

SOLVING STANDING'S CORPORATE BIAS: HOW AGENCIES CAN EMPOWER ADVOCATES TO CHALLENGE DEREGULATION

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EXECUTIVE SUMMARY

While the Trump administration routinely took deregulatory actions in an unlawful manner, advocates often struggled to exploit these legal vulnerabilities in court due to constitutional standing doctrine's pro-corporate bias. This issue brief explains how policymakers could design regulations to increase the likelihood that advocates can establish standing in the event of future rollbacks. This would empower progressives to more robustly challenge the next conservative administration's inevitable deregulatory agenda. While we identify and detail some specific strategies here—which we refer to as “standing hooks,” and which generally entail involving public interest organizations in the operation of regulatory frameworks—this issue brief ultimately calls for persistent attention to standing questions during the rulemaking process. When regulators and advocates undertake new rulemakings, they should consider how to best ensure that outside groups will be able to get into court to defend against future deregulation.

The following is a summary of key takeaways for regulators and advocates who aim to use standing hooks to ensure that someone will be able to get into court to defend progressive rulemakings from subsequent deregulatory rollback. We also briefly note how some of the lessons from the administrative context regarding standing could inform legislative efforts in Congress.

REGULATORS

For every rulemaking, regulators should consider how allied groups will be able to meet standing requirements in the event that a future administration attempts to deregulate. Where standing prospects seem questionable, policymakers should add “standing hooks” into the rulemaking itself. With regards to the two standing hook proposals identified in this issue brief, some important considerations include:

Information disclosure

- Public disclosure regimes should be integrated into the overall rulemaking, rather than tacked on as an afterthought.¹ The content of the disclosure provision must be closely tied to the substantive regulatory update at issue, otherwise this standing hook will fail to protect the entire rule.
- In order to serve as a standing hook, an information disclosure provision cannot grant agencies complete discretion to revise the specific content of the disclosure through guidance and policy documents.²

Incorporating advocates into standard-setting or enforcement

- Input solicitation provisions must be mandatory, not simply encouraged.³
- Regulators should consider identifying specific types of public interest groups that must be consulted.⁴
- Regulators should consider including rule-specific avenues of redress, even where other enforcement mechanisms already exist.⁵

Using final rule documents as a standing roadmap

- Regulators should identify non-exhaustive lists of intended beneficiaries, and lay out the chains of causation that explain how those beneficiaries stand to benefit from a given rulemaking.⁶
- Regulators should attempt to quantify benefits of standing hooks and other regulatory provisions to researchers and advocates.⁷

¹ See *infra*. at 15-17.

² See *infra*. at 17-18.

³ See *infra*. at 18-20.

⁴ See *infra*. at 21.

⁵ See *infra*. at 21-22.

⁶ See *infra*. at 23.

⁷ See *infra*. at 24.

ADVOCATES

Public interest organizations should advocate for the inclusion of standing hooks during the rulemaking process. And when regulators issue proposals that incorporate standing hooks, advocates should submit comments explaining how the standing hook will benefit their organizations' daily operations.

After a rule that contains a standing hook goes into effect, advocates should coordinate to ensure that at least one organization will take advantage of these provisions in ways that are likely to generate organizational standing in the event of future deregulation.⁸

LEGISLATORS

Whether Congress can solve standing inequities has been the fount of much legal scholarship in recent decades.⁹ Traditionally, standing critics have argued in favor of some sort of explicit conferral of standing by Congress.¹⁰ More recently, reformers have suggested that Congress use a *qui tam* model, which confers a bounty on a successful plaintiff in a citizen suit.¹¹

This issue brief suggests another path, albeit one we have not explored in depth: Congress is capable of incorporating these standing hooks—information disclosure provisions and avenues for advocate input—into new statutory schemes just as (if not in some cases more) easily than regulators. The goal would be to achieve via statutory design what Congress has failed to do by explicitly conferring standing in legislative text.¹²

⁸ See *infra*. at 24–26.

⁹ For a useful overview, see Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. Rev. 159 (2011).

¹⁰ Again, see *id.* at 182–85.

¹¹ See *id.* at 194.

¹² This is not an original idea, as lawyers in the environmental field have been kicking around the notion of adding information disclosure requirements to environmental statutes for just this purpose for decades.

INTRODUCTION

The Trump administration dedicated extraordinary energy to rolling back Obama-era regulatory policies, often at the behest of industry groups. It routinely did so unlawfully, as legal commentators and judges noted throughout the administration's four years in office.¹³ Unsurprisingly, this led courts to invalidate a number of Trump deregulatory efforts.¹⁴ Yet many other questionably lawful rollbacks survived; in fact, many never had to withstand judicial scrutiny at all, thanks to a complicated legal doctrine that determines who can and cannot get into court: the doctrine of standing.

Constitutional standing doctrine exists to ensure federal courts only hear disputes about concrete legal questions from litigants with a sufficiently significant stake in the outcome.¹⁵ In any given case, albeit sometimes more cursorily than others, federal courts determine whether the plaintiff has established “standing” and thus deserves to have the merits of their complaint considered. If a judge determines a plaintiff lacks standing, the case is thrown out before the underlying legal claim can be adjudicated.

What in theory may sound like a banal, technical consideration, in practice creates troubling disparities in who can access the justice system. In the administrative law context specifically, contemporary standing requirements structurally favor directly regulated entities (e.g., polluters, insurers, financial institutions, and industry) over a regulation's intended beneficiaries (e.g., workers, students, consumers, immigrants, and the environment).¹⁶ As a result, corporate interests can almost always establish

¹³ See e.g., Bethany A. Davis Noll and Christine Pries, *The Administration's Record in the Courts*, The Hill (Nov. 3, 2020), <https://thehill.com/opinion/white-house/524016-tired-of-winning-trumps-record-in-the-courts>; Fred Barbash and Deanna Paul, *The Real Reason the Trump Administration is Constantly Losing in Court*, Washington Post (Mar. 19, 2019), https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html; Kimberly Strawbridge Robinson, *High Court Rulings Highlight Trump's Administrative Law Stumbles*, Bloomberg Law (Jun. 19, 2020), <https://news.bloomberglaw.com/us-law-week/high-court-rulings-highlight-trumps-administrative-law-stumbles>; Margot Sanger-Katz, *For Trump Administration, It Has Been Hard to Follow the Rules on Rules*, New York Times (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/upshot/for-trump-administration-it-has-been-hard-to-follow-the-rules-on-rules.html>; Lawrence Hurley, *Trump Administration's "Sloppy" Work Has Led to Supreme Court Losses*, Reuters (Jun. 18, 2020), <https://www.reuters.com/article/us-usa-court-immigration-trump-analysis/trump-administrations-sloppy-work-has-led-to-supreme-court-losses-idUSKBN23P3M2>; Tucker Higgins, *The Trump Administration Has Lost More Than 90 Percent of Its Court Battles Over Deregulation*, CNBC (Jan. 24, 2019), <https://www.cnbc.com/2019/01/24/trump-has-lost-more-than-90-percent-of-deregulation-court-battles.html>.

¹⁴ Democracy Forward, *Trump Loses 93% of Cases in Court. We Know, Because We Sue Trump and Win* (Jun. 22, 2020), <https://democracyforward.org/updates/trump-loses-93-percent-of-cases-we-know-because-we-win/>; NYU School of Law Institute for Policy Integrity, *Roundup: Trump-Era Agency Policy in the Courts* (Updated: Apr. 1, 2021), <https://policyintegrity.org/trump-court-roundup>.

¹⁵ *TransUnion LLC v. Ramirez*, 594 U.S. ___, slip op. at 7 (2021).

¹⁶ See, e.g., Amanda Leiter, *Substance or Illusion - The Dangers of Imposing a Standing Threshold*, 97 Georgetown L. J. 391, 393–94 (2009) (“... one effect of the drive [to tighten standing constraints] is to make judicial review less available to beneficiaries of regulations (usually individuals or communities) than to objects of regulation (usually business interests)”).

standing to challenge new regulations from a progressive administration, whereas beneficiaries often struggle to do the same when faced with a conservative deregulatory agenda.

This power imbalance carries important implications for which types of rules face delayed implementation—no trivial matter, given that the Trump administration refused to defend in court many rules promulgated at the end of Obama’s second term¹⁷—or, ultimately, which types of rules face invalidation. The corporate standing advantage also bleeds into the rulemaking process itself, where the credible threat of an industry-backed lawsuit constrains the policy choices of even well-intentioned agency officials.

Fortunately, regulators are far from helpless in the face of standing’s deregulatory bias. Standing questions are highly contingent on the statutory and regulatory scheme at issue, which means that policymakers have the ability to design regulations in ways that will give advocates a better shot at establishing standing in the future. This issue brief argues that regulators should do just that, by including types of provisions that we call “standing hooks” in new regulatory proposals.

Adding “standing hooks” to new rules is important because (to note the obvious) progressive regulators only hold power for a limited time. In the event of a future conservative administration, the only entities standing in the way of a new spate of deregulatory actions will be outside groups willing to sue—but only if they can get into court in the first place. Thus, including “standing hooks” is an insurance policy intended to preserve a rule’s longevity. From policymakers’ perspective, the goal is to better insulate their regulations from a subsequent administration’s hostility by empowering advocates.

We propose two discrete “standing hooks”—essentially, categories of regulatory provisions—that policymakers should include as part of larger rulemakings: (1) adding public information disclosure provisions; and (2) incorporating advocates into the operation of enforcement regimes. We also recommend best practices, applicable to any rulemaking, that regulators drafting final rule documents could use to assist advocates attempting to establish standing in the future. Each of these proposals seeks to draw nongovernmental organizations into the heart of federal regulatory schemes. By doing so, we believe regulators can solve some of the standing hurdles that have bedeviled advocates battling against deregulation in the past.

¹⁷ Take, for example, the Obama administration’s 2016 Overtime Rule, which a federal judge permanently enjoined in 2017. The Trump administration decided not to appeal the decision, effectively killing the rule.

Additionally, centering nongovernmental organizations will have salutary effects beyond the doctrinal benefits that are the primary focus of this issue brief. Because individuals, even when they can establish standing, may be hesitant to launch a regulatory challenge for a number of reasons¹⁸—fear of retaliation, lack of financial or legal resources, unwillingness to spend years on a lawsuit—intentionally empowering interest groups should be a vital component of unrigging the legal system. As political scientists like Alexander Hertel-Fernandez have argued, “organized actors . . . are much more important and influential in American politics than the mass public or individual Americans are on their own.”¹⁹ And, of course, ensuring that government programs are transparent and that they allow for democratic input are worthy goals in and of themselves.²⁰

While we specifically identify two “standing hook” proposals, this issue brief ultimately calls for a recognition that regulations should be crafted with an eye toward helping advocates establish standing in the future. Each distinct rulemaking effort is too dependent on a range of legal, policy, and political considerations for a one-size-fits-all approach. But regulators should formally build into the rulemaking process consideration of how these and other “standing hooks” can be included in every rulemaking. For instance, the Office of Management and Budget (OMB) could include encouragement to this effect in its anticipated revision to rulemaking guidelines.²¹ This would mark a break from the federal government’s traditional reluctance to concede standing arguments—an understandable instinct that nevertheless fails to appreciate how, in a world where many administrative actions receive a court challenge, the doctrine’s lopsidedness exacerbates corporate power.

¹⁸ For example, Public Citizen struggled during the start of the Trump administration to challenge United States Department of Agriculture (USDA) waivers that allowed poultry processing plants to speed up the production line because the obvious plaintiffs for such a case—endangered workers—typically lacked union protection and thus risked losing their jobs over participation in the suit. Brookings Institution, *Access to the Courts: Assessing Modern Standing Doctrine and Potential Reforms* (Mar. 17, 2021), <https://www.youtube.com/watch?v=oV8PXwXHjYE> (starting at 1:14:00).

¹⁹ Alexander Hertel-Fernandez, *How Policymakers Can Craft Measures That Endure and Build Political Power*, Roosevelt Institute (June 2020), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_How-Policymakers-Can-Craft-Measures-that-Endure-and-Build-Political-Power-Working-Paper-2020.pdf.

²⁰ Nell Abernathy, Darrick Hamilton, and Julie Margetta Morgan, *New Rules for the 21st Century: Corporate Power, Public Power, and the Future of the American Economy*, Roosevelt Institute (April 2019), <https://rooseveltinstitute.org/publications/new-rules-for-the-21st-century-corporate-power-public-power-future-american-economy/>.

²¹ The White House, *Modernizing Regulatory Review* (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review>.

DISCUSSION

This brief begins with a short overview of constitutional standing doctrine and how it structurally advantages corporate entities over regulatory beneficiaries. Next, it identifies two versatile “standing hooks”—public information disclosure requirements and incorporating advocates into the operation of the regulatory regime—as well as best practices for regulators drafting final rule documents. Finally, the brief outlines considerations for advocates, before concluding with responses to some likely objections.

STANDING OVERVIEW

Courts use standing analysis to ascertain whether a plaintiff is entitled to have a federal court adjudicate their claim on the merits.²² Put differently, standing doctrine attempts to define constitutional limits on federal court jurisdiction.²³ Theoretically, these limits ensure that “abstract questions of public significance” are left to the legislative and executive branches, rather than the judiciary.²⁴

Standing doctrine derives from the Constitution’s instruction that federal courts only have the authority to resolve “cases” or “controversies,”²⁵ which courts have interpreted to mean that a plaintiff must demonstrate that they “[have] suffered some threatened or actual injury resulting from the putatively illegal action.”²⁶ In order for plaintiffs to establish constitutional standing, the Supreme Court has devised a test. Plaintiffs must show:

1. That they have suffered an injury in fact that is “concrete and particularized” and “actual or imminent,” as opposed to “conjectural or hypothetical”;
2. That the injury is “fairly traceable” to the defendant’s challenged action; and
3. That the injury is likely to be redressed if the court were to rule in the plaintiff’s favor.²⁷

²² *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

²³ *Id.* Traditionally, federal courts had also imposed what they referred to as “prudential” limits on standing, including that plaintiffs generally cannot raise claims that fall outside the “zone of interests” of the statute at issue; however, courts and scholars have taken the Supreme Court’s opinion in *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) to mostly eliminate the notion of “prudential standing,” and re-house these types of inquiries as questions of statutory interpretation (i.e., whether the plaintiff has a cause of action under the statute).

²⁴ *Id.*

²⁵ U.S. CONST. art. III, §2, cl. 1.

²⁶ *Warth* at 498.

²⁷ *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560-61 (1992).

Additionally, when seeking an injunction to prevent future action (as is often the case when litigating agency action), past injury does not satisfy the injury-in-fact standard;²⁸ instead, a plaintiff must show a “real and immediate” threat of future harm.²⁹

Litigants can find constitutional standing requirements to be confounding, and for good reason. “The complexity and continued expansion of the doctrine mean that results in the lower courts and in the Supreme Court itself are unpredictable,” writes law professor Heather Elliott. “Critics have accordingly called the doctrine ‘a morass,’ ‘incoherent,’ ‘manipulable,’ permeated with ‘doctrinal confusion,’ and without historical basis.”³⁰

Many scholars have noted that constitutional standing doctrine operates in practice to privilege corporate litigants over others in the administrative law context.³¹ This asymmetry is the unfortunate result of how modern administrative policymaking interacts with the prevailing constitutional standing framework. Often, policymakers issue new rules to prevent probabilistic harm. For example, regulators might know that a power plant’s pollution increases the *risk* of illness for those living nearby, but they won’t be able to pick out ahead of time the precise individuals who will develop cancer years later. Other times, agencies promulgate regulations to address relatively minor individual harms that, when aggregated, raise concerns at a societal scale.³²

²⁸ *Nat’l Whistleblower Ctr. v. HHS*, 839 F.Supp.2d 40, 45–46 (D.D.C. 2012).

²⁹ *Ctr. for Responsible Sci. v. Gottlieb*, 346 F. Supp. 3d 29, 36 (D.D.C. 2018) (quoting *Nat’l Res. Def. Council v. Pena*, 147 F.3d 1012, 1022 (D.C. Cir. 1998) (citation omitted)).

³⁰ Heather Elliott, *Associations and Cities as (Forbidden) Pure Private Attorneys General*, 61 Wm. & Mary L. Rev. 1329, 1341 (2020) (original citations omitted).

³¹ For a fairly comprehensive compendium of the literature, see Amanda Leiter, *Substance or Illusion – The Dangers of Imposing a Standing Threshold*, 97 Georgetown L. J. 391, 394, n. 15 (2009). See also Heather Elliott, *Congress’s Inability to Solve Standing Problems*, 91 B.U. L. Rev. 159, 165 (2011) (noting critics believe that “because the Court’s [standing] doctrine gives broad court access to those who are regulated by government action while limiting suits from those who benefit from government regulation, standing doctrine privileges anti-regulatory challenges over pro-regulatory challenges”); Carolyn Sissoko, *Is Financial Regulation Structurally Biased to Favor Deregulation*, 86 So. Cal. L. Rev. 365, 367–68 (2012) (explaining that lawsuits challenging deregulatory actions in the financial policy sphere are “relatively uncommon” because regulated entities have an easier time establishing standing than beneficiaries); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. Rev. 301, 304 (2002) (the injury standard “systematically favors the powerful over the powerless”).

³² See, e.g., Amanda Leiter, *Substance or Illusion – The Dangers of Imposing a Standing Threshold*, 97 Geo. L. J. 391, 411–12 (2009) (“For example, an employer who allegedly violates the Fair Labor Standards Act by refusing to compensate employees for the few minutes spent changing into protective gear at the start of each workday may significantly pad its own pockets while depriving each employee of only a few cents per day. In such situations, the extent of the harm to the named individual plaintiff-employee (a few dollars a year) is a wholly inadequate proxy for the importance of the underlying legal question (the legality of the employer’s company-wide compensation policy)”) (original citations omitted); see also Cass R. Sunstein, *Standing Injuries*, 1993 Sup. Ct. Rev. 37, 57 (1993) (“the characteristic form of modern regulatory statutes” is that “they are enacted not to prevent discrete harms by discrete actors, but to restructure incentives or to ensure against what we might describe as probable or systemic harms”).

These patterns of regulatory policymaking create problems for beneficiary-plaintiffs in the standing context. Injury in fact can be difficult to establish when the purported harm from a regulatory rollback is the risk of injury (or the loss of a probabilistic benefit), especially to a broad class.³³ Is such a harm best characterized as “concrete and particularized” or “conjectural or hypothetical”?³⁴ Similar issues arise when rules attempt to mitigate future harms. How do courts assess whether a plaintiff in the present will actually suffer in the future?³⁵ Adding to these difficulties, regulatory benefits are notoriously difficult to value, especially when those benefits are nonmonetary or uncertain.³⁶

Moreover, many modern regulations operate by imposing limits on one set of actors in order to benefit another: Payday lending rules place restrictions on lenders to protect borrowers; accreditation standards impose various requirements on colleges to safeguard students; environmental rules require polluters to install new technologies to protect the health of nearby residents. Yet standing doctrine’s second and third prongs about causation and redressability implicitly require additional showings from plaintiffs who are not themselves the direct object of regulations, which the Supreme Court has explained makes establishing standing “substantially more difficult.”³⁷

During the Trump era, these standing issues plagued advocates across a range of policy areas.³⁸ Sometimes, courts dismissed legal challenges before reaching

³³ For an account and critique of federal courts grappling with risk-based harm in the standing context, see generally Amanda Leiter, *Substance or Illusion - The Dangers of Imposing a Standing Threshold*, 97 Georgetown L. J. 391 (2009). This has led some scholars to argue that Congress is the better institution to determine who should be able to get into court. See, e.g., Mark Seidenfeld and Allie Akre, *Standing in the Wake of Statutes*, 57 Ariz. L. Rev. 745, 751 (2015).

³⁴ The Supreme Court and DC Circuit have settled on a fairly unclear, and thus unsatisfying, “substantial” or “significant” risk test. See e.g., *Natural Resources Defense Council v. Environmental Protection Agency*, 464 F.3d 456 (D.C. Cir. 2006); *Public Citizen, Inc. v. National Highway Traffic Safety Admin.*, 489 F.3d 1279 (D.C. Cir. 2007); *Summers v. Earth Island Institute*, 555 U.S. 488 (2009); *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010).

³⁵ See, e.g., *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

³⁶ See, e.g., Todd Phillips and Sam Berger, *Reckoning With Conservatives’ Bad Faith Cost-Benefit Analysis 9* (Aug. 14, 2020) https://cdn.americanprogress.org/content/uploads/2020/08/13130120/cost-benefit-brief.pdf?_ga=2.202300818.281828997.1619021728-1024683453.1619021728.

³⁷ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (“... to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff’s asserted injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing ‘depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.’ ... Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.”)

³⁸ Thankfully, many state attorneys general, who for various reasons have an easier time satisfying threshold standing inquiries, stepped up to defend against many rollbacks. However, even they at times struggled to establish standing. Those offices also have many demands on their time and are subject to a bevy of political considerations in selecting cases to pursue, making them imperfect substitutes when advocates cannot get into court.

the merits because of standing inadequacies;³⁹ other times, progressives decided against bringing a lawsuit at all because standing seemed too difficult to establish.⁴⁰ As a result, the Trump administration was able to get away with rescinding a number of Obama-era regulations, despite doing so unlawfully.

By contrast, regulated entities generally face no problems getting into court. Most regulatory requirements can be shown to impose direct costs on the regulated entity. Curtailing predatory yet profitable behavior, complying with a new disclosure requirement, or installing a new technology all require regulated entities to make expenditures. In fact, in final rule documents, agencies must estimate the costs that a rule imposes on regulated entities in order to withstand judicial scrutiny.⁴¹ These costs easily meet the injury-in-fact standard,⁴² as well as the causation and redressability prongs: Removal of the cost-imposing regulation would remedy the alleged injury in a straightforward manner. As a result, the Obama administration usually had to defend its major rulemakings in court on the merits, a pattern that is likely to recur during the Biden presidency.

The ease with which industry can establish standing to challenge new regulation compared to the difficulties facing everyday Americans trying to get into court to preserve important protections constitutes a grave power imbalance.⁴³ Courts enjoy enormous oversight authority over the regulatory state. That corporations more frequently get the chance to make their case in court carries implications for which agency actions get delayed or even invalidated. And it's not just that the courtroom door is wider for corporations than for regulatory beneficiaries; regulated entities' greater ability to sue also impacts the rulemaking process itself, where even the best-intentioned regulators must take into account the very real threat of an industry-backed legal challenge when making policy decisions—a threat that is less salient for conservative policymakers embarking on a deregulatory agenda.

³⁹ See, e.g., *American Federation of Teachers v. DeVos*, Case No. 5:20-cv-00455-EJD (ND. Cal. Sep. 3, 2020) (challenging a rollback of the Obama-era “Gainful Employment” rule regulating for-profit postsecondary educational institutions); *National Fair Housing Alliance v. Carson*, 330 F.Supp. 3d 14 (D.D.C. 2018) (challenging Trump administration efforts to hamper implementation of Obama-era Affirmatively Furthering Fair Housing rule).

⁴⁰ While it is difficult to account for unfiled lawsuits, the authors know from firsthand experience and extensive conversations with progressive advocates that this was a recurring problem.

⁴¹ See, e.g., *Michigan v. EPA*, 576 U.S. 743 (2015).

⁴² *TransUnion LLC ___*, slip op. at 9 (“As *Spokeo* explained, certain harms readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as physical harms and monetary harms. If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III.”)

⁴³ See *supra*. at 4-5.

We argue that progressive regulators should attempt to add “standing hooks” to new regulations to help make up for standing doctrine’s corporate bias. These proposals function by leveraging two subordinate strands of constitutional standing doctrine—organizational standing and informational injury.

Organizational Standing

Organizations can establish constitutional standing to sue under two theories. First, and less pertinent to this issue brief, membership organizations can establish associational standing when they litigate on behalf of their members who would have been able to meet standing requirements on their own.⁴⁴

Second, and centrally for our purposes, organizations can establish standing in their own right when, like individuals, they can show that they have suffered or are likely to suffer an injury caused by the challenged action that would be redressed by a favorable ruling.⁴⁵

Most of the case law regarding direct organizational standing focuses on what constitutes an injury in fact.⁴⁶ Given the DC Circuit’s heavy administrative docket, as well as its more stringent organizational standing threshold compared to some other circuits, we will use its standard throughout this brief.⁴⁷ The DC Circuit uses a two-part inquiry: (1) whether the challenged action has frustrated the organization’s mission in a manner that inhibits daily operations; and (2) whether the organization has used its resources to counteract that harm.⁴⁸

⁴⁴ See *Hunt v. Wash. State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977). Although it might behoove organizations to consider how a membership model might position them to challenge administrative action, plaintiffs asserting associational standing will still run into several of the problems inherent to the doctrine’s pro-corporate bias explained above. For a recent exploration of associational standing, see generally Heather Elliott, *Associations and Cities as (Forbidden) Pure Private Attorneys General*, 61 Wm. & Mary L. Rev. 1329 (2020).

⁴⁵ See *Havens Realty Corp. v. Coleman*, 455 U.S. 378 (1982).

⁴⁶ Courts attempt to determine whether an organization has suffered a “concrete and demonstrable injury” as opposed to “a mere setback to the organization’s abstract social interests,” the latter being insufficient to confer standing. *Ctr. for Responsible Sci. v. Gottlieb*, 346 F.Supp. 3d 29, 36 (D.D.C. 2018) (quoting *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) and *Equal Rights Ctr. v. Post Properties* 633 F.3d 1136, 1138 (D.C. Cir. 2011)).

⁴⁷ Other circuits’ standards for direct organization standing vary somewhat depending on whether they require one or both of the factors. See, e.g., *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (requiring both factors, like the DC Circuit, and holding that a fair housing organization had “direct standing to sue because it showed a drain on its resources from both a diversion of its resources and frustration of its mission.”); *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 111 (2d Cir. 2017) (stating that either diversion of resources or frustration of mission were “sufficient to constitute an injury-in-fact.”). Judges within the DC Circuit have bemoaned its organizational standing doctrine: *Nat’l Fair Hous. All. v. Carson*, 330 F.3d 14, 39 n.9 (“The D.C. Circuit’s ‘organizational-standing doctrine and the unwarranted disparity it seems to have spawned between individuals’ and organizations’ ability to bring suit’ has been the focus of pointed concern,” quoting *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 925 (D.C. Cir. 2015) (Millet, F., concurring)); *Ctr. for Responsible Sci.*, 346 F.3d 29, 36 (D.D.C. 2018) (“organizational-standing doctrine in the D.C. Circuit is ‘not a model of clarity’”).

⁴⁸ *PETA v. U.S. Dep’t of Agriculture*, 797 F.3d 1087, 1094 (D.C. Cir 2015).

The first prong essentially consists of two sub-requirements: The plaintiff organization must demonstrate (a) that “a direct conflict” exists “between the defendant’s conduct and the organization’s *mission*”; and (b) that said conduct impacts daily operations.⁴⁹ It is not sufficient, for example, for conduct to “affect[] an organization’s activities, but [be] neutral with respect to its substantive mission.”⁵⁰

To satisfy the second prong, a plaintiff must show that it “has expended ‘operational costs beyond those normally expended to carry out its advocacy mission.’”⁵¹ However, the diversion of resources must not be a “self-inflicted” budgetary choice. The court has found, for instance, that diverting resources to litigation or in anticipation of litigation does not qualify.⁵² Standing is also unavailable if the purported injury exclusively impacts an organization’s ability to lobby or conduct its pure issue-advocacy activities.⁵³ (Organizations must of course also satisfy the causation and redressability prongs of the traditional standing test.)

Informational Injury

To meet the first prong of the constitutional standing test—injury in fact—a plaintiff must show that they have suffered a harm that is “concrete and particularized”; however, the Supreme Court has repeatedly affirmed that concrete does not necessarily mean “tangible.”⁵⁴

One type of valid intangible injury is “informational injury,” a notion that most notably emerged from a case called *Federal Election Commission v. Akins*.⁵⁵ In that case, individual voters challenged a decision by the Federal Election Commission (FEC) to not label the American Israel Public Affairs Committee (AIPAC) as a

⁴⁹ *Nat’l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 41-42 (D.D.C. 2018) (quoting *Nat’l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996) (emphasis in original) and *Food & Water Watch* at 919). See also *Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler*, 789 F.2d 931 (D.C. Cir. 1986) (explaining that organizational standing also turns on whether organizations have alleged “inhibition of their daily operations, an injury both concrete and specific to the work in which they are engaged”).

⁵⁰ See *PETA* at 1095.

⁵¹ *Nat’l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 42 (D.D.C. 2018) (quoting *Nat’l Ass’n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011) (quoting *Nat’l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995))).

⁵² *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm’t, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011).

⁵³ *Nat’l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 42 (D.D.C. 2018).

⁵⁴ *Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S.Ct. 1540, 1548–49 (2016) (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130) (emphasis added); see also *id.* at 1549 (explaining that “although tangible injuries are perhaps easier to recognize . . . intangible injuries can nevertheless be concrete.” (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009) (free speech); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (free exercise))).

⁵⁵ 524 U.S. 11 (1998).

“political committee,” a designation that would have obliged the organization to abide by various disclosure requirements under the Federal Election Campaign Act. The Supreme Court rejected the FEC’s argument that the plaintiffs could not establish standing, explaining that:

The “injury in fact” that respondents have suffered consists of their inability to obtain information—lists of AIPAC donors (who are, according to AIPAC, its members), and campaign-related contributions and expenditures—that, on respondents’ view of the law, the statute requires that AIPAC make public.⁵⁶

The recent Supreme Court decision concerning standing doctrine, *TransUnion LLC v. Ramirez*, while generally troubling, does not suggest this line of cases has fallen out of favor, at least as regards public disclosure regimes (as compared to information disclosures to private individuals).⁵⁷

“STANDING HOOK” PROPOSALS

Below we outline two different “standing hooks” that will, if included as part of larger rulemakings, increase the odds that advocates would be able to challenge future deregulatory actions, restoring some parity to a doctrine that otherwise favors corporate interests. The first standing hook proposal is to add certain types of public data disclosure and information-sharing provisions to new regulations. The second proposal is to incorporate advocates into regulatory schemes, either by requiring regulated entities responsible for standard-setting to solicit organizations’ input or by writing an avenue for advocates to seek redress into the enforcement scheme.

From a formalist perspective, these “standing hook” proposals attempt to solve various doctrinal obstacles that inhibit advocates more frequently than industry groups. When designed properly, incorporating these proposals into new rules will ensure that if a hostile administration attempts to deregulate, organizations can establish “injury in fact” under the DC Circuit’s organizational standing test. By the same token, these “standing hooks” sidestep bedeviling causation

⁵⁶ *Id.* at 21. The Supreme Court added that it had “previously held that a plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.” *Id.* (citing *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 449, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982).

⁵⁷ 594 U.S. ___ slip op. at 25. (“*Akins and Public Citizen* do not control here. ... those cases involved denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information. This case does not involve such a public-disclosure law.”)

and redressability problems—which arise when rules primarily regulate third parties—by directly impacting the organizations best-suited to bring future legal challenges.

These proposals stem from two cases in the DC Circuit’s organizational standing jurisprudence: *Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler* (1986)⁵⁸ and *People for the Ethical Treatment of Animals v. U.S. Dep’t of Agric.* (2015).⁵⁹ While both of these cases show proof of concept in the sense that these two types of “standing hooks” have generated standing in the past, if policymakers hope to use these standing hooks to provide maximum protection to an *entire* rulemaking down the line, they must take into account certain considerations regarding design and content.

Public Data Disclosure, Reporting, and Information-Sharing Provisions

Our first proposed “standing hook” is to add public data disclosure and information-sharing provisions to substantive rulemakings. In addition to the benefits that will flow from the proliferation of public data sets, these types of provisions—when designed correctly—can give advocates, researchers, and beneficiaries a better chance to establish organizational standing in the event that a subsequent administration attempts to revise the associated regulatory regime. Additionally, it is likely that many public information disclosure regimes

⁵⁸ 789 F.2d 931, 935-37 (D.C. Cir. 1986). In *Action Alliance*, the DC Circuit found that a group of nonprofits had standing to challenge Department of Health and Human Services (HHS) regulations regarding age discrimination because those regulations deny (1) the “organizations access to information” and (2) “avenues of redress.” *Id.* at 937. At issue were HHS’s agency-specific regulations implementing the Age Discrimination Act (ADA), which departed from general government-wide regulations regarding the same law. Specifically, the HHS regulations omitted information disclosure requirements—obliging covered entities to provide publicly available self-evaluation and compliance information—contained in the government-wide regulations. The HHS regulations also immunized the agency’s own rules from scrutiny under the ADA; though this provision did not exempt those regulations from potential judicial scrutiny, it did bind HHS administrative appeal officials, which in turn could effectively transform administrative review into “a meaningless process” and leave complainants with “only one viable option: time-consuming and expensive resort to the courts.” In sum, the DC Circuit held that these nonprofits had established standing under two independent theories: the organizations had used the now-curtailed information to counsel clients and had previously pursued administrative remedies through avenues that were now closed.

⁵⁹ 797 F.3d 1087, 1094–97 (D.C. Cir. 2015). Nearly 30 years after *Action Alliance*, PETA successfully challenged the USDA’s decision to exclude birds from Animal Welfare Act (AWA) regulation. The DC Circuit concluded that, because the decision required PETA to file complaints at a bevy of local and state agencies instead of with the USDA and prevented the USDA from generating investigative reports that served as the basis of PETA educational resources, “PETA . . . expended—and must continue to expend—resources due to the USDA’s allegedly unlawful failure to apply the AWA’s protections to birds and its alleged injuries fit comfortably within our organizational-standing jurisprudence.” Thus, the Court held that PETA had established standing—thanks to a public information disclosure scheme and a mechanism allowing for outside input into enforcement, which are our two standing hooks.

will allow plaintiffs to successfully establish standing using an alternative theory, informational injury.⁶⁰ This is a particularly versatile “standing hook” because disclosure provisions can fit within a range of statutory authorities.⁶¹

Yet not just any disclosure regime will suffice. We identify design features policymakers should understand when crafting this type of “standing hook.”

Designing disclosure requirements as essential components of a larger regulatory scheme

Perhaps the most important consideration for regulators to keep in mind is that the content of data disclosure and information schemes is critical. It is fairly simple to tack onto a larger regulation a generic public disclosure provision that, if repealed, would allow advocates to secure standing to challenge *only* that disclosure provision’s rescission.⁶² That may well be sufficient where disclosure itself is the extent of the regulatory scheme. But using disclosure and information-sharing provisions as a hook to defend *other* substantive components of the regulatory framework—as we propose here—is trickier.

Doing so requires closely tying disclosure, reporting, and information-sharing provisions to the specific substantive changes that regulators hope to protect; otherwise, advocates and the public will still encounter difficulties establishing standing. This is because a plaintiff must establish standing separately for each claim they wish to challenge.⁶³ The key, to use the DC Circuit’s phrasing in a recent case, *Mozilla Corp. v. Fed. Comm’n Comm’n*, is to design disclosure provisions so that they form an “essential component” of the substantive regulatory change, thereby allowing would-be plaintiffs to challenge the substantive provisions as “derivatively support[ed]” by a rule’s informational disclosure component.⁶⁴

⁶⁰ Some recent decisions in the DC Circuit complicate this slightly, as they seem to indicate that informational injury requires a plaintiff to point to a statute, as opposed to a regulation, that establishes a legal right to information. See, e.g., *Public Citizen Health Research Group v. Pizzella*, 2021 WL 86861 (D.D.C. 2021). However, it is not clear why this would be the case, or that the DC Circuit has definitely reached a conclusion on this question. Courts in other circuits have held that a regulatory right to information can confer informational injury just like a statutory provision, a conclusion reached in part by analyzing DC Circuit precedent. See *Nat’l Educ. Ass’n v. DeVos*, 345 F. Supp. 3d 1127, 1142 (N.D. Cal. 2018). For a thorough discussion of this point, see *id.* at 1142–46 (citing *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931 (D.C. Cir. 1986) and *PETA v. U.S. Department of Agriculture*, 797 F.3d 1087 (D.C. Cir. 2015)). See also *Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 958–59 (7th Cir. 2005). Regardless, our proposal does not stand or fall on establishing informational injury.

⁶¹ It is worth noting that when agencies require disclosures from regulated entities (as opposed to from the agency itself), those regulations usually become subject to the Paperwork Reduction Act. 44 U.S.C. 3501 *et. seq.*

⁶² See, e.g., *Nat’l Educ. Ass’n v. DeVos*, 345 F. Supp. 3d 1127 (N.D. Cal. 2018). However, it is important to keep in mind the points made in the following subsection.

⁶³ *Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 560 (9th Cir. 2019). “Standing is not dispensed in gross.” *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996).

⁶⁴ 90 F.3d 1, 46–47 (D.C. Cir. 2019).

To better understand this admittedly fine distinction, consider the following real-world examples.

In *American Federation of Teachers v. DeVos (AFT)*, advocates attempted to challenge the Trump Department of Education's rescission of the Obama administration's 2014 "gainful employment" (GE) rule,⁶⁵ which sought to protect student-borrowers from predatory for-profit colleges and universities by limiting the institutions that could receive federal loans.⁶⁶ The 2014 GE rule had two components: (1) it required certain affirmative disclosures by institutions about their programs, including, for example, typical occupations obtained by graduates, degree completion rates, and the program's duration; and (2) it established an eligibility framework whereby institutions that failed to meet certain thresholds (which measured a typical graduate's "debt-to-earnings rate") across multiple years would lose access to Title IV funding.⁶⁷

When the Department of Education attempted to withdraw the entire 2014 GE rule in 2019, the plaintiffs in AFT sought to challenge the rescissions of both the disclosure and eligibility provisions, primarily based on the access to information that the students lost.⁶⁸ However, the district court ruled that the plaintiffs were actually alleging two "legally distinct" claims against "two distinct regulatory frameworks."⁶⁹ The court explained that the two regulatory provisions do not interact, and thus the information disclosure rescission could not be used as a path to establish standing to challenge the eligibility requirements.⁷⁰ Critically, it noted that under the 2014 GE rule, the disclosure requirements did not concern the types of metrics, namely debt-to-earnings data, that served as the primary determinant in the eligibility provision.⁷¹ As a result, the court concluded (referencing the logic of *Mozilla Corp.*) that "these frameworks are thus not derivative of each other," and proceeded to only seriously undertake a standing analysis for plaintiffs' disclosure provision claim.⁷² (As we subsequently address, the plaintiffs ultimately failed to meet standing requirements to pursue even that single claim.)

⁶⁵ 84 Fed. Reg. 31,392; see also *Am. Fed'n of Teachers v. DeVos*, Case No. 5:20-cv-00455-EJD (N.D. Cal. Sep. 3, 2020).

⁶⁶ 20 U.S.C. § 1002(b)(1)(A)(i), (c)(1)(A).

⁶⁷ 79 Fed. Reg. 64,889.

⁶⁸ AFT at 12. Technically AFT alleged two additional injuries, but the court deemed these to be "premised" on the informational injury, and thus not independent theories for standing. *Id.* at 17.

⁶⁹ AFT at 13.

⁷⁰ AFT at 13–14 (explaining, "nothing in the 2014 GE Rule's Disclosure Requirements impacts the Eligibility framework, or vice versa. Indeed, a violation of one does not result in a violation of the other," because "if the Court vacated the 2019 Rescission Rule based on Plaintiffs' Disclosure claims, Plaintiffs' Eligibility Claims would not be redressed.")

⁷¹ AFT at 13 ("To the contrary, under the 2014 GE Rule, programs were obligated to disclose information *outside* of debt-to-earnings metrics.")

⁷² *Id.*

In contrast to the *AFT* case, *Mozilla Corp.* challenged a Federal Communications Commission (FCC) decision to reclassify broadband internet so as to deregulate its providers. The FCC justified its decision in part based on new transparency rules it simultaneously adopted, the goal of which was to ensure consumers could make informed decisions about how providers operate their networks. As part of their lawsuit, plaintiffs challenged these transparency rules, a move the FCC argued should be forestalled by a lack of standing; the plaintiffs had failed to identify any harms that the transparency rule specifically caused. The DC Circuit held that the plaintiffs had standing to challenge the regulation anyway, because plaintiffs had appropriately identified harms that would follow from the reclassification: “When a party alleges concrete injury from promulgation of an agency rule, it has standing to challenge essential components of that rule, invoked by the agency to justify the ultimate action, even if they are not directly linked to Petitioners’ injuries.”⁷³

Thus, for disclosure provisions to serve as “standing hooks,” regulators must do more than simply tack on a generic information-sharing amendment to a forthcoming regulation. Instead, regulators should ensure that the disclosed information precisely reflects the substantive changes being made elsewhere in the rulemaking. Ideally, the disclosure scheme and other substantive regulatory changes operate in a mutually reinforcing manner. When possible, the agency should explain in a final rulemaking document how interrelated provisions justify one another.

Specifying the content of disclosure provisions in regulation and understanding the trade-offs of retaining agency discretion

It is also important for agencies to specify *what* information must be disclosed in the regulatory text of public information reporting provisions, rather than allotting themselves substantial discretion.

Ultimately, the plaintiffs in the *AFT* case failed to establish standing to challenge even just the 2014 GE rule disclosure provision, a consequence of the broad discretion the agency accorded itself in the original rulemaking. The rule did not require the Department of Education to collect specific information. Instead, the provision directed the Secretary of Education to create a disclosure template, but left the question of what information to collect entirely to the Secretary’s discretion.⁷⁴ Because of this lack of specificity, the court found that the plaintiffs

⁷³ *Mozilla Corp.* at 46–47.

⁷⁴ 34 C.F.R. § 668.412 (“the Secretary identifies the information that must be included in the template.”) The regulation offered suggestions about what types of information should be included, but only used precatory language. See, e.g., 34 C.F.R. § 668.412(a) (“That information may include, but is not limited to...”)

had suffered no cognizable harm; by the text of the regulation, they were not entitled to any specific information.⁷⁵

Had the 2014 GE rule been more specific about even the type of information that regulated entities had to disclose—graduation rates or employment statistics, for example—the plaintiffs probably would have been able to advance the litigation. For example, in a different case, *Nat'l Educ. Ass'n v. DeVos*, plaintiffs successfully established standing to challenge the Department of Education's delay of a 2018 rule that did provide details on the type of information that must be disclosed in the text of the regulation.⁷⁶ Here, the plaintiffs challenged the Trump Administration's decision to delay a rule that required online college programs to disclose to students any adverse actions a state or accrediting agency has initiated against the program and whether the program satisfied state licensing requirements.⁷⁷ The court found that plaintiffs had standing to challenge the rule because "[t]heir loss of the Disclosures and the opportunity to use them to make a more informed decision is itself a concrete injury."⁷⁸

Incorporating Advocates into Regulatory Schemes

Another way in which regulators could ensure that advocates have standing to challenge future deregulatory actions is by more directly involving them in the implementation and enforcement of rules. This could be accomplished by requiring regulated entities to seek input from advocates or by providing advocates specific "avenues of redress" in regulations.

Requiring Regulated Entities to Seek Input from Advocates

First, rules could include provisions that require regulated entities to consult certain affected groups in the development of standards or plans. In addition to the power-building benefits of intentionally involving interest groups in this kind of standard-setting, these provisions, when designed correctly, would help ensure that the consulted advocates could show a concrete injury in the event that a future administration were to rescind the rule.

This is not a particularly novel policy concept. There are numerous examples of federal policies that require regulated entities to consult with affected groups.

⁷⁵ *AFT* at 16.

⁷⁶ *Nat'l Educ. Ass'n v. DeVos*, 345 F. Supp. 3d 1127, 1141 (N.D. Cal. 2018).

⁷⁷ *Program Integrity and Improvement*, 81 Fed. Reg. 92,232 (Dec. 19, 2016).

⁷⁸ *NEA* at 1148.

In some cases, that is due to an express statutory command.⁷⁹ In other cases, agencies interpret broad grants of statutory authority to impose community input requirements by regulation.

For example, in 2015, the Obama Administration promulgated a new rule aimed at better enforcing the Fair Housing Act's requirement that the US Department of Housing and Urban Development (HUD) and the cities, states, and public housing agencies that the agency funds affirmatively further fair housing (AFFH).⁸⁰ The statutory AFFH requirement has been in place since 1968 but has generally been weakly enforced. In an attempt to give the requirement some teeth, the Obama administration's regulation required covered jurisdictions to develop an Assessment of Fair Housing (AFH). Through this process, state and local governments were required to solicit public comment and evaluate data to identify any obstacles to fair housing in their jurisdictions. In addition, the rule required that covered jurisdictions subsequently develop a plan of action to overcome any identified obstacles. Under the regulation, HUD would review AFHs for completeness, rather than to make a determination as to whether the jurisdiction was ultimately in compliance with its statutory obligation to affirmatively further fair housing.

The AFFH rule demonstrates that merely including provisions requiring community input may not be sufficient to confer standing for advocacy groups down the line. When the Trump administration delayed the rule, three nonprofit organizations sued HUD.⁸¹ The organizations argued that they had standing to sue because, among other things, the delay "deprived them of critical procedural protections that ma[de] it far easier to develop and promote local policies that affirmatively further fair housing," thereby impairing their missions.⁸² In a somewhat surprising decision, the court held that the organizations did not have

⁷⁹ For example, the Affordable Care Act (ACA) imposed new requirements on charitable hospital organizations, including that they conduct an annual community health needs assessment (CHNA) every three years that, among other things, "takes into account input from persons who represent the broad interests of the community served by the hospital facility, including those with special knowledge of or expertise in public health." (*Patient Protection and Affordable Care Act of 2010*, Pub. L. No. 111-148, 124 Stat. 119 (2010), Codified as Amended 42 U.S.C. § 9007(a)). In implementing regulations, the Internal Revenue Service (IRS) spells out that this input must include at least one state, local, tribal, or regional governmental public health department and members of medically underserved, low-income, and minority populations in the community served. In addition, the hospital may solicit input from "a broad range of persons located in or serving its community, including, but not limited to, health care consumers and consumer advocates, nonprofit and community-based organizations, academic experts, local government officials, local school districts, health care providers and community health centers, health insurance and managed care organizations, private businesses, and labor and workforce representatives." The IRS regulations further require that the hospital must include a description of how the hospital facility solicited the required community input and, importantly, how it took into account the input received. (*Additional Requirements for Charitable Hospitals*, 79 Fed. Reg. 78953, 79002 (Dec. 31, 2014).)

⁸⁰ *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42271 (Jul. 16, 2015).

⁸¹ *Nat'l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14 (D.D.C. 2018).

⁸² *Id.* at 44.

standing to sue. However, the court’s reasoning suggests that giving advocates the opportunity to provide input to shape plans or standards *can* confer standing to challenge future rollbacks if the provisions are crafted carefully.

Thus, there are a few design features that policymakers should consider when crafting these provisions to increase the likelihood that they can serve as effective “standing hooks.”

1. Make Requirements to Solicit Input Mandatory

First, where possible, regulators should make it mandatory that regulated entities solicit and document input from advocates and affected communities. In *National Fair Housing Alliance*, the court noted that many of the community participation provisions were “encouraged” instead of mandatory.⁸³ This weakened the plaintiff’s standing claim because the court found that the procedural protections at issue were discretionary.⁸⁴

2. Tie Procedural Protections to Substantive Outcomes

Regulators should also require that regulated entities demonstrate that the input received has been incorporated into decisions and outcomes.⁸⁵ This type of requirement would help with standing in two ways. First, it would help organizations establish injury in fact by elevating the right to provide input from a “bare procedural right” to a more substantive right. Legally, this is an important distinction. In *Spokeo, Inc. v. Robins*, the Supreme Court held that a “bare procedural violation” is not enough to satisfy the injury-in-fact requirement of Article III, unless the plaintiff can show some other concrete interest that is affected by the deprivation.⁸⁶ Importantly, this does not mean that the plaintiff has to show that access to the procedural right will change the substantive outcome. Instead, the plaintiff has to show that they are affected by the challenged action in a substantive way.

⁸³ *Id.* at 47.

⁸⁴ *Nat’l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 47 (D.D.C. 2018).

⁸⁵ As in the ACA rule mentioned above. See *supra*. n.79.

⁸⁶ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (“Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, *Robins* could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.”)

Second, requiring regulated entities to actually incorporate input from advocates into decisions and outcomes would help organizations establish redressability in future litigation over any subsequent deregulatory actions. In *Nat'l Fair Housing*, the court noted that even if the plaintiffs had been able to establish a cognizable injury, “any theories of causation and redressability that the plaintiffs assert would be too speculative because redress would be premised on the actions of third parties.”⁸⁷ Namely, the court noted that even if the plaintiffs were successful, “local governments may still not engage in all the activities that the plaintiffs assert are necessary for those entities to affirmatively further fair housing.”⁸⁸ If the rule required that regulated entities not only solicit community interests, but also demonstrate that they have taken that input into consideration, it would have been easier for the plaintiffs to show that a favorable decision would have redressed their injury.

3. Identify Specific Groups or Types of Groups that Must be Consulted

Regulators should also consider providing detail about the type of group or entity that must be consulted, or even identifying specific groups that must be involved in the process of setting standards. Interestingly, commenters responding to HUD's initial notice of proposed rulemaking (NPRM) suggested a number of ways that the community input requirement could have been strengthened, which, if adopted, arguably would have helped advocates' standing theory in *Nat'l Fair Housing*. For example, some commenters suggested that HUD identify a “coordinating entity to oversee the public participation process.”⁸⁹ Providing more detailed requirements about the groups that must be consulted will make it easier for groups to establish standing because their injury will be less speculative if a future administration rescinds the rule—prior to the rescission, their input would definitely have been sought, whereas post-rescission it no longer would be.

Include Enforcement Mechanisms or “Avenues of Redress” in Regulations

A second way that regulators could involve advocates in regulatory schemes is by including them in enforcement schemes. One relatively straightforward way to do this would be to provide a complaint mechanism within a regulatory scheme through which advocates can allege violations or request administrative review.

⁸⁷ *Nat'l Fair Hous. All.* at 51.

⁸⁸ *Id.*

⁸⁹ *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42271 (Jul. 16, 2015).

Courts have found that agency actions that deprive organizations of administrative review of actions that run counter to the organization's mission can cause an injury sufficient to confer standing. For example, in *PETA* (2015), the DC Circuit held that PETA had standing to challenge the USDA's failure to craft avian-specific animal welfare regulations because, as a result, the organization could not seek to prevent inhumane treatment of birds through its normal process of submitting USDA complaints.⁹⁰ By effectively eliminating the agency complaint process as a forum of redress, the agency thus impaired PETA's mission and required that "it expend resources to seek relief through other, less efficient and effective means."⁹¹

The biggest consideration for policymakers here is, when possible, simply to avoid issuing regulations that are solely "planning" rules with no substantive enforcement mechanism—or at least to be aware that issuing such a rule makes it less likely that advocates will have standing to challenge a later rescission of the rule.

The AFFH rule is again an instructive example. Commenters had suggested that HUD include "a formal complaint process for community stakeholders to object to the program participant's actions or certification that they are affirmatively furthering fair housing" and an "enforcement mechanism to be used in processing such a complaint."⁹² HUD declined to add any enforcement mechanism stating that "this rule is a planning rule and not a rule directed to the enforcement of the duty to affirmatively further fair housing. Procedures to receive and investigate complaints, conduct compliance reviews, challenge AFFH certifications, and obtain compliance are already available to HUD under regulations implementing the Fair Housing Act and other civil rights statutes."⁹³

While it's hard to say definitively that including the requested enforcement mechanism would have meant the plaintiffs in *Nat'l Fair Housing* had standing to sue (partly because the court's decision largely turned on the fact that some provisions of the rule were still in effect), in most cases, including enforcement mechanisms in the rule and specifying that advocacy groups can use these avenues of redress will help ensure that advocates can show a concrete injury (i.e., that they were deprived of that avenue of redress) in the event that a later administration rescinds the rule.

⁹⁰ See *supra*. n.59.

⁹¹ *PETA v. U.S. Dep't of Agriculture*, 797 F.3d 1087, 1091-92 (D.C. Cir 2015).

⁹² *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42271, 42313 (Jul. 16, 2015).

⁹³ *Id.*

Using Final Rule Documents as a Roadmap for Standing

The above “standing hooks” amount to proposals of administrative policy design, but regulators should also think deliberately about how to write final rule documents in ways that will help advocates establish standing in the event of future deregulation.

Regulators should be explicit about writing into final rule documents a non-exhaustive list of the regulation’s intended beneficiaries, including public interest organizations.⁹⁴ To help these beneficiaries demonstrate that they meet the causation and redressability prongs of the constitutional standing test, regulators should use the final rule document to lay out the chains of causation that explain how these beneficiaries, including advocates, stand to benefit from the new rulemaking. In the context of public disclosure provisions, for example, agencies can explain how the public, researchers, and advocacy organizations are all expected to use the published information, based perhaps on advocates’ comments submitted in response to the proposed rule.

The goal of stating beneficiaries explicitly is two-fold. First, it’s possible that courts should owe some deference to agency articulations of potential injuries and chains of causation. The Supreme Court had previously acknowledged that Congress should receive some deference on this front,⁹⁵ although in the immediate wake of the Court’s 2021 decision in *TransUnion LLC* it remains unclear whether Congress possesses any meaningful ability to confer standing whatsoever.⁹⁶ Still, agencies can attempt to explain how they believe Congress has already articulated harms and chains of causation—either explicitly or by implication—that are likely to satisfy standing requirements.⁹⁷ At the very least, agency expertise retains rhetorical power in the courtroom. An advocate’s arguments about alleged harms take on added legitimacy when the federal government has articulated the same theory. Second, and perhaps more importantly, by identifying a regulation’s intended beneficiaries and explaining why they meet standing requirements in the rulemaking document, agencies can lay out a roadmap for advocates to use in the future.

⁹⁴ “Non-exhaustive” is an important qualifier, so that regulators do not inadvertently harm a future plaintiff’s standing claim.

⁹⁵ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (“In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* that Congress may ‘elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.’ 504 U.S., at 578, 112 S.Ct. 2130. Similarly, Justice Kennedy’s concurrence in that case explained that ‘Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.’ *Id.*, at 580, 112 S.Ct. 2130”).

⁹⁶ 594 U.S. ___, slip op. at 11 (“But under Article III, an injury in law is not an injury in fact.”)

⁹⁷ For more on Congress’s role in affecting standing inquiries, see Mark Seidenfeld and Allie Akre, *Standing in the Wake of Statutes*, 57 *Ariz. L. Rev.* 745 (2015).

Regulators should also attempt to quantify the benefits that standing hooks and other rulemaking provisions will offer researchers and public interest organizations in order to sharpen future injury-in-fact theories. The precise nature of this endeavor will vary highly depending on the rule at issue, but forays into Obama-era rulemakings reveal some likely best practices. For example, regulators should take time to break down economy-wide benefits from a rule into specific subpopulations with identifiable characteristics.⁹⁸ Advocates could then seek out plaintiffs who meet the characteristics of that subpopulation, increasing the likelihood that estimates from the rulemaking will help establish a “concrete and particularized” injury in fact.

When it comes to public disclosure, reporting, and other information-sharing provisions, agencies should estimate the value of the information being provided, perhaps by estimating the costs beneficiaries would incur by attempting to recreate the data sets themselves. For example, in *NEA*, the court found standing based on a related estimate: the cost of disclosures to the *regulated entity*, which the court then assumed would be the minimal cost for students to reproduce the information on their own.⁹⁹

CONSIDERATIONS FOR ADVOCATES

Because these “standing hooks” operate by leveraging organizational standing doctrine, public interest organizations must take advantage of these tools if they hope to be able to defend new rules from a future administration’s deregulatory effort.

When it comes to advocacy group input and participation in the regulatory scheme, this is rather straightforward. Organizations should simply participate when given the opportunity, and consider informally designating one organization as a coordinating entity. Doing so will make it significantly more likely that they are able to meet the legal requirements for organizational standing.

⁹⁸ For a good example of this, see the Obama administration’s 2016 overtime rule: *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 81 Fed. Reg. 32391 (May 23, 2016). Relatedly, the White House has already directed the Office of Management and Budget to incorporate equity considerations into the rulemaking process. “Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” The White House (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

⁹⁹ *NEA* at 1150.

Public data disclosure and other information-sharing provisions, however, require organizations to use the reported information more deliberately in order to establish standing.¹⁰⁰ Given the DC Circuit’s organizational standing requirements—that an organization not only demonstrate that the alleged harms adversely impact its ability to carry out its mission, but also expend resources to counteract those harms—it is important for an organization, upon losing access to publicly disclosed information, to attempt to recreate that data set using different, presumably more expensive means (e.g., hiring contractors, conducting its own investigations, building its own database).¹⁰¹ It is the cost of recreating the disclosed information, in other words, that serves as the nub of the “standing hook.”¹⁰²

When an agency promulgates a rule that includes a disclosure or information-sharing provision, organizations should take time to best determine how to use that information. If that includes recurring educational activities, the disclosed information should become a central part of those activities; thus, if the disclosure regime changes, organizations will have to expend resources in an attempt to recreate the lost information. Of course, organizations can use disclosed information in any number of other ways. An organization that, for example, uses a database of polluters to inform its strategy about where to focus its public campaigns is likely to be able to meet standing requirements in the event of a rollback, so long as the organization can demonstrate that the database is (1) actually an integral part of its strategic assessments and (2) contains information that would somehow incur costs for the organization to reproduce on its own.

¹⁰⁰ The second prong of the DC Circuit’s organizational standing test—which asks whether the organization has used its resources to counteract the alleged harm—includes some troubling carveouts for resources spent in anticipation of litigation, certain types of advocacy, and certain types of educational activities (*Ctr. for Responsible Sci. v. Gottlieb*, 346 F.Supp. 3d 29, 38 (D.D.C. 2018)). The educational carveout is particularly tricky because some educational activities can generate standing. For example, in *People for the Ethical Treatment of Animals v. U.S. Dep’t of Agric.*, the DC Circuit held that PETA had standing to sue the US Department of Agriculture (USDA) over its decision not to regulate birds under the Animal Welfare Act (AWA) (797 F.3d 1087 (D.C. Cir. 2015)). Had it regulated birds under the AWA, the USDA would have had to produce inspection reports, which PETA uses as its “primary source of information” for educating the public; without these inspection reports, the court explained, PETA had to expend additional resources to conduct its own investigations and mine state and local data in order to fulfill its educational mandate (*Id.* at 1093–97). These additional expenditures, the court reasoned, were sufficient to confer standing (*Id.*). By contrast, an organization that, due to a change in regulatory scheme, merely changes the topic or content of the regular educational briefings it undertakes is unlikely to be able to establish standing. *See e.g., Ctr. for Responsible Sci. v. Gottlieb*, 346 F.Supp. 3d 29, 37 (D.D.C. 2018) (explaining that educational activities a nonprofit undertook after the Federal Drug Administration declined to adopt a restriction on animal testing did not confer standing because “the educational campaign here appears part and parcel of [the organization’s] mission, and the record indicates that the current activity does not extend beyond what it does in the normal course.”); *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 920 (D.C. Cir. 2015) (“Although Lovera alleges that FWW will spend resources educating its members and the public about the NPIS and USDA inspection legend, nothing in Lovera’s declaration indicates that FWW’s organizational activities have been perceptibly impaired in any way.”); *National Taxpayers Union, Inc. v. U.S.* 68 F.3d 1428, 1434 (D.C. Cir. 1995) (“Similarly, NTU’s self-serving observation that it has expended resources to educate its members and others regarding Section 13208 does not present an injury in fact. There is no evidence that Section 13208 has subjected NTU to operational costs beyond those normally expended to review, challenge, and educate the public about revenue-related legislation”).

¹⁰¹ This is an important lesson from *PETA*. *See supra*. n.59.

¹⁰² In the language of *TransUnion LLC*, the goal is to articulate a “monetary injury,” which “readily qualif[ies] as [a] concrete injur[y] under Article III.” 594 U.S. ___, slip op. at 9.

One clear lesson is that direct services organizations generally have a better chance at establishing organizational standing than pure issue-advocacy groups.¹⁰³ As a result, progressive coalitions should consider collaborating to make sure at least one services-based organization uses new public disclosure regimes in a manner that is likely to generate standing in the event of a rollback.

RESPONSES TO LIKELY OBJECTIONS

AGENCY CONCERNS ABOUT ALLEVIATING STANDING BURDENS

There may be concern that including a standing hook in a new rule, even if the goal is to empower progressive organizations to oppose future deregulation, may also increase the likelihood that the rulemaking receives a legal challenge upon its promulgation. However, as described above,¹⁰⁴ corporations and other regulated entities will almost always have standing to challenge regulatory advances—the unfortunate reality is that important rules will receive a challenge whether or not regulators include standing hooks. Adding standing hooks will, however, help fill the gap created by the doctrine’s asymmetry, allowing advocates to defend rules from corporate-backed deregulation.

Nor does adding standing hooks undermine the separation of powers rationale that the Supreme Court has said animates standing doctrine. If courts are competent enough to hear a case challenging the implementation of a regulation brought by a regulated entity, it is difficult to fathom why it would undermine the separation of powers for a court to hear a similar case regarding the rescission of the same regulation brought by an intended beneficiary.

¹⁰³ See *Ctr. for Responsible Sci. v. Gottlieb*, 346 F. Supp. 3d 29, 42 (D.D.C. 2018) (“Along the same line, in the bulk of cases satisfying organizational standing, the plaintiff organization engaged in direct services to individuals that were made more difficult by the challenged action”).

¹⁰⁴ See *supra*. at 4-10.

PRESERVING AGENCY CAPACITY, RESOURCES, AND FLEXIBILITY

Using any of our proposals will require the investment of agency time and resources. First, it will take some time during the rulemaking process to design a regulation that includes a standing hook and to write final rule documents in an optimal manner. Even after, depending on the precise regulatory scheme, agency employees may have to dedicate time to administering a public disclosure or organizational input provision. While agency leaders may view these drains on limited resources as a drawback, it is once again important to keep the larger picture in mind. Standing hooks aim to defend regulators' successes from a future hostile administration; the entire goal is to ensure new rules last longer than they otherwise might. Standing hooks are thus best conceived of as an *investment*, as opposed to as a *cost*. Additionally, as noted throughout the brief, these proposals may have further benefits beyond conferring standing, as intentionally empowering interest groups and ensuring that government programs are transparent and that they allow for democratic input are worthy goals in and of themselves.

Agencies often seek to preserve for themselves some degree of flexibility in rulemaking (recall the disclosure requirements in the *AFT* case).¹⁰⁵ This is an understandable instinct. Notice-and-comment rulemaking is resource- and time-intensive, so it is much easier to be able to adapt to changing conditions by using guidance documents and other policy statements instead. Yet regulators should understand that maintaining flexibility can come at a cost for advocates attempting to protect the regulation from a future hostile administration, especially in the context of public disclosure regimes.

¹⁰⁵ See *supra*. at 17-18.

CONCLUSION

Given how it operates to privilege the interests of corporations and other regulated entities, the judge-made doctrine of standing has many vocal critics. While most reform proposals identify steps that either the judiciary (by revising the legal test) or Congress (by enacting new legislation) could undertake, this brief has focused on the administrative state.

We propose that regulators leverage an important progressive constituency to circumvent standing's corporate skew: public interest nonprofit organizations. By incorporating "standing hooks" into new rulemakings and keeping standing concerns in mind while drafting final rules, agencies can improve the odds that these advocates will be able to challenge future deregulation, thereby offering new rules a greater chance at longevity. These proposals could be adopted by agencies on their own initiative, or even encouraged by OMB through its government-wide rulemaking guidelines currently under revision. Executive branch policymakers should take standing's inherent biases seriously, otherwise they risk seeing their hard-won regulatory advances undone as soon as the next conservative administration takes office. Empowering public interest organizations has other advantages as well, including building political power and making government more transparent and accountable.

Fundamentally, the regulatory state exists to improve the lives of consumers, workers, and families. Yet thanks to constitutional standing doctrine's lopsidedness, these are the very people who struggle the most to get into court to prevent unlawful deregulation. Regulators can and should help rebalance these weighted scales.

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ABOUT GOVERNING FOR IMPACT

Governing for Impact (GFI) was founded in 2019 with the mission to prepare a new administration to make transformative change. In addition to developing policy proposals about democracy reform and combating climate change, GFI, with a team of regulatory experts and administrative lawyers, produced a series of memoranda about how a new administration could quickly and reliably reverse the Trump Administration's regulatory agenda.