did not adequately raise this claim, there is neither prejudice to ANTHC nor any barrier to the Court addressing it now; and (4) the cases that ANTHC cites are inapposite.

Although ANTHC argues that SCF forfeited its Executive Committee claim by not adequately arguing in response to ANTHC's motion to dismiss that it was injured, ANTHC concedes in a footnote that SCF did raise this argument "in opposition to the motion to dismiss." AB 48; *see* 2ER-38 (stating, in opposition to the motion to dismiss, that "SCF filed a complaint seeking a declaration that (1) the delegation of almost the full power of the Board to the five-person executive committee . . . [was] contrary to Section 325 and illegal"). SCF, therefore, did present this claim to the District Court in the place where ANTHC contends SCF should have done so.

That was not, however, the only place where SCF pressed its Executive Committee claim. SCF also did so in its complaint, and in briefing relating to the other dispositive motions filed around the same time as ANTHC's motion to dismiss was being briefed. *See* OB 35-36 (quoting extensively from passages where SCF pressed this claim). A claim is not forfeited so long as a litigant "raise[s] the essence of the claim" to the district court in a timely manner. *See One Indus., LLC v. Jim O'Neal Distrib.*, 578 F.3d 1154, 1158–59 (9th Cir. 2009) (claim not forfeited when raised primarily in another motion, one that was not the subject of the notice of appeal, where the claim was "central to the case before and during litigation and was discussed extensively in [the party's] opening brief on appeal").

SCF clearly raised more than the mere "essence" of its Executive Committee claim to the District Court.

This case law makes sense given that the forfeiture doctrine applies to *claims*, not *arguments*. *See United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) ("it is claims that are deemed waived or forfeited, not arguments"). The forfeiture doctrine is designed to ensure that parties are not able to relinquish counts in their complaints in the district court only to bring them back on appeal and surprise their adversaries. But forfeiture does not stand as a barrier even to "a new argument to support what has been [a] consistent claim." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *see also Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). SCF repeatedly and consistently pressed its *claim* concerning the Executive Committee. *See* OB 35-36.

SCF concentrated on its informational injury in response to ANTHC's motion to dismiss because that claim was the focus of ANTHC's motion. ANTHC's motion to dismiss was divided into two sections: its mootness section focused on the Executive Committee, SER-139-141, and its standing section focused on informational barriers, SER-133-139. *See, e.g.*, SER-137 ("Here, SCF is seeking to enforce its selected Director's alleged right to access and share certain

information."). SCF's opposition to the section on standing, therefore, focused on the informational barriers as well.[6]

But even if this Court is of the view that SCF should or could have made additional *arguments* concerning its Executive Committee claim in the brief responding to ANTHC's motion to dismiss, there is no barrier to this Court considering this claim on appeal. "[P]arties are not limited to the precise arguments they made below." *Lebron*, 513 U.S. at 379; *accord Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013) ("we may consider new legal arguments raised by the parties relating to claims previously raised in the litigation"); *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 558 n.8 (9th Cir. 2016) ("we may consider [a party's] 'new legal arguments ... [because they] relat[e] to claims previously raised in the litigation'" (first alteration added, quoting *Thompson*, 705 F.3d at 1098)). There is no unfairness to ANTHC, as it has long been aware of this claim, and there has been no attempt to "sandbag the opposing party with a new issue presented for the first time on appeal." *One Indus.*, 578 F.3d at 1159.

[6] The entire second portion of SCF's opposition brief focused on the Executive Committee, making it abundantly clear to the District Court that SCF was not abandoning this claim. SER-33-35.

The cases that ANTHC cites in support of its forfeiture argument are inapposite. Both *United States ex rel. Silingo v. WellPoint, Inc.*, 904 F.3d 667, 681 (9th Cir. 2018) and *Carvalho v. Equifax Information Services, LLC*, 629 F.3d 876, 888 (9th Cir. 2010) were situations where plaintiffs abandoned counts in their complaints—entire claims—before their cases were appealed. By contrast, there can be no argument that SCF abandoned any theory of relief here. And while the language that ANTHC cites from *Walsh v. Nevada Department of Human Resources*, 471 F.3d 1033, 1037 (9th Cir. 2006) is *dicta*, forfeiture existed there because the plaintiff failed to make an "overture to the district court to suggest that [the plaintiff] had a continuing interest in pursuing" its claim. *Id.* (alteration in original). SCF made much more than an "overture" that it was pursuing its Executive Committee claim, especially since it was a basis for SCF's motion for summary judgment.

B. This Claim Is Not Moot

ANTHC also argues that SCF's Executive Committee claim is moot because ANTHC amended its Bylaws in April 2017 to expressly require that all Executive Committee actions be ratified by the Board in order to be effective, and therefore there is "no reasonable expectation" that the alleged violation will recur. AB 50. Whether SCF's claim is moot is plainly a different question from whether SCF had standing at the time it filed its complaint. *See Lozano v. AT&T Wireless Servs.*,

504 F.3d 718, 733 (9th Cir. 2007) (explaining the differences between standing and mootness). But SCF's claim is not moot because ANTHC has not presented any evidence that the offending conduct will not recur, and thus cannot overcome the voluntary cessation doctrine.

"[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Jacobus v. Alaska*, 338 F.3d 1095, 1103 (9th Cir. 2003) (quotation marks omitted). "The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012). "In determining mootness, the *defendant* bears the burden of showing that its voluntary compliance moots a case by convincing the court that 'it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" *Lozano*, 504 F.3d at 733 (quoting *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 190 (2000) (citation omitted)); *see also Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (party asserting mootness bears "heavy burden" to demonstrate it).

ANTHC has not come close to meeting its "heavy burden." ANTHC continued to argue in the District Court that its formation of the Executive Committee was lawful, while at the same time arguing that this claim was moot.

See SER-130. And SCF presented evidence to the District Court that ANTHC's offending conduct had reoccurred even after the Bylaw change: ANTHC transferred responsibility for executive compensation to another committee, and then that committee secretively evaluated yet another lucrative compensation package for Mr. Teuber. 5ER-245-46.

Moreover, ANTHC changed its Bylaws in April 2017, AB 49, three months *after* SCF filed its complaint. *See* 2ER-126. "[T]he mere cessation of illegal activity in response to pending litigation does not moot a case." *Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009). SCF is entitled to a declaration that ANTHC is not "free to return to [its] old ways." *Smith v. Univ. of Wash., Law Sch.*, 233 F.3d 1188, 1194 (9th Cir. 2000) (quotation marks omitted).

ANTHC's response to this is to argue that SCF somehow conceded mootness at the hearing before the District Court on ANTHC's motion to dismiss. AB 50-51. But SCF never withdrew its opposition to ANTHC's motion to dismiss on mootness grounds, and referenced ANTHC recognizing the "error of their ways" as a way of demonstrating consciousness of guilt, not as accepting ANTHC's unsupported assertion that it will never reengage in the offending conduct. SCF expressly stated that ANTHC changed its Bylaws only because SCF "filed the lawsuit," and stated that had it not, Mr. Teuber "would have used the

executive committee for additional years of compensation." SER-4-5. Nothing in the transcript acknowledges that ANTHC has met its "heavy burden" to demonstrate that the offending conduct will not recur.

In any event, the District Court never reached ANTHC's mootness argument. It did not find any facts regarding mootness or address SCF's argument that the voluntary cessation doctrine serves as a barrier to a dismissal on mootness grounds. There is, thus, no mootness holding for this Court to review.

C. This Injury Is Concrete

Finally, ANTHC incorrectly argues that the Executive Committee injury is insufficiently concrete because it is a "bare statutory violation" and SCF suffered no actual harm. AB 52-56. An injury is sufficiently concrete for Article III standing where it causes the plaintiff to "suffer some harm that 'actually exist[s]' in the world"—that is, the injury "is 'real' and not 'abstract' or merely 'procedural.'" *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1112 (9th Cir. 2017) (*Spokeo II*) (alteration in original) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (*Spokeo I*)). The deprivation of governance rights—here, the right to engage in the "management and control" of ANTHC—is not a mere procedural violation, and even if it were, the violation caused SCF concrete harm.

ANTHC does not cite a single case holding that corporate governance rights are merely "procedural." Its sole support for this notion is a citation to *Summers v.*

Earth Island Institute, 555 U.S. 488, 496 (2009), which concerned the right to comment on federal agency action, not corporate governance. The right to comment on federal agency action is different from the right to participate in the governance of a corporate entity. If a plaintiff has a right to govern an organization, an injury occurs when that right is abridged. *See e.g. LAIF X SPRL v. Axtel, S.A. de C.V.*, 390 F.3d 194, 197 (2d Cir. 2004) (injury not questioned where plaintiff alleged it "cannot exercise the governance rights for which it bargained"); *Ute Indian Tribe of the Uintah & Ouray Reservation v. Ute Distrib. Corp.*, 455 F. App'x 856, 864 (10th Cir. 2012) (tribe had standing where it was "deprived of its right under Utah law to vote" on amendment to corporate articles of incorporation). Although governance rights typically arise under state law, federal courts routinely adjudicate the rights of various corporate stakeholders (partners, directors, shareholders, etc.), sometimes without questioning whether the aggrieved party has been sufficiently injured to create standing.[7] That is the case

[7] *Cf. Lapidus v. Hecht*, 232 F.3d 679, 683 (9th Cir. 2000) (shareholders had standing (under state law) to bring direct action for violation of their voting rights); *W. Dist. Council of Lumber Prod. & Indus. Workers v. Louisiana Pac. Corp.*, 892 F.2d 1412, 1416 (9th Cir. 1989) (shareholders injured by misleading proxy statement that failed to disclose material information). Most cases involving corporate governance rights are brought in state court, the law providing the given governance right is a state law, and the recipient of the governance right is a director or a shareholder. Here, the law providing the governance right is Section 325, and the recipient is a participant in the Consortium. Despite the unique source and recipient of the governance rights at issue, the same logic applies: the rights

here: ANTHC subverted SCF's right to "cast one vote" through its designated Director, effectively locking SCF out of the boardroom on a matter on which it is entitled to have input.[8]

Even if the violation could be cast as a procedural violation, standing would still be proper. To determine whether standing exists for a procedural violation, courts evaluate "(1) whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in [the] case actually harm, or present a material risk of harm to, such interests." *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1174 (9th Cir. 2018) (alteration in original) (quoting *Spokeo II*, 867 F.3d at 1113). Both prongs of this test are met here.

As to the first prong, Section 325 was enacted to protect SCF's concrete interest in ANTHC governance. Congress passed Section 325 to ensure that SCF and the other regional health entities would have a say in the "management and

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provided by Section 325 are rights to manage and control a corporate entity, the deprivation of which is a concrete injury.

[8] That corporate governance rights are intangible is irrelevant, as intangible rights can give rise to concrete interests for standing purposes. *See, e.g. Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 986 (9th Cir. 2017) (privacy invasion intangible but sufficiently concrete for standing); *Maya*, 658 F.3d at 1069 (economic injury).

control" of ANTHC. Congress was clear that it wanted all Alaska Native people who would be affected by its reorganization of healthcare in Alaska to have input on how ANTHC would provide certain statewide services. *See* 2ER-45.

Another concrete interest at stake here in the tribal entity context is self-determination. Congress legislates against a background recognition that there should be "maximum Indian participation in the direction of . . . Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities." 25 U.S.C. § 5302(a). Transitioning programs to Alaska Native "management and control," 2ER-45, is supposed to enhance, not detract from, self-determination. *See id.* § 5302(b) (explaining Congress' "commitment" to "a meaningful Indian self-determination policy" that will allow "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of, *inter alia*, health services). For Alaska Native people, having input into how federal health services are provided by ANTHC is more than a mere procedural interest: it is the substantive lynchpin to achieving "the measure of self-determination essential to their social and economic well-being." *Id.* § 5302(c). Shutting SCF out of decisions relating to how ANTHC allocates the scarce federal funds it receives to provide certain statewide health services impacts SCF's interest in representing the tens of thousands of Alaska Native people it serves.

As to the second prong, the creation of the Executive Committee and the delegation of the full power of the Board to it actually invaded SCF's interests in governance and self-determination. It prevented SCF's designated Director from having any input regarding Mr. Teuber's exorbitant compensation agreement. Contrary to ANTHC's assertion, any subsequent ratification of the contract by the full ANTHC Board did not cure the inability of SCF's designated director to cast her Congressionally mandated vote, as the contract was already effective and a done deal. Had the Board rejected the contract, then Mr. Teuber could have sued for breach of contract. In other words, by the time the ratification occurred, the deprivation was already complete.

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The District Court erred in holding that SCF "did not frame its asserted injury" as an injury to its governance and participation rights. 3ER-240. This was the core violation that SCF alleged in its complaint and repeatedly pressed. ANTHC injured SCF when it created the Executive Committee in the way it did.

IV.
ANTHC'S INFORMATIONAL BARRIERS INJURED SCF

As explained in Section II, *supra*, ANTHC's argument that the informational barriers it erected did not injure SCF is inconsistent with the text, legislative history and purpose of Section 325. Equally unavailing is ANTHC's argument that even if Section 325 does create an informational right for SCF, deprivation of that

right "still would not suffice for standing" because the right to information in Section 325 is not "freestanding" and therefore insufficiently concrete to support a lawsuit, relying heavily on *Wilderness Society, Inc. v. Rey*, 622 F.3d 1251 (9th Cir. 2010). AB 36-44.

This argument fails because it implies that SCF's informational rights are trivial, which is not the case. As explained extensively in SCF's opening brief, information is critical to meaningful governance. *See* OB 38-40; 5A Fletcher Cyc. Corp. § 2235 (it is "axiomatic" that one cannot "make a full contribution to the management" of an organization unless provided "access to the corporation's books and records"). ANTHC effectively extinguished SCF's governance rights by prohibiting SCF's designated Directors from sharing critical information with SCF. But Congress did not intend to create hollow governance rights when it enacted Section 325. By "draw[ing] on the expertise" of the regional health entities "to ensure efficient, experienced Alaska Native management and control" of ANTHC, it intended those governance rights to be significant. 2ER-45. ANTHC cannot reasonably contend that the deprivation of a significant governance right is not a concrete injury.

ANTHC's response to this is to argue that SCF can never suffer informational injury on account of a violation of Section 325 because Section 325's purpose was not an "entitlement to information per se." AB 37. Ultimately,

ANTHC's argument is that Congress needed to use the word "information" instead of "governance" in its description of what it sought to accomplish through Section 325. But when interpreting a law, courts have "never required that Congress use magic words." *F.A.A. v. Cooper*, 566 U.S. 284, 291 (2012). There are examples of courts finding entitlements to information even when there is no such "freestanding" right. *See Doe v. Pub. Citizen*, 749 F.3d 246, 264 (4th Cir. 2014) (informational injury found where plaintiffs denied "information that they contend they have a right to obtain and inspect" under the First Amendment). And ANTHC's argument makes sense only if one ignores the critical relationship between governance rights and information, and how withholding the latter can extinguish the former.

The analysis from the main case upon which ANTHC relies, *Wilderness Society*, cannot be neatly imported here because it arose in a very different context. There, the statute at issue provided the public with rights to participate in a public comment process. 622 F.3d at 1259. This Court held that even though the rights at issue "necessarily involve the dissemination of information, they are not thereby *tantamount* to a right to information per se." *Id*. at 1259. But the right to govern a corporation effectively is far more particularized and concrete than a diffuse, generalized interest in commenting on proposed regulations. By designating SCF

as an entity entitled to govern ANTHC, Congress endowed SCF with meaningful rights in the Consortium.

Moreover, even if the informational deprivation were viewed as a "procedural injury," procedural injuries that are tied to "some concrete interest that is affected by the deprivation" are sufficient for standing. *Summers*, 555 U.S. at 496; *see also Spokeo II*, 136 S. Ct. at 1549; *Wilderness Soc.*, 622 F.3d at 1260. That is the case here. As explained above, *see supra* Section III.C, SCF's interest in information is inextricably tied to its interest in exercising its governance rights—its right to "management and control" of ANTHC—and its interest in self-determination.

This was not the case in *Wilderness Society*, where the "process" and "participation" plaintiffs sought consisted merely of the right that any citizen had to "comment on [] proposals." 622 F.3d at 1259. This is different than the right to actually vote on proposals or bring proposals to the Board, through SCF's designated Director. For a similar reason, the Supreme Court explained that the informational injury in *Federal Election Commission v. Akins* was "sufficiently concrete" because it was "directly related to voting." 524 U.S. 11, 24-25 (1998). SCF's interest in information in order to exercise its management and control right here is far more particularized and concrete than the plaintiffs' interests in

generalized "process" and "participation" were in *Wilderness Society*. 622 F.3d at 1259.

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The District Court erred in holding that SCF was not injured by ANTHC's information barriers. It failed to recognize the critical link between information and governance, and the concrete interest in governance that ANTHC's informational barriers impaired. SCF cannot exercise its governance and participation rights in a meaningful way without access to information about ANTHC's operations and governance. The District Court's holding that SCF was not injured should be reversed.

V.
ANTHC'S COUNTERCLAIMS DEMONSTRATE CONCRETE ADVERSITY

ANTHC's mirror image counterclaims demonstrate that there is an "an honest and actual antagonistic assertion of rights by one [party] against another." *Ctr. for Biological Diversity v. United States Forest Serv.*, 925 F.3d 1041, 1043 (9th Cir. 2019) (quotation marks omitted; alteration in original). As explained above, ANTHC's actions injured SCF. The presence of mirror-image counterclaims reinforces the point that "the parties will be truly adverse and their legal presentations sharpened." *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017).

VI.
THE DISTRICT COURT SHOULD HAVE, AT A MINIMUM, GRANTED LEAVE TO AMEND

"Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002) (quotation marks omitted). Even though SCF explained to the District Court that it *could* amend its complaint *if* the District Court held that SCF lacked standing, 2ER-39, the District Court did not grant such leave after erroneously concluding that SCF lacked standing. ANTHC misleadingly parses SCF's language to argue that SCF was "not actually requesting" such leave. AB 24, n.6. But SCF was not required to say more than it did, because unless a district court determines that amendment would be futile, "a district court should grant leave to amend even if no request to amend the pleading was made." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (quotation marks omitted). Leave to amend should be granted whenever "justice so requires," Fed. R. Civ. P. 15(a)(2), and with "extreme liberality," *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001).

Although SCF maintains that it has standing, should this Court determine otherwise, then the District Court's dismissal should be vacated with instructions

to permit SCF leave to amend to add its designated Directors as plaintiffs.[9] Amendment would not be futile, as even ANTHC concedes that designated Directors "can assert claims related to ANTHC's corporate governance." SER-127.

VII. CONCLUSION

Under ANTHC's view, SCF was not injured because the regional health entities that Congress specifically named in Section 325 have *no role* in governing ANTHC. This fiction is impossible to square with Section 325's text and legislative history. Congress wanted to "draw on the existing expertise of the Alaska Native regional health entities now managing extensive regional health networks in Alaska" in order "to ensure efficient, experienced Alaska Native management and control" over ANTHC. 2ER-45. Because Section 325 endows SCF with governance and accompanying informational rights, ANTHC injured SCF when it infringed upon them. This Court should reverse the District Court and hold that SCF has standing to redress these injuries in this suit.

[9] Similarly, prudential standing, AB 56-57, is not an issue in this appeal. SCF asserts its own rights provided to it by Congress in Section 325, not the rights of its designated Directors.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1 that the attached brief is proportionately spaced, has a typeface of 14 points, and, according to the word count feature of the word processing system used to prepare the brief (Microsoft Word 2016), contains 6,957 words.

Dated: July 3, 2019

/s/ William D. Temko

WILLIAM D. TEMKO

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 3, 2019. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: July 3, 2019

/s/ William D. Temko

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