

PATAGONIA VS. TRUMP

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INTRODUCTION

Few lawsuits better capture our divided times than the Patagonia clothing company's suit against President Donald Trump over Trump's reduction of the Bears Ears National Monument in Utah.¹ Patagonia seems to be the paradigm of a socially responsible corporation; its founder practically invented corporate activism.² President Trump is, from the perspective of his opponents, an editorial cartoon of a Gilded Age crony capitalist come to life.³ The landscape involved in Patagonia's suit against Trump is fitting for a fight between good and evil: It is the red-rock canyons and wind-blown buttes of southeast Utah, an area that has been the setting for many cowboy westerns.⁴ And the underlying legal dispute is timeless: a fight

1. Complaint for Declaratory and Injunctive Relief, *Utah Diné Bikéyah v. Trump*, No. 1:17-cv-02605-TSC (D.D.C. Dec. 6, 2017) [hereinafter UDB Compl.]. See generally Josh Dawsey & Juliet Eilperin, *Trump Shrinks Two Huge National Monuments in Utah, Drawing Praise and Protests*, WASH. POST (Dec. 4, 2017), https://www.washingtonpost.com/politics/trump-scales-back-two-huge-national-monuments-in-utah-drawing-praise-and-protests/2017/12/04/758c85c6-d908-11e7-b1a8-62589434a581_story.html?utm_term=.576b908d40b1.

2. David Gelles, *Patagonia v. Trump*, N.Y. TIMES, May 6, 2018, at BU 1 (reporting that Patagonia "bills itself 'the Activist Company,'" and that "Patagonia has been unapologetically political since the 1970s"); *id.* (tracing Patagonia's activism to 1972, when founder Yvon Chouinard put company's support behind move to block development on Ventura River). See generally YVON CHOUINARD & VINCENT STANLEY, *THE RESPONSIBLE COMPANY: WHAT WE'VE LEARNED FROM PATAGONIA'S FIRST 40 YEARS* (2d ed. 2016) (Patagonia founder and long-time Patagonia employee discuss elements of corporate responsibility and how Patagonia has implemented those elements).

3. See, e.g., Victoria Martínez, Editorial, *Trump: A Pecuniary Barbarian in a New Gilded Age*, ACTIVIST HIST. REV. (Sept. 8, 2017), <https://activisthistory.com/2017/09/08/trump-a-pecuniary-barbarian-in-a-new-gilded-age/>; Rosecrans Baldwin, *Patagonia vs. Donald Trump*, GQ (Apr. 5, 2018), <https://www.gq.com/story/patagonia-versus-donald-trump> (quoting Patagonia founder Yvon Chouinard as stating that Trump administration "is purposely not doing anything about climate [change] for the sake of making more money").

4. Moab to Monument Valley Film Commission, *Films Made in the Area*, MOAB, <http://discovermoab.com/movie-sites/> (last visited Jan. 7, 2019).

over land—specifically, the 1.1 million acres of public lands that Trump slashed from Bears Ears’ original boundaries.⁵

This Article analyzes whether Patagonia has a dog in this fight—i.e., whether it has standing for its federal-court suit against Trump. Patagonia asserts that it has standing because Trump’s action injures the company as well as its employees and the athletes it sponsors.⁶ Patagonia is thus suing both on its own behalf and in a representative capacity. In suing for itself, Patagonia asserts what is often called “organizational standing.” In suing in a representative capacity, Patagonia asserts “third-party” standing and “associational” standing. Patagonia thus draws upon three lines of standing doctrine.

Patagonia’s arguments for standing urge a bold extension of existing law. Patagonia’s argument for *organizational* standing is bold because for-profit corporations like Patagonia usually sue the government for *over*-protecting the environment and, in the process, hurting the corporation’s bottom line.⁷ In contrast, Patagonia argues that Trump’s reduction of Bears Ears *under*-protects the environment and, in the process, hurts Patagonia’s environmental advocacy efforts.⁸ Patagonia’s bid for *third-party* standing is bold because Patagonia does not claim that the injury to the third parties it seeks to represent—namely, its employees and sponsored athletes—impairs its relationship with those third parties, as is typically required for third-party standing. Patagonia’s argument for *associational* standing is bold because, in most lawsuits claiming that the government is under-protecting the environment, the plaintiff-association is a nonprofit group like the Natural Resources Defense Council suing for its members, not a for-profit corporation like Patagonia suing for its work force.⁹ Because Patagonia’s standing

5. See UDB Compl., *supra* note 1, at 2.

6. See UDB Compl., *supra* note 1, at 19.

7. See generally *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

8. See UDB Compl., *supra* note 1, at 19; Alexander C. Kaufman, *Patagonia’s CEO Is Ready to Lead the Corporate Resistance to Donald Trump*, HUFFINGTON POST (June 18, 2017), https://www.huffingtonpost.com/entry/patagonia-public-lands_us_59440a8ee4b01eab7a2d51e0.

9. See, e.g., Michael S. Greve, 65 TUL. L. REV. 339, 351 (1990) (“The vast majority of private enforcement actions” under citizen-suit provisions of environmental statutes “has been brought by environmental advocacy groups such as the Natural Resource Defense Council (NRDC).”); Jan G. Laitos, *Standing and Environmental Harm: The Double Paradox*, 31 VA. ENV’T L.J. 55, 56–57 (2013) (stating that a common element of judicial challenges to government actions that “seem to adversely affect the natural environment” is that “the suit is brought by a non-profit non-governmental organization whose members are angered or saddened about a threat to an environmental resource”).

arguments are bold, they depend for their success on the court's taking a liberal view toward standing.

There is caselaw from the 1960s and 1970s supporting a more liberal view of standing than exists today.¹⁰ Although the Court began restricting standing by the end of the 1970s, it has never revisited the key cases from the more liberal era on which Patagonia's standing arguments partly rely.¹¹ Patagonia's lawsuit against Trump might be a good vehicle for the Court to revisit those cases, because the suit pushes those cases up to—and, this Article will argue, *over*—the constitutional brink. This constitutional brink is the separation of powers principle that underlies Article III's standing requirements.¹²

This Article argues that Patagonia does not meet Article III's standing requirements under current caselaw. Patagonia's organizational-standing argument fails because it mistakenly treats setbacks to an organization's social-justice agenda as cognizable injury.¹³ Patagonia's lack of a cognizable injury, among other deficiencies, also defeats its argument for third-party standing argument.¹⁴ Patagonia's associational-standing argument founders on the fact that Patagonia is not a membership association or anything like it.¹⁵ In sum, Patagonia lacks any viable basis under current law for standing to sue Trump for reducing Bears Ears.¹⁶

That conclusion is only one of this Article's theses. In analyzing Patagonia's standing, this Article develops two courses of action for the Court. The Article argues, first, that the Court should clarify the

10. See 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.1, at 53 (3d ed. 2008) [hereinafter WRIGHT & MILLER] (“From 1968 into the early years of the 1970s, the cases . . . culminated in what was seen to be a very permissive approach to standing. . . . From the late years of the 1970s on, a more demanding approach has been taken in many areas, but by no means all.”).

11. See *id.* (“No single approach [to standing] has become finally dormant; none has gone to eternal rest.”).

12. See, e.g., *Allen v. Wright*, 468 U.S. 737, 752 (1984) (“[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.”).

13. See *infra* Section II.C.

14. See *infra* Part IV.

15. See *infra* Section V.C.

16. There has been scant commentary on Patagonia's standing to sue Trump over Bears Ears' reduction, and no academic writing as far as this author knows. See Kaufman, *supra* note 8 (quoting Professor Mark Squillace as stating that “[t]he test for standing is not too draconian, so I think most courts would let Patagonia in”); cf. Warren Henry, *No, Patagonia, President Trump Is Not ‘Stealing Our Land’*, FEDERALIST (Dec. 6, 2017), <http://thefederalist.com/2017/12/06/no-patagonia-president-trump-not-stealing-land/> (“Patagonia's assertion of standing arguably rests on whether the marginal disincentive of people to buy its wares caused by Trump's decision is so minimal as to not constitute a concrete injury in fact, where the monument remains in a smaller form.”).

leading case on which Patagonia will rely for organizational standing: *Havens Realty Corp. v. Coleman*.¹⁷ Contrary to some lower courts' understanding, *Havens* does not apply in lawsuits to vindicate public rights, such as Patagonia's.¹⁸ In addition, the Article argues that the Court should revisit and repudiate the current test on which Patagonia relies for associational standing, a test that comes from *Hunt v. Washington State Apple Advertising Commission*.¹⁹ The *Hunt* test for associational standing is indefensible on precedential and constitutional grounds.²⁰

These points are elaborated in the next six parts of this Article. Part I describes Patagonia's lawsuit against President Trump. Part II analyzes Patagonia's assertion of organizational standing under current law. Part III argues that the Court must clarify that *Havens Realty Corp. v. Coleman*, a leading case on organizational standing, does not apply to suits like Patagonia's. Part IV analyzes Patagonia's assertion of third-party standing under current law. Part V analyzes Patagonia's assertion of associational standing under current law. Part VI argues that the Court should revisit and revise the *Hunt* test for associational standing.

I. BACKGROUND OF PATAGONIA V. TRUMP

A. *The Creation and Reduction of the Bears Ears National Monument*

In December 2016, a few weeks before leaving office, President Barack Obama issued a proclamation establishing the Bears Ears National Monument.²¹ The monument covered about 1.35 million acres of federally owned land in southeast Utah.²² Bears Ears' name came from the one that local Native American tribes had given to twin buttes in the monument.²³ Obama created Bears Ears under the Antiquities Act of 1906, a statute that authorizes the president to

17. 455 U.S. 363 (1982).

18. See *infra* Part III.

19. 432 U.S. 333 (1977).

20. See *infra* Part VI.

21. Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

22. Ryan K. Zinke, Secretary of the Interior, Memorandum to the President, Interim Report Pursuant to Executive Order 13792, at 4 (June 10, 2017), <https://digitallibrary.utah.gov/awweb/awarchive?item=85969> [hereinafter Zinke Interim Report].

23. Proclamation No. 9558, 82 Fed. Reg. at 1139.

designate national monuments on existing public lands and to “reserve parcels of land as a part of the national monuments.”²⁴

Bears Ears’ creation by Obama was a big win for some and a big loss for others. And Bears Ears’ reduction by Trump was a monumental reversal of fortunes.

Bears Ears’ creation was a big win for three main groups. It was a big win for environmentalists.²⁵ That is because when public land becomes a monument, the permissible uses of the land for things like logging and mining become severely restricted.²⁶ Bears Ears’ creation was also a big win for scientists, because some land in the monument (there is a dispute about how much) has objects of archeological and paleontological significance.²⁷ Bears Ears’ creation was, perhaps most of all, a big win for the Native American tribes who had pushed for

24. 54 U.S.C. § 320301(a)–(b) (2012 & Supp. IV 2017).

25. See, e.g., Robinson Meyer, *Obama’s Environmental Legacy, in Two Buttes*, ATLANTIC (Dec. 30, 2016), <https://www.theatlantic.com/science/archive/2016/12/obamas-environmental-legacy-in-two-buttes/511889/> (“For the coalition of environmentalists and Native leaders who had long sought protection for the land, [creation of Bears Ears] was a momentous victory.”).

26. Before the designation of Bears Ears, much of the federally owned land that fell within its original boundaries was administered under principles of “multiple use” and “sustained yield,” which permitted some extractive uses on some land. These principles applied to the monument land administered by the Department of Interior’s Bureau of Land Management (BLM) under the Federal Land and Policy Management Act (FLPMA). 43 U.S.C. §§ 1702(c), 1712(c)(1) (2012). The principles of multiple use and sustained yield applied to land within the monument administered by the Department of Agriculture’s Forest Service (FS) under the Multiple-Use Sustained-Yield Act of 1960, which, as its name suggests, requires the FS to develop and administer the “renewable surface resources of the national forests for multiple use and sustained yield.” 16 U.S.C. § 529 (2012). The multiple-use and sustained-yield principles no longer necessarily apply when a monument is created. For example, the proclamation establishing Bears Ears directs BLM and the FS to manage the land to implement the purposes of the proclamation, which are to “protect[] and restor[e]” the objects declared to be antiquities. Proclamation No. 9558, 82 Fed. Reg. at 1143–44. That direction can cause uses of the monument land to be restricted to serve “the overriding management goal” of protection. CONG. RESEARCH SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 7–8 (2017), https://www.everycrsreport.com/files/20170130_R41330_e313e8a36511852dca4acb3687edf27c4ef3aab0.pdf.

27. See Darryl Fears & Juliet Eilperin, *Spectacular Fossils Found at Bears Ears—Right Where Trump Removed Protections*, WASH. POST (Feb. 22, 2018), https://www.washingtonpost.com/news/speaking-of-science/wp/2018/02/22/spectacular-fossils-found-at-bears-ears-right-where-trump-removed-protections/?utm_term=.49ac0d13d5da. But see Proclamation No. 9681, 82 Fed. Reg. 58,081, 58,082 (Dec. 8, 2017) (Trump proclamation modifying Bears Ears partly based on disagreement about location and significance of archeological and paleontological objects).

protection of the area and were to be represented on an advisory commission for the monument.²⁸

The biggest losers were Utah officials and Utahns who hate how much control the federal government exercises over their State.²⁹ The control stems from the federal government's ownership of about 63% of the land in Utah.³⁰ Bears Ears' creation sparked particular ire because, as the Antiquities Act allows, Obama created it despite opposition from Utah's elected officials.³¹ Utah Senator Mike Lee captured the ire when he said, after Obama created Bears Ears, "This arrogant act by a lame duck president will not stand. . . . I will work tirelessly . . . [to] undo this designation."³²

Efforts by Senator Lee, Senator Orrin Hatch, and other opponents of Bears Ears paid off less than a year after Obama created it.³³ Within months of taking office, President Trump ordered Secretary of the Interior Ryan Zinke to review certain monuments.³⁴ In December 2017, less than one year after Bears Ears' creation, Trump issued proclamations reducing Bears Ears and a second massive monument in Utah, the Grand Staircase Escalante National Monument.³⁵ Bears

28. See Proclamation No. 9558, 82 Fed. Reg. at 1144 (establishing Bears Ears Commission composed of officers from "the Hopi Nation, Navajo Nation, Ute Mountain Ute Tribe, Ute Indian Tribe of the Uintah Ouray, and Zuni Tribe" to "partner with the Federal agencies" responsible for administering Bears Ears); Complaint for Injunctive and Declaratory Relief at 13–18, *Hopi Tribe v. Trump*, No. 1:17-cv-02590 (D.D.C. Dec. 4, 2017) (allegations describing tribal involvement in creation of Bears Ears).

29. See Eric Lipton & Lisa Friedman, *Oil Was Central in Decision to Shrink Protected Utah Site, Emails Show*, N.Y. TIMES, Mar. 5, 2018, at A11.

30. CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 8 (2017), <https://fas.org/sgp/crs/misc/R42346.pdf>.

31. See generally San Juan County Comm'n, Comment on Notice of Review of Certain National Monuments Established Since 1996 (May 25, 2017), <https://www.regulations.gov/document?D=DOI-2017-0002-99611>.

32. Meyer, *supra* note 25.

33. See Jesse Hyde, *Behind the Scenes: How Hatch's Loyalty Pushed Trump to Undo Bears Ears*, DESERET NEWS (May 5, 2017), <https://www.deseretnews.com/article/865679308/Behind-the-scenes-How-Hatchs-loyalty-pushed-Trump-to-undo-Bears-Ears.html> (describing the role of Hatch and other Utah officials in getting Trump to reduce Bears Ears).

34. Exec. Order No. 13,792, 82 Fed. Reg. 20,429 (May 1, 2017).

35. Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 8, 2017) (modifying Grand Escalante); Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 8, 2017) (modifying Bears Ears).

Ears was reduced by about 85%: from 1.35 million acres to about 200,000 acres.³⁶ With that, the former winners became losers.³⁷

But they did not take it lying down. And they found a champion in a purveyor of puffy jackets and other outdoor apparel.

B. Patagonia's Lawsuit

Within hours of President Trump's announcement that he was slashing Bears Ears, Patagonia replaced its usual internet home page with this stark message: "The President Stole Your Land."³⁸ A few days later, Patagonia sued Trump over his reduction of Bears Ears.³⁹

Patagonia filed the suit in the United States District Court for the District of Columbia.⁴⁰ Joining Patagonia as co-plaintiffs in the suit are seven nonprofit entities.⁴¹ The suit names as defendants not only President Trump but also four other federal officials.⁴² The suit claims violations of the Antiquities Act and the Constitution's separation of

36. Dawsey & Eilperin, *supra* note 1. In reducing Bears Ears, Trump's proclamation renamed the two remaining portions of it "the Indian Creek and Shash Jáa units." Proclamation No. 9681, 82 Fed. Reg. at 58,085.

37. Katie Tubb, Commentary, *In Big Win for Utah, Trump Scales Back Federal Land Grab from Obama Administration*, HERITAGE FOUND. (Dec. 5, 2017), <https://www.heritage.org/environment/commentary/big-win-utah-trump-scales-back-federal-land-grab-obama-administration>.

38. PATAGONIA (Dec. 5, 2017, 12:00 AM), <http://www.patagonia.com/home> [<http://web.archive.org/web/20171205010613/www.patagonia.com/home>]; Gelles, *supra* note 2.

39. See UDB Compl., *supra* note 1.

40. *Id.* (caption).

41. Patagonia's co-plaintiffs are: (1) lead plaintiff Utah Diné Bikéyah; (2) the Conservation Lands Foundation, Inc.; (3) Friends of Cedar Mesa; (4) Archeology Southwest; (5) the Access Fund; (6) the National Trust for Historic Preservation in the United States; and (7) the Society of Vertebrate Paleontology. *Id.*

42. Besides Trump, the named defendants are Secretary of Interior Zinke; Secretary of Agriculture Sonny Perdue; Brian Steed, Deputy Director of the Bureau of Land Management (BLM); and Tony Tooke, Chief of the U.S. Forest Service (FS). *Id.* The presence of these other defendants reflects that some land in Bears Ears is administered by the Secretary of the Interior, acting through the BLM, and the rest is administered by the Secretary of Agriculture, acting through the FS. See Zinke Interim Report, *supra* note 22, at 4.

powers doctrine and Take Care Clause.⁴³ The suit seeks declaratory and injunctive relief restoring Bears Ears to its original size.⁴⁴

As interesting and important as are the claims on the merits, the issues of standing raised by Patagonia's suit are equally interesting, and potentially more important. The merits claims all turn on whether the Antiquities Act authorizes a president to reduce a monument previously created under the Act.⁴⁵ That issue concerns the proper interpretation of a single, albeit important, public land law.⁴⁶ In contrast, the standing issues arise under Article III of the U.S. Constitution, and they implicate a vast body of public-law litigation.⁴⁷ The next section briefly describes Patagonia's standing arguments and summarizes the Article III requirements for them.

43. The plaintiffs claim that the reduction of Bears Ears violates the Antiquities Act because the Act authorizes the president only to create national monuments, not to reduce or abolish them. UDB Compl., *supra* note 1, at 65–68 (Counts I and II). Because the reduction is *ultra vires*, plaintiffs argue, it violates the separation of powers by trespassing on Congress's power under the Property Clause, U.S. CONST. art. IV, § 3, cl. 2. *See* UDB Compl., *supra* note 1, at 68–69 (Count III). It violates the Take Care Clause (U.S. CONST., art. II, § 3), the plaintiffs say, because President Trump's *ultra vires* proclamation reducing Bears Ears is inconsistent with President Obama's proclamation creating it. UDB Compl., *supra* note 1, at 69–70 (Count IV).

44. UDB Compl., *supra* note 1, at 70–71.

45. For discussion of whether the Antiquities Act authorizes the president to reduce or abolish a monument previously created under the Act, see Richard H. Seamon, *Dismantling Monuments*, 70 FLA. L. REV. 553 (2018).

46. The term “public land law” refers, roughly speaking, to laws for the administration of federally owned land. *See* Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801, 802–03 (1993).

47. *See, e.g.*, Gill v. Whitford, 138 S. Ct. 1916, 1929 (2018) (explaining the relation between personal standing requirements and the limitations of judicial authority under Article III of the Constitution). “Public-law litigation comprises lawsuits which seek to vindicate important social values that affect numerous individuals and entities.” Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 270 n.1 (1989). Unlike litigation arising from “disputes between private parties about private rights,” the “object” of public-law litigation is “the vindication of constitutional or statutory policies.” Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

C. Patagonia's Standing Arguments and the Article III Requirements

Patagonia and its co-plaintiffs are organizations.⁴⁸ The U.S. Supreme Court has recognized that an organization can sue both on its own behalf and also in a representative capacity.⁴⁹ Reflecting that precedent, Patagonia and several of its co-plaintiffs sue for themselves as well as for certain “affiliates.”⁵⁰ Patagonia, in particular, sues for—and alleges injury to—itsself as well as “its employees and sponsored athletes.”⁵¹ Several of Patagonia’s co-plaintiffs sue for—and allege injury to—themselves as well as their “members.”⁵² Patagonia cannot sue for its members, because it has no members in the usual sense.⁵³

Unfortunately, the capacities in which an organization can sue, and establish standing, lack stable shorthand names.⁵⁴ This Article uses the terms used by the United States Court of Appeals for the D.C.

48. The plaintiff in the lawsuit against Trump is “Patagonia Works.” UDB Compl., *supra* note 1, at 1 (caption). Although Patagonia Works describes itself in the complaint as “an outdoor apparel company,” *id.* ¶ 43, at 16, it describes itself on its website as “the holding company for Patagonia, Inc. (apparel), Patagonia Provisions (food), Patagonia Media (books, films and multimedia projects), and future investments and joint ventures.” FAQ, PATAGONIA WORKS, <http://www.patagoniaworks.com/faq/> (last visited Jan. 7, 2019). This Article uses “Patagonia” to refer to the plaintiff.

49. *E.g.*, *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

50. UDB Compl., *supra* note 1, ¶ 1, at 1.

51. *Id.* ¶ 51, at 19; *id.* ¶ 174, at 55.

52. *See id.* ¶¶ 14–15, at 6; *id.* ¶ 27, at 10; *id.* ¶ 35, at 13–14; *id.* ¶ 58, at 21; *id.* ¶ 64, at 23; *id.* ¶ 71, at 25.

53. As noted above, *supra* note 48, “Patagonia Works,” a holding company, is the named plaintiff. Patagonia Works’ website describes the companies it holds as its “member companies.” FAQ, PATAGONIA WORKS, <http://www.patagoniaworks.com/faq/>. But Patagonia does not appear to sue on behalf of those companies. Compare UDB Compl., *supra* note 1, ¶ 1, at 1, ¶ 174, at 55 (stating that the listed plaintiffs are collectively suing “on behalf of themselves, their members, and other affiliates”), and *supra* note 52 (listing the other listed plaintiffs’ specific allegations of injury to membership), with UDB Compl., *supra* note 1, at 16–19 (Patagonia Works alleging individual injury without any mention of membership or injury to its members). Moreover, the portion of the complaint that describes the plaintiffs identifies “Patagonia Works” as “an outdoor apparel company,” UDB Compl., *supra* note 1, ¶ 43, at 16, a description that applies only to one of the member companies of the holding company Patagonia Works. Although the matter is unclear, it seems that the named plaintiff, Patagonia Works, is implicitly representing the member company that sells clothing, which is, in turn, suing for itself and its employees and sponsored athletes.

54. *See, e.g.*, *Summers v. Earth Island Inst.*, 555 U.S. 488, 497–98 (2009) (discussing “organizational standing”); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (using the term “representational or associational standing” to discuss the same thing); *cf. Allen v. Wright*, 468 U.S. 737, 751 (1984) (“[T]he constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition.”).

Circuit, in which Patagonia brought its suit against Trump. The D.C. Circuit uses “organizational standing” when an organization sues for injury to itself.⁵⁵ The D.C. Circuit uses “third-party standing” when a plaintiff asserts a third party’s rights based on the plaintiff’s relationship with the third party.⁵⁶ Finally, the D.C. Circuit uses the term “associational standing” when an organization sues for injury to its members or other constituents.⁵⁷

Whatever type of standing a plaintiff asserts, it must “satisfy the familiar three-part test for Article III standing.”⁵⁸ The organization must show that it, or the third parties or other constituents whose rights it seeks to assert, or both “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”⁵⁹ For organizational standing, the plaintiff-organization must show traceable, redressable injury in fact to itself or its activities.⁶⁰ For third-party standing, the plaintiff-organization must show traceable injury in fact to itself, as well as traceable, redressable injury in fact to the third party whose rights it seeks to assert.⁶¹ Finally, for associational standing, the plaintiff-organization need only show traceable, redressable injury to its constituents; the plaintiff-organization need not show traceable injury to itself.⁶² As a leading treatise states, the plaintiff granted associational standing gets to “borrow” the standing of a party not before the court.⁶³

Patagonia’s suit challenges an action—Trump’s reduction of Bears Ears—that does not target the company or its constituents. In lawsuits brought by plaintiffs that are not the target of the defendants’ challenged action, “standing is . . . ordinarily substantially more difficult to establish.”⁶⁴ Patagonia thus faces a

55. See, e.g., *Elec. Privacy Info. Ctr. v. FAA*, 892 F.3d 1249, 1255 (D.C. Cir. 2018).

56. See, e.g., *Am. Immigration Lawyers Ass’n v. Reno*, 199 F.3d 1352, 1360 (D.C. Cir. 2000). *But see* WRIGHT & MILLER, *supra* note 10, § 3531.9.3, at 712 (using term “relationship standing” for what D.C. Circuit calls “third-party standing”).

57. *Elec. Privacy Info. Ctr.*, 892 F.3d at 1253.

58. *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018).

59. *Id.* (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)).

60. *Elec. Privacy Info. Ctr.*, 892 F.3d at 1255.

61. *Am. Immigration Lawyers Ass’n*, 199 F.3d at 1360.

62. *Elec. Privacy Info. Ctr.*, 892 F.3d at 1253.

63. WRIGHT & MILLER, *supra* note 10, § 3531.9.5, at 875 (using the term “borrowed member standing” to describe what the D.C. Circuit calls “associational standing”—i.e., cases in which organizations have standing based solely on their members’ injury).

64. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992) (internal quotation marks omitted).

hurdle in showing that Trump's action has a sufficiently direct and personal effect on it or its constituents to constitute cognizable injury.

Patagonia faces another hurdle due to its unorthodox position as a for-profit corporation seeking additional environmental protections. A for-profit corporation like Patagonia usually sues the government for *over*-protecting the environment.⁶⁵ In suing the government for *under*-protecting the environment, Patagonia is behaving as if it were a nonprofit environmental advocacy organization. Indeed, most of the plaintiffs suing Trump for his reduction of the Utah monuments *are* nonprofit environmental advocacy organizations.⁶⁶ Partly because Patagonia is not one of the usual suspects, it has gotten more attention than the other plaintiffs.⁶⁷ For the same reason, Patagonia's arguments for standing are necessarily bold, and a court decision upholding its standing would be momentous. It would enable a whole new class of plaintiffs—deep-pocketed, for-profit organizations that market themselves as socially responsible—to sue the government for activities adverse to those plaintiffs' social justice agenda.

65. See generally *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

66. Patagonia's lawsuit is one of five lawsuits challenging Trump's reduction of Bears Ears or Grand Staircase. The others are: (1) *Hopi Tribe v. Trump*, No. 1:17-cv-02590 (D.D.C. Dec. 4, 2017); (2) *Wilderness Soc'y v. Trump*, No. 1:17-cv-02587 (D.D.C. Dec. 4, 2017); (3) *Grand Staircase Escalante Partners v. Trump*, No. 1:17-cv-02591-EGS (D.D.C. Dec. 4, 2017); and (4) *Nat. Res. Def. Council, Inc. v. Trump*, No. 1:17-cv-02606 (D.D.C. Dec. 7, 2017). All told, fifteen of the twenty-five plaintiffs in these lawsuits are nonprofit environmental organizations.

67. See Kim Bhasin & Polly Mosendz, *Patagonia and the Big Business of Fighting Trump*, BLOOMBERG (Dec. 8, 2017), <https://www.bloomberg.com/news/articles/2017-12-08/patagonia-and-the-big-business-of-fighting-trump> ("Similar cases have been brought by environmental groups and Native American tribes, but Patagonia is the first retailer to get embroiled in such litigation."); Gelles, *supra* note 2 (discussing Patagonia's suit without mentioning Patagonia's co-plaintiffs); Abha Bhattari, *Patagonia Is Suing the President—And Drawing Ire from Republicans in Congress*, WASH. POST (Dec. 12, 2017), https://www.washingtonpost.com/news/business/wp/2017/12/12/patagonia-is-suing-the-president-and-drawing-ire-from-republicans-in-congress/?utm_term=.c95d1b1da3f9 (same).

II. WHETHER PATAGONIA HAS ORGANIZATIONAL STANDING UNDER CURRENT LAW

A. Current Law of Organizational Standing

To sue in federal court on their own behalf, organizations must meet the same standing requirements as individuals and can do so based on the same types of injury.⁶⁸ For example, a corporation can challenge a government regulation that causes it economic injury.⁶⁹ Besides economic injuries, an organization can sue the government for injuring its constitutional rights.⁷⁰ Relevant to Patagonia's suit against Trump, the Court has found standing in lawsuits brought by organizations that claimed injury from presidential actions.⁷¹

Besides traditional injuries, the Court has found standing for organizations based on "interests that would seem rather abstract to many observers."⁷² The leading case is *Havens Realty Corp. v. Coleman*.⁷³

One of the plaintiffs in *Havens* was a nonprofit organization, "Housing Opportunities Made Equal" (HOME).⁷⁴ HOME counseled and gave referrals to low- and moderate-income people seeking housing around Richmond, Virginia.⁷⁵ HOME sued a Richmond-area landlord, Havens Realty, for falsely telling HOME's black employee "tester," and one of HOME's black clients, that Havens had no vacancies in one of its apartment complexes.⁷⁶ HOME claimed that those falsehoods were part of Havens' efforts to "steer" black renters to one complex and white renters to a different complex.⁷⁷ HOME argued that this racial steering violated its right under the Fair Housing Act to truthful information about housing vacancies.⁷⁸ HOME also alleged that the violation injured it by "frustrat[ing] the

68. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982) ("In determining whether [the plaintiff-organization] has standing . . . , we conduct the same inquiry as in the case of an individual.").

69. E.g., *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46 (1970) (per curiam).

70. E.g., *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341–46 (2014).

71. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2406 (2018); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952).

72. WRIGHT & MILLER, *supra* note 10, § 3531.9.5, at 858.

73. 455 U.S. 363 (1982); see WRIGHT & MILLER, *supra* note 10, § 3531.9.5, at 858 (describing *Havens* as "[t]he leading illustration" of a decision according "the protection of standing to" fairly "abstract" interests).

74. *Havens*, 455 U.S. at 367.

75. *Id.* at 368.

76. *Id.*

77. *Id.* at 369.

78. *Id.*

organization's counseling and referral services, with a consequent drain on resources."⁷⁹

The Court held that this organizational injury gave HOME standing to seek money damages.⁸⁰ The Court determined that Havens' "steering practices have perceptibly impaired HOME's ability to give counseling and referral services for low- and moderate-income home-seekers."⁸¹ The Court held that "[s]uch concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests."⁸² Thus, HOME's injury differed from the mere interest in a problem that the Court had, in an earlier case, held insufficient to give an environmental organization standing.⁸³

As discussed below, Patagonia cannot establish organizational standing under current law.

B. Patagonia's Allegations of Organizational Injury

Patagonia alleges that Trump's reduction of Bears Ears "will cause Patagonia to suffer an immediate and irreparable injury."⁸⁴ Patagonia says it will suffer this injury "[b]y virtue of" three circumstances:

[i] its long history in the region, [ii] its statutory purposes and obligations as a California benefit corporation that require Patagonia to use its business to conserve public lands like Bears Ears, [and] [iii] its substantial investment of financial support, and employee time, into the establishment and defense of the Bears Ears National Monument.⁸⁵

It elaborates on each circumstance.

79. *Id.*

80. *Id.* at 378–79. In the lower courts, HOME had sought injunctive relief only as a representative of its members, and had abandoned its claim of representational standing by the time the case reached the Court. *Id.* at 378.

81. *Id.* at 379.

82. *Id.*

83. *Id.* (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (internal quotation marks omitted)).

84. UDB Compl., *supra* note 1, ¶ 50, at 19.

85. *Id.*

Patagonia attributes its “long history in the Bears Ears area” to that area’s offering “some of the best rock climbing in North America.”⁸⁶ This virtue, Patagonia explains, has led its employees, sponsored athletes, and customers to visit the area “for various purposes, including . . . product testing, marketing, professional training, fitness, education, recreation, [and] spiritual and aesthetic enjoyment.”⁸⁷ Patagonia asserts that its “workforce and many of its customers intend to visit Bears Ears in the future.”⁸⁸

Patagonia also asserts that it has legal duties as “a California benefit corporation.”⁸⁹ Those duties are to:

- (i) contribute one-percent (1%) of its annual net revenue to non-profit charitable organizations that promote environmental conservation and sustainability; (ii) create a material positive impact on society and the environment[;] and (iii) consider the impact of any action on its workforce, customers and the environment.⁹⁰

To satisfy those duties, Patagonia explains, it has given money to environmental groups “that have galvanized local support for” Bears Ears and other monuments.⁹¹ Patagonia says it has also supported these groups by “using its own marketing platforms and employee time to advocate for their shared conservation goals” and “provid[ing] tactical support” for them,⁹² such as “hosting a bi-annual ‘Tools for Grassroots Activists’ conference, where it brings together environmental nonprofits with advocacy experts to train nonprofit employees on executing their mission.”⁹³

Patagonia adds that, besides supporting groups interested in Bears Ears, Patagonia has directly invested money and employee time into creating and protecting Bears Ears.⁹⁴ The efforts include making movies about the area; advocating for the area’s protection through its “marketing channels”; organizing “phone, social media and letter-

86. *Id.* ¶ 46, at 17.

87. *Id.*

88. *Id.* ¶ 46, at 18.

89. *Id.* ¶ 43, at 16 (citing CAL. CORP. CODE §§ 14600–14631 (West 2018)). *See generally* J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 487–89 (2012).

90. UDB Compl., *supra* note 1, ¶ 43, at 16–17.

91. *Id.* ¶¶ 44–45, at 17.

92. *Id.* ¶ 44, at 17.

93. *Id.* ¶ 44, at 17.

94. *Id.* ¶ 47, at 18.

writing campaigns”; and meeting with state and federal officials.⁹⁵ In addition, Patagonia’s CEO helped develop “a unified industry position in support of Bears Ears.”⁹⁶ Patagonia’s founder wrote op-eds supporting Bears Ears’ creation.⁹⁷ Now that Trump has downsized Bear Ears, Patagonia alleges, it “will be forced to divert more resources away from other organizational activities in support of conservation and social equity and towards protection and restoration of . . . the Bears Ears National Monument.”⁹⁸

In sum, Patagonia rests its claim of organizational injury on (1) its “long history” with the Bears Ears region; (2) its status as a public benefit corporation; and (3) the time and attention it has devoted—and must continue to devote—to advocating for Bears Ears. The next section analyzes whether those grounds establish the “injury in fact” required by Article III, and concludes they do not.

C. Analysis of Patagonia’s Organizational Standing Allegations Under Current Law

1. Patagonia’s “Long History” in the Bears Ears Area

Patagonia’s first argument for standing rests on its “long history” in the Bears Ears area.⁹⁹ But under *Sierra Club v. Morton*, mere history with an area cannot establish organizational standing.¹⁰⁰

In *Sierra Club*, the Club sued the federal government over the federal government’s approval of a ski resort on federal land in the Mineral King Valley of the Sierra Nevada Mountains.¹⁰¹ The Club did not “allege that it or its members would be affected in any of their activities or pastimes by the [resort’s] development.”¹⁰² Instead, the Court described the Club as asserting standing because of its “special interest” in preserving “national parks, game refuges, and forests.”¹⁰³ The Court held that the Club’s “special interest” did not constitute the injury in fact necessary to give the Club organizational standing.¹⁰⁴

95. *Id.* ¶¶ 48–49, at 18–19.

96. *Id.* ¶ 49, at 19.

97. *Id.*

98. *Id.* ¶ 50, at 19.

99. *Id.* ¶ 46, at 17.

100. 405 U.S. 727 (1972).

101. *Id.* at 728–30.

102. *Id.* at 735.

103. *Id.* at 730.

104. *Id.* at 739–40. The specific issue in *Sierra Club* was whether the Club could seek federal-court review of federal agency action under Section 10 of the Administrative Procedure Act (APA), 5 U.S.C. § 702 (2012). *Sierra Club*, 405 U.S. at

Patagonia's claims of organizational standing seemingly differ from the Sierra Club's in two ways. First, Patagonia asserts a longstanding interest specifically in "the Bears Ears area."¹⁰⁵ In contrast, the Court described the Sierra Club as relying, more generally, on an interest in preserving "national parks, game refuges, and forests."¹⁰⁶ Second, Patagonia connects its "long history" in the area to the use of the Bears Ears area by people associated with the company: its employees, customers, and sponsored athletes.¹⁰⁷ In contrast, "[n]owhere in the pleadings or affidavits did the [Sierra] Club state that its members use Mineral King for any purpose."¹⁰⁸ But neither apparent difference matters.

Despite the Court's description in the *Sierra Club* opinion, the Club did not assert just a broad interest in national parks, game refuges, and forests.¹⁰⁹ To the contrary, the Club repeatedly referred to its specific interest in the Sierra Nevada Mountains. In its complaint, the Club claimed that one of its "principal [sic] purposes" was "to protect and conserve the [natural] resources of the Sierra Nevada Mountains."¹¹⁰ Consistent with that claim, the court of appeals had analyzed (and rejected) the Club's standing based on the Club's "assert[ion] that it has for many years taken a special interest . . . particularly [in] lands on the slopes of the Sierra Nevada [M]ountains."¹¹¹ The Club repeated this "special interest" when petitioning the Court for certiorari.¹¹² Similarly, counsel for the Club emphasized at oral argument before the Court that the Club "has

732–33. In earlier cases, the Court had held that a plaintiff seeking review under Section 10 of the APA must show that the defendant's challenged conduct caused the plaintiff "injury in fact" and that the injury "was to an interest arguably within the zone of interests to be protected or regulated by the statutes that the [defendant] w[as] claimed to have violated." *Id.* at 733 (internal quotation marks omitted). The "injury in fact" required for review under Section 10 of the APA is the same "injury in fact" that Article III requires for standing. This equivalence is shown by later cases in which the Court cites *Sierra Club* as addressing Article III's injury in fact requirement. *E.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

105. UDB Compl., *supra* note 1, ¶ 46, at 17.

106. *Sierra Club*, 405 U.S. at 730.

107. UDB Compl., *supra* note 1, ¶ 46, at 17.

108. *Sierra Club*, 405 U.S. at 735.

109. *Id.* at 730.

110. Appendix 4, *Sierra Club v. Morton*, 405 U.S. 727 (1972) (No. 70-34) (reproducing Sierra Club's Complaint, paragraph 3 of which makes the allegation quoted in the text accompanying this note).

111. *Sierra Club v. Hickel*, 433 F.2d 24, 29 (9th Cir. 1970), *aff'd sub nom Sierra Club v. Morton*, 405 U.S. 727 (1972).

112. Petition for a Writ of Certiorari 2, *Sierra Club v. Morton*, 405 U.S. 727 (1972) (No. 70-34).

worked to preserve the lands of Sequoia National Park and Mineral King since its founding.”¹¹³ The U.S. Supreme Court’s references to the Club’s more general interest in national parks, game refuges, and forests presumably reflects that the Club’s interest in the specific geographic area where the challenged development was to occur did not affect the Court’s analysis of the Club’s organizational standing.

Thus, Patagonia’s “long history in the Bears Ears area” does not meaningfully differ from the Sierra Club’s “special interest” in the Sierra Nevada Mountains. If anything, Patagonia’s ties to Bears Ears area are weaker than the Sierra Club’s ties to the Sierra Nevada Mountains. Unlike the Sierra Club, Patagonia cannot claim that it has had an interest in the allegedly affected area since its founding.¹¹⁴ Nor can Patagonia claim that one of its “princip[le] purposes” is to protect the area.¹¹⁵ It therefore follows a fortiori from the Court’s rejection of organizational standing in *Sierra Club* that Patagonia’s “long history” in the Bears area cannot establish organizational standing.¹¹⁶

Patagonia would not have organizational standing even if it proved that its employees, customers, and sponsored athletes use Bears Ears, as the asserted injury to those individuals’ use of the area does not injure Patagonia itself. Patagonia does not claim, for example, that injury to its employees’ use of the area for product testing and marketing will hurt the company’s ability to test products or market them.¹¹⁷ Because injury to employees’ use of Bears Ears

113. Oral Argument Transcript, *Sierra Club v. Morton*, 405 U.S. 727 (1972) (No. 70-34), <https://www.oyez.org/cases/1971/70-34>; *id.* (counsel for Sierra Club emphasizing that “[t]he Club in this case did in fact allege its special interest in the [geographic] area involved” and that “no one . . . at the District Court level had any question . . . as to the deep involvement of the club with Sequoia National Park and Mineral King, so that a case or controversy would be assured”).

114. *Cf. id.* See generally Oliver Houck, *Unfinished Stories*, 73 U. COLO. L. REV. 867, 911–12 (2002) (describing the role of famous naturalist John Muir in the formation of the Sierra Club and the Club’s connection to preservation of the Sierra Nevada Mountains).

115. Appendix 4, *Sierra Club v. Morton*, 405 U.S. 727 (1972) (No. 70-34) (reproducing Sierra Club’s Complaint, paragraph 3 of which makes the allegation quoted in the text accompanying this note).

116. UDB Compl., *supra* note 1, ¶ 46, at 17.

117. Patagonia probably could not plausibly claim that its ability to test and market products has been hurt by Trump’s reduction of Bears Ears. To do so, Patagonia would have to show that specific areas of Bears Ears excluded by Trump’s reduction of the monument have special features that do not exist elsewhere and that face imminent threat of being altered by the reduction in ways that prevent their use for Patagonia’s purposes. *Cf. Hawaii v. Trump*, 859 F.3d 741, 765 (9th Cir. 2017) (holding that State of Hawaii had standing to challenge executive order restricting entry of certain aliens because of injury to state university’s ability to attract diverse

does not injure Patagonia, that use is irrelevant to Patagonia's organizational standing.¹¹⁸

2. Patagonia's Status as a Public Benefit Corporation

Patagonia's status as a public benefit corporation also does not give it organizational standing. Patagonia asserts that this status obligates it to (1) give money to environmental causes; (2) create a "material positive impact" on society and the environment; and (3) consider the impact of its actions on its workforce, customers, and the environment.¹¹⁹ Patagonia also asserts that to comply with the first obligation it has given money to groups that supported the creation of Bears Ears.¹²⁰ Each activity is separately analyzed below.

First, under *Sierra Club*, neither Patagonia's general interest in the environment nor its specific interest in Bears Ears gives it organizational standing.¹²¹ Patagonia's contributions to environmental causes show its organizational interest in actions that harm the environment, but President Trump's reduction of Bears Ears does not affect Patagonia's ability to contribute to environmental causes, including to the protection of Bears Ears. Thus, Patagonia's contributions cannot establish organizational injury traceable to Trump's action.

Second, under *Allen v. Wright*, Patagonia's duty to create a material positive impact on society and the environment is too generalized to establish organizational standing.¹²² In *Allen*, parents of black public school children sued the federal government for granting tax-exempt status to racially discriminatory private schools.¹²³ The parents claimed injury from "the mere fact of Government financial aid to discriminatory private schools."¹²⁴ The Court understood this as "a claim of stigmatic injury . . . suffered by all members of a racial group when the Government discriminates on

students and faculty), *vacated on other grounds*, 138 S. Ct. 377 (2017); *Coal. for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1281–83 (D.C. Cir. 2012) (consumers lacked standing to challenge FDA's refusal to ban thimerosal-preserved vaccines because they had not shown that they could not readily obtain thimerosal-free vaccines at a reasonable price).

118. As discussed below, however, their use of Bears Ears is relevant to Patagonia's associational standing. *See infra* notes 121–34 and accompanying text.

119. UDB Compl., *supra* note 1, ¶ 43, at 16–17.

120. *Id.* ¶¶ 44–45, at 17.

121. *See supra* Section II.C.1.

122. 468 U.S. 737 (1984).

123. *Id.* at 739.

124. *Id.* at 752.

the basis of race.”¹²⁵ The Court recognized that “this sort of noneconomic injury is one of the most serious consequences of discriminatory government action.”¹²⁶ But the Court held that the parents lacked standing because they had not been personally discriminated against by the private schools that enjoyed tax-exempt status.¹²⁷ Their children, for example, had not been denied admission to those schools because of their race.¹²⁸ The Court explained that without a showing of personal injury the plaintiffs’ claim was not cognizable:

If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school. . . . A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition of standing in such circumstances would transform the federal courts into no more than a vehicle for the vindication of the value interests of concerned bystanders. Constitutional limits on the role of the federal courts preclude such a transformation.¹²⁹

So too here, Patagonia’s asserted duty to create a material *positive* impact on the environment does not give it standing to challenge, in federal court, every action that it thinks will have a material *negative* impact on the environment. A contrary conclusion would enable every person or company that felt duty-bound to protect the environment to challenge every governmental action that was thought to threaten the environment, regardless of location. An environmentalist in Maine could challenge a government action in Hawaii without showing that the action caused personal injury.¹³⁰ If that were possible, the federal

125. *Id.* at 754.

126. *Id.* at 755.

127. *Id.*

128. *Id.* at 746.

129. *Id.* at 755–56 (internal quotation marks and citation omitted).

130. *Cf.* Joseph L. Sax, *Standing to Sue: A Critical Review of the Mineral King Decision*, 13 NAT. RESOURCES J. 76, 84 (1973) (criticizing Court’s decision in *Sierra Club* because it would not “allow an individual citizen of Florida, for example, to sue to enforce laws protecting the Alaskan wilderness”).

courts would become “no more than a vehicle for the vindication of the value interests of concerned bystanders.”¹³¹

Patagonia presumably will emphasize that it has carried out its duty by giving money specifically to groups that supported the creation of Bears Ears.¹³² Patagonia would then argue that these efforts to do its duty have been thwarted by Trump’s reduction of Bears Ears.¹³³ That argument overlaps with Patagonia’s assertion of standing based on its own, direct efforts to protect Bears Ears, as discussed below.¹³⁴ The argument is flawed because the failure of one’s advocacy efforts is not injury in fact under Article III.

Finally, Patagonia’s duty to consider the impact of its actions on its employees, customers, and the environment is not injured by Trump’s reduction of Bears Ears. Trump’s action does not prevent Patagonia from contributing to whomever it likes or from considering the consequences of its actions. Under standing doctrine, it has no traceable injury in fact.

3. Patagonia’s Diversion of Resources for Continued Advocacy Efforts

Patagonia states that it has devoted money and employee time to advocating for Bears Ears.¹³⁵ Patagonia also claims that it must continue diverting resources to these self-described “advocacy efforts” because of Trump’s reduction of Bears Ears.¹³⁶ These claims are modeled after those found sufficient for organizational standing in *Havens Realty Corp. v. Coleman*.¹³⁷ But Patagonia’s claims are altogether different.

Recall that in *Havens*, the plaintiff-organization HOME alleged that the defendant Havens Realty injured HOME’s housing counseling and referral activities by giving false information to a HOME employee and a HOME client about vacancies in Havens’ apartment complexes.¹³⁸ The Court held that these allegations established traceable injury in fact to HOME:

131. *Allen*, 468 U.S. at 756 (internal quotation marks omitted).
132. UDB Compl., *supra* note 1, ¶ 47, at 18.
133. *Id.* ¶¶ 49–50, at 19.
134. *See infra* Section II.C.3.
135. UDB Compl., *supra* note 1, at 18–19.
136. UDB Compl., *supra* note 1, at 18, 19.
137. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).
138. *Id.* at 368.

If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income home-seekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests.¹³⁹

Havens does not control this case for three reasons: First, the nature of the organization's activities and the nature of the alleged injury are significantly different. Second, *Havens* arose from a lawsuit against a private defendant, whereas Patagonia's suit is against the federal government. Finally, *Havens* related to private rights, while Patagonia is asserting public rights.

Patagonia's activities and injuries are significantly different than HOME's. In *Havens*, the plaintiff, HOME, claimed injury to its counseling and referral activities that helped individuals find homes.¹⁴⁰ Patagonia claims injury to its "advocacy efforts" to preserve and protect Bears Ears.¹⁴¹ What Patagonia calls "advocacy efforts," the D.C. Circuit calls "pure issue-advocacy."¹⁴² The D.C. Circuit has repeatedly and correctly held that "[i]mpediments to pure issue-advocacy cannot establish standing."¹⁴³

139. *Id.* at 379 (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)).

140. *See Havens*, 455 U.S. at 369.

141. UDB Compl., *supra* note 1, at 19; *see supra* Section II.C.1 for a summary of the advocacy efforts.

142. *E.g.*, *Elec. Privacy Info. Ctr. v. FAA*, 892 F.3d 1249, 1255 (D.C. Cir. 2018).

143. *Id.*; *accord* *Food & Water Watch v. Vilsack*, 808 F.3d 905, 919–20 (D.C. Cir. 2015); *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011); *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161–62 (D.C. Cir. 2005). The D.C. Circuit has in two cases suggested that it has sometimes upheld *Havens* standing based on an organization's assertion of injury to its advocacy efforts. *Am. Soc'y for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 27 (D.C. Cir. 2011) ("[M]any of our cases finding *Havens* standing involved activities that could just as easily be characterized as advocacy—and, indeed, sometimes are."), *quoted in* *PETA v. USDA*, 797 F.3d 1087, 1094 n.4 (D.C. Cir. 2015). In the cases to which the court referred, however, the court upheld organizational standing based on harm to organizational activities *in addition to* pure issue advocacy, such as counselling individuals. *See* *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011) (denying standing to organization in that case but discussing cases upholding organizational standing where organizations claimed that defendant's conduct required more organizational expenditures for counseling clients); *Abigail All. for*

This holding follows from *Sierra Club v. Morton*.¹⁴⁴ There, the Court held that an organization’s “special interest” in preserving public land did not give it standing to challenge government action adverse to that interest.¹⁴⁵ A special-interest organization like the Sierra Club inevitably advances that interest by advocating for it.¹⁴⁶ If a special-interest organization could bypass the holding of *Sierra Club* merely by claiming that advocacy efforts to advance its interest have failed, *Sierra Club* would be meaningless.

Still, an organization’s advocacy efforts *could* be injured in a way that would constitute injury in fact. Suppose the federal government made a rule barring companies from using their websites to criticize the federal government. That rule would impair Patagonia’s advocacy efforts by barring messages like the one—“The Government Stole Your Land.”—that Patagonia posted after Trump reduced Bears Ears.¹⁴⁷ That rule would cause cognizable injury by “ma[king] the organization’s activities more difficult.”¹⁴⁸ But Patagonia cannot claim injury merely because its advocacy efforts to protect Bears Ears suffered a setback when Trump reduced the Bears Ears monument.¹⁴⁹

Better Access to Developmental Drugs v. Eschenbach, 469 F.3d 129, 132 (D.C. Cir. 2006) (alleging impairment to organization’s counselling and referral activities); Spann v. Colonial Vill., Inc., 899 F.2d 24, 29 (D.C. Cir. 1990) (organizations claimed increased “[e]xpenditures to reach out to potential home buyers or renters who are steered away from housing opportunities by discriminatory advertising . . .”). Thus, D.C. Circuit case law suggests uncertainty about what constitutes “pure issue-advocacy” but not about the principle that the lack of success of an organization’s advocacy efforts does not constitute injury in fact. *Elec. Privacy Info. Ctr.*, 892 F.3d at 1255.

144. See generally *Sierra Club v. Morton*, 405 U.S. 727 (1972).

145. *Id.* at 739–41.

146. See Appendix 4, *Sierra Club*, 405 U.S. 727 (No. 70–34) (reproducing complaint, paragraph three of which alleged that “[f]or many years the SIERRA CLUB by its activities and conduct has exhibited a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country”) (emphasis added). See generally Houck, *supra* note 114, at 912–20 (describing Sierra Club’s efforts to protect Mineral King Valley, which stretched back to 1893).

147. See Gelles, *supra* note 2

148. *Nat’l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996); cf. *NAACP v. Button*, 371 U.S. 415, 424–26, 428 (1963) (holding that NAACP had organizational standing to challenge Virginia law that treated NAACP’s activities as the “improper solicitation of legal business” and explaining that NAACP is directly engaged in “those activities . . . which the statute would curtail”).

149. Besides claiming a setback to its past “advocacy efforts” for Bears Ears, UDB Compl., *supra* note 1, at 18, Patagonia alleges that Trump’s reduction of Bears Ears has led Patagonia to “divert resources” to advocacy efforts seeking the restoration of Bears Ears’ original boundaries. *Id.* at 19. Patagonia’s diversion of resources is a voluntary decision. As such, it cannot constitute injury in fact. *E.g.*, *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm’n on Election Integrity*, 878 F.3d 371, 379 (D.C.

III. THE COURT SHOULD CLARIFY THAT *HAVENS* DOES NOT APPLY TO SUITS SEEKING TO VINDICATE PUBLIC RIGHTS, LIKE PATAGONIA'S.

Under current law, the Court purports to apply its “familiar three-part test” for standing—which requires traceable, redressable injury-in-fact—in all federal court cases.¹⁵⁰ As Professor Richard Fallon has explained, however, this articulation of a one-size-fits-all standing test does not reflect reality.¹⁵¹ In reality, the Court analyzes standing differently depending on the type of case.¹⁵² One type of case that deserves, and which the Court has implicitly given, distinctive treatment is private actions to vindicate public rights.¹⁵³ Patagonia’s suit against Trump seeks to vindicate public rights, and Patagonia’s organizational standing should be analyzed accordingly.¹⁵⁴ Its organizational standing should not be analyzed under *Havens Realty v. Coleman* because *Havens* concerned private rights.¹⁵⁵ The Court should clarify that *Havens* does not apply to suits seeking to vindicate public rights. The clarification is needed because lower federal courts regularly apply *Havens* to suits seeking to vindicate public rights.¹⁵⁶

Cir. 2017); *see also* *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 418 (2013) (holding that costs incurred by plaintiffs because of their subjective but unsubstantiated fear of government surveillance was “self-inflicted” injury not traceable to the government); *cf. Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 n.7 (10th Cir. 2005). *See generally* WRIGHT & MILLER, *supra* note 10, § 3531.5, at 356–62 & n.73.

150. *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018); Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1067 (2015) (“Since the 1970s, the Court has recited its tripartite demand for injury in fact, causation, and redressability with mind-numbing regularity, as if all, or nearly all, of standing doctrine could be divided into just three parts.”); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 277 (2008) (“The Court has . . . proclaimed a one-size-fits-all standing doctrine.”).

151. Fallon, *supra* note 150, at 1068 (“Far from becoming more elegant and unified, standing doctrine has grown more complex and variegated with nearly every recent Supreme Court Term.”); *see also* Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1195 (2014) (arguing that the Court is “wrong to view modern standing doctrine as a single-minded inquiry into the *adequacy* of a plaintiff’s injury”).

152. *See* Fallon, *supra* note 150, at 1068–92 (describing areas of law in which the Court applies distinctive standing requirements).

153. *See Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1552 (2016) (Thomas, J., concurring) (“[D]ifferences between legal claims brought by private plaintiffs for the violation of public and private rights underlie modern standing doctrine.”).

154. *See* Section II.C.3.

155. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377 (1982) (explaining that although HOME could not receive standing for the “entire Richmond metropolitan area,” the organization could vindicate the rights of a “relatively compact neighborhood”).

156. In particular, the D.C. Circuit regularly applies *Havens* in suits to vindicate public rights. *E.g.*, *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm’n on Election*

Scholars have shown that at common law, courts distinguished suits asserting “private rights” from suits to vindicate “public rights.”¹⁵⁷ To use Blackstone’s definition, “public rights” belong “to the whole community, considered as a community, in its social aggregate capacity.”¹⁵⁸ Public rights “may include interests generally shared, such as those in the free navigation of waterways, passage on public highways, and general compliance with regulatory law.”¹⁵⁹ Private

Integrity, 878 F.3d 371, 374, 378–79 (D.C. Cir. 2017) (suit against a federal entity for failing to conduct privacy assessment supposedly required by federal statute); League of Women Voters of the U.S. States v. Newby, 838 F.3d 1, 8 (D.C. Cir. 2016) (APA suit against federal election official claiming violation of federal statute on voter registration); Friends of Animals v. Jewell, 828 F.3d 989, 990, 994 (D.C. Cir. 2016) (suit alleging violation of Endangered Species Act); PETA v. USDA, 797 F.3d 1087, 1089, 1093–97 (D.C. Cir. 2015) (suit asserting violation of Animal Welfare Act); Turlock Irrigation Dist. v. FERC, 786 F.3d 18, 21, 24 (D.C. Cir. 2015) (suit asserting violation of Federal Power Act). Other courts have also applied *Havens* to analyze organizational standing in suits to vindicate public rights. *See, e.g.*, Citizens for Responsibility & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174, 189–90 (S.D.N.Y. 2017) (suit asserting violation of Domestic and Foreign Emoluments Clauses, U.S. CONST. art. II, § 1, cl. 7; *id.* art. I, § 9, cl. 8); Cornucopia Inst. v. USDA, 260 F. Supp. 3d 1061, 1064, 1067 (W.D. Wisc. 2017) (suit asserting violations of federal APA, Organic Food Production Act of 1990, and Federal Advisory Committee Act); Animal Legal Def. Fund v. USDA, 223 F. Supp. 3d 1008, 1013, 1017 (C.D. Cal. 2016) (suit asserting violation of Poultry Product Inspection Act); PETA v. Miami Seaquarium, 189 F. Supp. 3d 1327, 1332, 1337 (S.D. Fla. 2017) (suit asserting violation of Endangered Species Act), *aff’d*, 879 F.3d 1142, 1146 & n.5 (11th Cir. 2018); Puget Soundkeeper All. v. Rainier Petroleum Corp., 138 F. Supp. 3d 1170, 1174–75 (W.D. Wash. 2015) (citizen suit alleging violation of Clean Water Act); PennEnvironment v. PPG Indus., 23 F. Supp. 3d 553, 556–57, 587 (W.D. Pa. 2014) (citizen suit alleging violation of federal Clean Water Act and Resource Conservation and Recovery Act); Slockish v. U.S. Fed. Highway Admin., 682 F. Supp. 2d 1178, 1182, 1201 (D. Or. 2010) (suit alleging violations of National Environmental Policy Act, National Historic Preservation Act, and Department of Transportation Act).

157. *See* Hessick, *supra* note 150, at 289 (“Standing grew out of the distinction between public and private rights.”); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 693 (2004) (stating that “much of the traditional discourse about standing was cast in terms of the distinction between ‘public rights’ and ‘private rights’ . . .”). *But cf.* James E. Pfander, *Standing to Sue: Lessons from Scotland’s Actio Popularis*, 66 DUKE L.J. 1493, 1500 (2017) (describing Scotland’s Sessions Court’s entertainment of “*actio popularis*”—public action—in which private plaintiffs sued to assert public rights); James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1631–49 (2011) (discussing influence of Scottish law on the generation that framed the U.S. Constitution, as compared to influence of Blackstone’s Commentaries).

158. 4 WILLIAM BLACKSTONE, COMMENTARIES *5.

159. Woolhandler & Nelson, *supra* note 157, at 693; *see also, e.g.*, Holyoke Co. v. Lyman, 82 U.S. (15 Wall.) 500, 506 (1872) (stating that uses of rivers for navigation, fishing, and generating power “may be and often are regarded as public rights”); Smith v. Maryland, 59 U.S. (18 How.) 71, 74–75 (1855) (stating that soil below low-water

rights, unlike public rights, are held by individuals. They “include an individual’s common law rights in property and bodily integrity, as well as in enforcing contracts.”¹⁶⁰ At common law, suits asserting private rights were brought by private plaintiffs, whereas suits asserting public rights generally could be brought only by the King or his delegate or, in this country, by the government.¹⁶¹

Despite the history distinguishing who could assert private rights and who could assert public rights, no member of the Court said the distinction should affect standing analysis until Justice Thomas said so in a concurring opinion in *Spokeo v. Robins*.¹⁶² As discussed next, Justice Thomas’s concurrence in *Spokeo* shows three things relevant to Patagonia’s suit against Trump. First, Patagonia’s suit seeks to vindicate public rights. Second, the leading case relevant to Patagonia’s assertion of organizational standing, *Havens Realty Corp. v. Coleman*, is a suit asserting private rights.¹⁶³ Third, because of that difference, Patagonia’s organizational standing should not be governed by *Havens*.

Spokeo was a private action under the Fair Credit Reporting Act.¹⁶⁴ Plaintiff Thomas Robins claimed that defendant Spokeo, which operates a “people search engine,” violated the Act by reporting inaccurate information about him.¹⁶⁵ Mr. Robins sued under the provision in the Act that authorizes private actions to recover either “actual damages” or statutory damages of one hundred dollars to one

mark of Chesapeake Bay was held by Maryland “subject to . . . certain public rights, among which is the common liberty of taking fish”).

160. Woolhandler & Nelson, *supra* note 157, at 693.

161. See *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring) (stating that at common law, in general “only the government had the authority to vindicate a harm borne by the public at large, such as the violation of the criminal laws”); see also *United States v. Cooper Corp.*, 312 U.S. 600, 610 (1941) (stating that Congress in the Clayton Act “recognized the distinction between proceedings initiated by the Government to vindicate public rights and actions by private litigants for damages”); *Guthrie v. Harkness*, 199 U.S. 148, 158–59 (1905) (referring to right of visitation as a “public right” that “exist[s] in the state for the purpose of examining into the conduct of a corporation,” and contrasting it with “the private right of the shareholder to have an examination of the business in which he is interested”).

162. *Spokeo*, 136 S. Ct. at 1550–54 (Thomas, J., concurring); see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2428 (2018) (Thomas, J., concurring) (citing his concurrence in *Spokeo* in stating that at common law, “[a] plaintiff could not bring a suit vindicating public rights . . . without a showing of some specific injury to himself”).

163. 455 U.S. 363, 377 (1982).

164. *Spokeo*, 136 S. Ct. at 1544.

165. *Id.* at 1546 (explaining that Robins alleged Spokeo inaccurately reported that he was in his fifties, married with children, and relatively wealthy).

thousand dollars for each violation.¹⁶⁶ The Court held that Mr. Robins lacked standing to sue for statutory damages unless he could show concrete injury or a “real risk” of concrete injury.¹⁶⁷ The Court added that concrete injury can include “an intangible harm,” and that “[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles.”¹⁶⁸ History includes, of course, the distinction between public rights and private rights that Justice Thomas discussed in his concurrence.¹⁶⁹

Justice Thomas concurred “to explain how, in [his] view, the injury-in-fact requirement applies to different types of rights.”¹⁷⁰ He explained, “Common-law courts more readily entertained suits from private plaintiffs who alleged a violation of their own rights, in contrast to private plaintiffs who asserted claims vindicating public rights.”¹⁷¹ Justice Thomas cited Blackstone and modern scholars to explain the difference between public rights and private rights.¹⁷² He also quoted Blackstone’s statement that private plaintiffs suing for violations of public rights had to show the violation caused them “some extraordinary damage[s], beyond the rest of the [community].”¹⁷³

Justice Thomas also argued that “[t]hese differences between legal claims brought by private plaintiffs for the violation of public and private rights underlie modern standing doctrine.”¹⁷⁴ He explained, “The Court has said time and again that, when a plaintiff seeks to vindicate a public right, the plaintiff must allege that he has suffered a ‘concrete’ injury particular to himself.”¹⁷⁵ He added that the concrete-injury requirement “applies with special force” when the private plaintiff seeking to vindicate public rights sues the federal executive branch to require it to “follow the law.”¹⁷⁶ By contrast, Justice Thomas wrote, “the concrete-harm requirement does not apply as rigorously when a private plaintiff seeks to vindicate his own private rights.”¹⁷⁷ In suits for violations of private rights, Justice

166. *Id.* at 1545.

167. *Id.* at 1548–49.

168. *Id.* at 1548.

169. *Id.* at 1550–54 (Thomas, J., concurring).

170. *Id.* at 1550 (Thomas, J., concurring).

171. *Id.*

172. *Id.* at 1551–52 (Thomas, J., concurring).

173. *Id.* at 1551 (Thomas, J., concurring) (alteration in original) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *220).

174. *Id.* at 1552 (Thomas, J., concurring).

175. *Id.*

176. *Id.*

177. *Id.*

Thomas said, the Court “ha[d] not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the ‘injury-in-fact’ requirement.”¹⁷⁸

Justice Thomas is right to say that modern standing law reflects, albeit implicitly, the difference between public rights and private rights. The difference shows up in two ways. First, the Court repeatedly refuses to hear “generalized grievances”—i.e., injuries shared in common with the public.¹⁷⁹ Second, and relatedly, the Court decides standing based on the separation of powers doctrine, a doctrine that requires suits for violations of public rights to be treated differently from suits for violations of private rights.¹⁸⁰

These two aspects of the precedent appear in a famous case from the dawn of the modern standing era as well as in the leading modern case on standing. The cases are, respectively, *Frothingham v. Mellon* and *Lujan v. Defenders of Wildlife*.¹⁸¹

178. *Id.* It would seem odd that Justice Thomas concurred if you focused only on the statement he made in the text that accompanies this note. The statement in full is: “Our contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights.” *Id.* It appeared to be undisputed that the statute at issue in *Spokeo*, the Fair Credit Reporting Act, gives people, like the plaintiff Mr. Robins, a personal legal right to have companies like Spokeo report only accurate information about themselves. *See id.* at 1545–46, 1548. Therefore, according to the statement of Justice Thomas quoted above, it would seem that Mr. Robins had adequately pleaded injury in fact by asserting a violation of his personal legal rights under the Act. Yet that conclusion conflicts with the whole point of the majority’s opinion, which was that proof of a violation of the Act was *not* enough to give Mr. Robins standing; Mr. Robins also had to show the violation caused or created an actual or real risk of *concrete* harm. *Id.* at 1549. In truth, although the statement of Justice Thomas quoted above suggests—contrary to the majority’s opinion—that a violation of the Act alone sufficed to confer injury in fact, elsewhere Justice Thomas says, more equivocally, “[T]he concrete-harm requirement does not apply *as rigorously* when a private plaintiff seeks to vindicate his own private rights.” *Id.* at 1552 (emphasis added). This latter statement, unlike the first one quoted in this note, is consistent with the majority’s holding that, besides a violation of a statutorily created private right, the plaintiff must show that the violation created concrete harm or a risk of it.

179. *E.g.*, *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (“Our refusal to serve as a forum for generalized grievances has a lengthy pedigree.”).

180. *E.g.*, *Allen v. Wright*, 468 U.S. 737, 761 (1984).

181. *See generally* *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992); *Massachusetts v. Mellon*, 262 U.S. 447 (1923). *Massachusetts v. Mellon* consolidated two suits, one by Massachusetts and the other by Ms. Frothingham as a federal taxpayer. 262 U.S. at 478. The Court sometimes cites the part of its decision addressing the taxpayer’s claim as *Frothingham v. Mellon*. *See* *Bond v. United States*, 564 U.S. 211, 225 (2011). In *Defenders of Wildlife*, however, the Court cited the *Frothingham* case as “*Massachusetts v. Mellon*.” 504 U.S. at 574. On the prominence of *Frothingham* and *Defenders of Wildlife*, see WRIGHT & MILLER, *supra* note 10, § 3531.1, at 53 (describing *Massachusetts v. Mellon*—referring to it by the name of the consolidated case *Frothingham v. Mellon*—as “preeminent among the early decisions limiting

Harriet Frothingham was a federal taxpayer.¹⁸² She challenged a federal statute that gave states money to reduce maternal and infant mortality.¹⁸³ The Court held that her interest as a federal taxpayer was “so remote, fluctuating, and uncertain” that it gave her no basis to challenge the statute.¹⁸⁴ Her interest was “a matter of public concern and not of individual concern.”¹⁸⁵ As such, she did not present a case within the federal court’s power under the Constitution’s framework of separated powers.¹⁸⁶ The Court explained:

The party who invokes the [federal judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.¹⁸⁷

The Court concluded that deciding a suit brought by a plaintiff without a direct, personal injury “would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.”¹⁸⁸

The Court relied on *Frothingham* in *Lujan v. Defenders of Wildlife*.¹⁸⁹ Defenders of Wildlife challenged a federal rule interpreting the scope of the Endangered Species Act (ESA).¹⁹⁰ Defenders sued under the ESA’s “citizen suit” provision, which authorized “any person” to sue the federal government for violations of the ESA.¹⁹¹ The Court held that plaintiffs suing under the ESA’s citizen suit provision had to satisfy Article III’s “concrete injury requirement.”¹⁹²

standing”); *id.* § 3531.2, at 118 (stating that discussion of standing analysis in *Lujan v. Defenders of Wildlife* is “one of the most frequent—indeed almost obligatory—citations in standing decisions”).

182. *Frothingham*, 262 U.S. at 452. *See generally* *Frothingham v. Mellon*, 288 F.252 (D.C. Cir. 1923).

183. *Frothingham*, 262 U.S. at 479.

184. *Id.* at 487.

185. *Id.*

186. *Id.* at 488.

187. *Id.*

188. *Id.*

189. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 574 (1992).

190. *Id.* at 557–58.

191. *Id.* at 571–72.

192. *Id.* at 578.

In so holding, the Court in *Defenders of Wildlife* cited *Frothingham* and other cases in which it had consistently held that a plaintiff raising only a generally applicable grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.¹⁹³ The Court relied on the separation of powers to explain the federal courts’ inability to hear generalized grievances by plaintiffs who cannot show personal, concrete harm:

Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those “Cases” and “Controversies” that are the business of the courts rather than of the political branches.¹⁹⁴

Thus, as in *Frothingham*, the Court in *Defenders of Wildlife* treated the suit before it as resting solely on an asserted violation of public rights, and as such one that fell outside federal judicial power under our system of separated powers.

Keep in mind that suits to vindicate public rights need not be suits against the federal government, and not all suits against the federal government seek to vindicate public rights. For example, an action seeks to vindicate “public rights” when it is brought under a citizen suit provision against a non-federal defendant for violations of a public law like the Clean Water Act (CWA).¹⁹⁵ To cite another example that Justice Thomas took from common law, a suit against a private defendant who created a public nuisance asserts public rights.¹⁹⁶ Conversely, a suit against the federal executive branch will not always involve public rights; it may instead involve “private rights.”¹⁹⁷ The

193. *Id.* at 573–74.

194. *Id.* at 576.

195. *E.g.*, *L.A. Cty. Flood Control Dist. v. Nat. Res. Def. Council, Inc.*, 568 U.S. 78, 81 (2013) (CWA suit against local flood control district and other defendants); *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 176–77 (2000) (CWA suit against private corporation).

196. *Spokeo v. Robins*, 136 S. Ct. 1540, 1551 (2016) (Thomas, J., concurring).

197. *Id.* at 1551–52 (Thomas, J., concurring).

paradigm case is *Marbury v. Madison*, which involved Marbury’s right to a statutorily created office for a fixed term.¹⁹⁸

Suits for violations of private rights do not implicate the separation of powers doctrine like suits for violations of public rights do. Justice Thomas argued in *Spokeo*, “The separation-of-power concerns underlying our public-rights decisions are not implicated when private individuals sue to redress violations of their own private rights.”¹⁹⁹ Similarly, Professor Andrew Hessick has argued that “invoking separation of powers to restrict standing in private rights cases turns the separation of powers doctrine on its head.”²⁰⁰ If Justice Thomas and Professor Hessick are right, the Court’s decisions analyzing standing in private rights case shouldn’t be applied to public rights cases. And that brings us to Patagonia’s suit against Trump.

Patagonia’s suit seeks to vindicate public rights. That is because Patagonia argues that the president and other executive branch officials have violated public laws—namely, the Antiquities Act, the separation of powers doctrine, and the Take Care Clause—regulating public lands.²⁰¹ Justice Thomas cites cases involving public lands as an example of suits to vindicate “public rights.”²⁰² That characterization is supported by Court precedent in a different context.²⁰³ It is also supported by scholars.²⁰⁴ Indeed, Patagonia

198. 5 U.S. (1 Cranch) 137, 170 (1803) (“The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.”); see Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce Them*, 72 GEO. WASH. L. REV. 253, 263 (2003) (“*Marbury* was anchored in the world of private rights and the common law.”); cf. Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 3 (2003) (stating that “*Marbury* exhibits three distinct faces,” only one of which is “[a] ‘private-rights’ face”).

199. *Spokeo*, 136 S. Ct. at 1552 (Thomas, J., concurring).

200. Hessick, *supra* 150, at 318.

201. See *supra* note 43 and accompanying text.

202. *Spokeo*, 136 S. Ct. at 1551–52 (Thomas, J., concurring).

203. See *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (including among cases that involve public rights—and that can therefore be adjudicated by non-Article III entities—cases between private parties and the government involving congressional power over public lands); cf. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1372–78 n.3 (2018) (holding that non-Article III entity could, under statutorily specified circumstances, reconsider and cancel previously issued invention patent because the matter involved “public rights”; and discussing relationship between invention patents and land patents).

204. *Woolhandler & Nelson*, *supra* note 157, at 704–07 (discussing 18th and 19th century case law limiting ability of private parties in litigation to invoke rules that let government take public ownership of land illegally owned by aliens and corporations);

identified its suit as a public rights case in the message it put on its website the day it filed suit.²⁰⁵ When Patagonia announced online, “The President Stole Your Land,” it was speaking to the American public about its public lands.²⁰⁶ As a public rights case, Patagonia’s suit requires a different standing analysis from that for a private rights suit.

As discussed above, the leading case on Patagonia’s organizational standing is *Havens Realty Corp. v. Coleman*.²⁰⁷ Yet *Havens* was a private rights case.²⁰⁸ Justice Thomas made this clear in his *Spokeo* concurrence when he cited *Havens* as a suit “to vindicate a statutorily created private right.”²⁰⁹ The Fair Housing Act created the private right, which entitled the plaintiffs to accurate housing information.²¹⁰ Although *Havens* was a private rights case, the D.C. Circuit and other courts have applied *Havens* to suits seeking to vindicate public rights.²¹¹

If the Court is serious about using history to inform standing law, it should recognize the common law distinction between public rights cases and private rights cases.²¹² Also, in an appropriate case, the Court should clarify that *Havens* was a private rights case, and the Court’s decision in *Havens* therefore should not be applied to public rights cases.²¹³

see also Pfander, *supra* note 157, at 1521 (describing “*actio popularis*”— i.e., public action—in which citizens sued a town’s magistrates to challenge their decision to lease public land, to vindicate public “right of pasturage” in the land).

205. Gelles, *supra* note 38 and accompanying text.

206. Gelles, *supra* note 38 and accompanying text; *see also* *Patagonia Files Claim Against Trump over Removing Bears Ears Protections*, GUARDIAN (Dec. 7, 2017), <https://www.theguardian.com/environment/2017/dec/07/patagonia-files-claim-against-trump-over-removing-bears-ears-protections> (quoting Patagonia lawyer Robert Tadlock: “This is about the issue of public lands.”); Rose Marcario, *Patagonia CEO: This Is Why We’re Suing President Trump*, TIME (Dec. 6, 2017), <http://time.com/5052617/patagonia-ceo-suing-donald-trump/> (editorial by Patagonia CEO stating that Trump’s reduction of Bears Ears “robs the American people of their public lands heritage”).

207. *See supra* notes 155–56 and accompanying text.

208. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1553 (2016) (Thomas, J., concurring).

209. *Id.*

210. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982).

211. *See supra* note 156 and accompanying text.

212. *Spokeo*, 136 S. Ct. at 1550–52 (Thomas, J., concurring).

213. The issue of what plaintiff-organizations should have to show to establish organizational standing to assert public rights is beyond the scope of this Article; however, if one adopts Justice Thomas’s approach in his *Spokeo* concurrence, I would argue that organizations, like individual plaintiffs, must show “some extraordinary damage, beyond the rest of the community.” *Id.* at 1551 (Thomas, J., concurring) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *220). Furthermore, the

IV. WHETHER PATAGONIA HAS THIRD-PARTY STANDING

Patagonia sues not only for itself but also for its employees and sponsored athletes.²¹⁴ These workers, Patagonia alleges, visit “the Bears Ears area . . . for various purposes, including . . . product testing, marketing, professional training, fitness, education, recreation, [and] spiritual and aesthetic enjoyment.”²¹⁵ In asserting standing for these workers, Patagonia will rely on cases in which the Court has held that a plaintiff can sometimes assert the rights of third parties with whom the plaintiff has a relationship.²¹⁶ Patagonia’s suit against Trump, however, does not meet the requirements for third-party standing.

requirement to show “extraordinary damage” should apply “with special force” in cases, like Patagonia’s, that seek “to require [executive officials] to ‘follow the law.’” *Id.* at 1552 (Thomas, J., concurring). That requirement should not be satisfied by allegations of injuries to generic activities in which anyone could engage, like making recreational or aesthetic use of the public land affected by a defendant’s challenged conduct. Rather, by analogy to private suits for a public nuisance at common law, the plaintiff should have to show injury that is different in nature, not just degree, from that of the general public. *See id.*; *see also* Tyler v. Judges of Court of Registration, 179 U.S. 405, 406 (1900) (“[E]ven in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, [the plaintiff] must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens.”); *Irwin v. Dixon*, 50 U.S. (9 How.) 10, 27–28 (1850) (to the same effect); 2 H.G. WOOD, PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS; INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY § 646, at 855 (3d ed. 1893) (“It is not enough that [the private plaintiff suing for a public nuisance] has sustained more damage than another; it must be of a different character, special and apart from that which the public in general sustain, and not such as is common to every person who exercises the right that is injured.”). *See generally* William B. Hale, *Parties to Actions*, in 15 THE ENCYCLOPAEDIA OF PLEADING AND PRACTICE 473 (William M. McKinney ed., Long Island, NY, Edward Thompson Co. 1899) (stating that “where a public wrong results in special and peculiar damage to an individual, differing in kind and not merely in degree from that suffered by the public at large, he may maintain an action individually to protect his interests”). Although clothing companies like Patagonia and individuals like their typical customers could not make the required showing that I propose, the required showing could be made by Native American Tribes and their members who claim to have long used an area like Bears Ears for cultural and spiritual purposes. *See* Complaint for Injunctive and Declaratory Relief ¶¶ 74, 82, 96, 104, *Hopi Tribe v. Trump*, No. 1:17-cv-02590 (D.D.C. Dec. 4, 2017) (generally alleging “profound historic, cultural, and spiritual ties to Bears Ears” and detailing those ties). To use Richard Re’s concept, the Tribes and their members have a much stronger claim of “relative standing” than Patagonia and its customers. *See generally* Re, *supra* note 151.

214. UDB Compl., *supra* note 1, ¶ 174, at 55–58.

215. UDB Compl., *supra* note 1, ¶ 46, at 17–18.

216. *E.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (citing *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004)).

The Court has long held that “a party ‘generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties.’”²¹⁷ This rule against third-party standing “assumes that the party with the right has the appropriate incentive to challenge (or not challenge) government action and to do so with the necessary zeal and appropriate presentation.”²¹⁸ It also reflects concern that if people other than the owner of the legal right asserts it, courts might have to “decide abstract questions of wide public significance” that should be resolved by the political branches.²¹⁹

The rule against third-party standing has an exception, however, when the party asserting a third party’s rights not only can show traceable injury in fact to himself, herself, or itself, but can also “make two additional showings.”²²⁰ First, the plaintiff must have a “close relationship” with the third party.²²¹ Second, there must be “a hindrance to the [third party’s] ability to protect his[, her, or its] own interests.”²²²

Patagonia stumbles at the start, because it cannot show injury in fact to itself, as required for both organizational standing and third-party standing.²²³ Patagonia also probably cannot meet the “close relationship” and “hindrance” requirements for third-party standing.

The Court has not defined the term “close relationship” or applied it consistently.²²⁴ In most cases upholding third-party standing, however, the relationship or potential relationship between the plaintiff and the third party relates to—and is impaired or altogether prevented by—the defendant’s challenged conduct. For example, the Court has let abortion providers challenge abortion restrictions by asserting the rights of their actual or potential female patients.²²⁵ The

217. *Kowalski*, 543 U.S. at 129.

218. *Id.*

219. *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 510 (1975)).

220. *Id.* at 130.

221. *Morales-Santana*, 137 S. Ct. at 1689 (quoting *Kowalski*, 543 U.S. at 130).

222. *Id.* (quoting *Kowalski*, 543 U.S. at 130).

223. *See supra* notes 147–49 and accompanying text.

224. Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 309 n.171 (1984) (stating that in determining what is a sufficient relationship for third-party standing, “the Court . . . proceed[s] on a largely intuitive basis”); *see also Kowalski*, 543 U.S. at 134 (Thomas, J., concurring) (“We have granted third-party standing in a number of cases to litigants whose relationships with the directly affected individuals were at best remote.”).

225. *See Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (plurality opinion); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 62 (1976); *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

Court has let white criminal defendants assert the rights of black people excluded from their jury by discriminatory peremptory challenges.²²⁶ In a famous third-party standing case, the Court let the owner of a bar assert the equal protection rights of her would-be male customers who, unlike their female counterparts, were prevented by the challenged Oklahoma law from drinking low-alcohol beer until they were twenty-one years old.²²⁷ In all these cases, the challenged conduct adversely affected or blocked the existing or potential relationship between the third party (actual or potential abortion patient, excluded black juror, would-be bar patron) and the litigant asserting the third party's rights (abortion provider, white criminal defendant, and bar owner).²²⁸

That is not true of the conduct challenged in Patagonia's suit against Trump. Trump's reduction of Bears Ears does not hurt Patagonia's relationship with its employees or sponsored athletes with one possible exception: Patagonia alleges that its employees test products and do marketing in the Bears Ears area.²²⁹ It does not allege, however, that reduction of Bear Ears will prevent its employees from carrying out their testing or marketing duties. There appears to be nothing about the Bears Ears area that makes it uniquely suitable for those activities. Thus, Patagonia probably cannot show the "close relationship" required for third-party standing.²³⁰

226. *Powers v. Ohio*, 499 U.S. 400, 410–15 (1991).

227. *Craig v. Boren*, 429 U.S. 190, 195 (1976).

228. *See supra* notes 225–27; *see also, e.g.*, *Barrows v. Jackson*, 346 U.S. 249, 257 (1953) (upholding standing of white seller of property to assert equal protection rights of black purchasers in suit against seller for breaching racially restrictive covenant; stating that refusal to allow third-party standing could "result in a denial of [purchasers'] constitutional rights"); WRIGHT & MILLER, *supra* note 10, § 3531.9.3, at 715 (calling *Barrows* "one of the most famous decisions on invoking the rights of others").

229. UDB Compl., *supra* note 1, ¶ 46, at 17–18.

230. The U.S. Supreme Court has not addressed the third-party standing of an employer to assert the rights of employees. Lower federal courts have done so, however, with mixed results. The Ninth Circuit upheld an employer's third-party standing in *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001). The Ninth Circuit held that an "adult cabaret" owner could—in his challenge to an ordinance regulating adult cabarets—assert the rights of adult-cabaret managers and entertainers. *Id.* at 1010. The court observed that the ordinance's stringent requirements for managers and entertainers could cause those potential employees of the plaintiff-owner to "choose to engage in their professions in other cities," and that, without managers and entertainers, the plaintiff-owner could not do business. *Id.* Thus, the ordinance impaired the relationship between the plaintiff-owner and existing or potential managers and entertainers. Those circumstances, together with the First Amendment context, justified third-party standing. *See also* *White's Place, Inc. v. Glover*, 222 F.3d

Patagonia also probably cannot show that a “hindrance” prevents its employees and sponsored athletes from asserting their own rights. The hindrance, such as it is, presumably consists simply of a lack of money and willingness by those third parties to sue Trump themselves. Their lack of means and motivation is not comparable to the “hindrances” that the Court has found sufficient to justify third-party standing.²³¹ Moreover, treating a lack of means and motivation

1327, 1330 (11th Cir. 2000) (denying associational standing to an employer seeking to assert its employees’ rights; but agreeing with the Fifth Circuit that “a business may assert the First Amendment rights of its employees where ‘violation of those rights adversely affects the financial interests or patronage of the business’” (quoting *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1252 (5th Cir. 1995)); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 574 n.3 (3rd Cir. 1980) (holding that company had third-party standing to assert employees’ privacy rights in challenge to administrative subpoena directed to company requiring it to turn over employee records; noting that employer-employee relationship is “ordinarily” not as intimate as doctor-patient relationship that has supported third-party standing in U.S. Supreme Court precedent); *cf.* *UAW v. Dana Corp.*, 278 F.3d 548, 559 n.13 (6th Cir. 2002) (holding that employer lacked third-party standing because employees could assert their own rights); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 742 (6th Cir. 1997) (holding that employer lacked third-party standing to assert employee’s rights because employer’s interests did not necessarily align with employees’ interests); *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 488–89 (9th Cir. 1996) (holding that employer lacked third-party standing to assert employees’ rights because they could assert their own rights); *MD II Entm’t, Inc. v. City of Dallas*, 28 F.3d 492, 497 (5th Cir. 1994) (same); *O’Hare v. Gen. Marine Transp. Corp.*, 740 F.2d 160, 172 (2nd Cir. 1984) (same).

231. *Cf.* *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (upholding standing to assert rights of third party who was dead); *Hodel v. Irving*, 481 U.S. 704, 711–12, 723 n.7 (1987) (same); *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972) (upholding contraceptive distributor’s standing to assert rights of potential customers because, under challenged statutory scheme restricting distribution, contraceptive users were “denied a forum in which to assert their own rights”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) (holding that NAACP could assert its members’ right to withhold from the State the fact that they were members of the NAACP; reasoning that, “[t]o require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion”); *Barrows*, 346 U.S. at 257 (upholding third-party standing of white seller of property to challenge racially restrictive covenant when “it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court”); *cf.* *Miller v. Albright*, 523 U.S. 420, 432–33 (1998); *id.* at 448 (O’Connor, J., concurring in the judgment) (court upheld third-party standing of daughter to assert father’s equal protection rights where father sued for himself but had his claim incorrectly dismissed by lower court for lack of standing); *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (plurality opinion) (letting abortion provider assert female patients’ rights because patients might refrain from suing to protect their privacy, despite option of suing pseudonymously, and because individual claims might become moot, despite mootness exception for issues capable of repetition yet evading review); *id.* at 121–22 (Stevens, J., concurring in part) (not joining in plurality’s third-party standing analysis but concluding that abortion providers could assert their own constitutional rights); *id.* at 126 (Powell, J., concurring in part and dissenting in part) (concluding that obstacles

as a “hindrance” conflicts with a central purpose of the rule against third-party standing—respecting the choice of rights holders not to assert those rights.²³² That choice will often be based on the rights holder’s determination of whether it is worth it to sue. Thus, it would not be unusual if Patagonia’s employees and sponsored athletes determined that it is not worth their time and money to sue Trump. That determination therefore cannot confer third-party standing upon Patagonia.²³³

V. WHETHER PATAGONIA HAS ASSOCIATIONAL STANDING UNDER CURRENT LAW

A. Patagonia’s Allegations of Associational Standing

Patagonia alleges “direct and immediate injury” not only to itself but also to its “employees” and “sponsored athletes.”²³⁴ The employees and athletes assertedly suffer harm because they use Bears Ears for various purposes, and those uses will be impaired by Trump’s reduction of the monument.²³⁵ Patagonia refers to their employees and sponsored athletes as “affiliates.”²³⁶ Case law, however, uses the term “constituents” when a non-membership organization like Patagonia seeks to sue for people who are not its members.²³⁷ This Article will likewise use the term “constituents,” and turns, in the next section, to discussing the law on whether Patagonia can sue for its constituents.

that plurality perceived to third parties’ assertion of their own rights were “chimerical”).

232. *E.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 161–66 (1990); *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 80 (1978); *Wulff*, 428 U.S. at 113–14.

233. *Viceroy Gold Corp.*, 75 F.3d at 489 (“A simple lack of motivation does not constitute a [hindrance] to asserting [one’s own] interest.”); *cf.* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 310 (1979) (discussing “the self-determination perspective” as basis for an argument that “persons should not be able to assert the rights of others *even assuming* they are good representatives”).

234. UDB Compl., *supra* note 1, ¶ 174, at 55–58.

235. UDB Compl., *supra* note 1, ¶ 46, at 17–18; *id.* ¶ 174, at 55–58.

236. UDB Compl., *supra* note 1, ¶ 1, at 1.

237. *E.g.*, *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 342 (1977).

B. Current Law of Associational Standing

In *Hunt v. Washington State Apple Advertising Commission*, the Court established a three-part test for when an association can sue as a representative of its members:

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.²³⁸

Although the test seems to assume that the plaintiff-association has members, the Court made clear that this is not necessary.²³⁹ Indeed, the Court in *Hunt* applied this test to uphold the standing of an organization that lacked members.²⁴⁰

The plaintiff in *Hunt* was a state agency, the Washington State Apple Advertising Commission.²⁴¹ The Commission was created by statute to promote the Washington apple industry by advertising, research, and public education.²⁴² It was headed by Washington apple growers and dealers who were elected by their fellow growers and dealers.²⁴³ Its activities were financed entirely by mandatory assessments on the apple industry.²⁴⁴ The assessments were based on the volume of apples grown and packaged as Washington apples.²⁴⁵

The Commission challenged a North Carolina law, claiming that it violated the dormant Commerce Clause.²⁴⁶ The challenged law prohibited containers of apples sold in North Carolina from bearing any grade except the USDA grade.²⁴⁷ It thereby prevented containers of Washington apples shipped there from displaying the unique grade that Washington State had devised to distinguish its apples for their quality.²⁴⁸ The Court held, in an opinion for the Court by Chief Justice

238. *Id.* at 343.

239. *Id.* at 344.

240. *Id.* at 345.

241. *Id.* at 336–37.

242. *Id.*

243. *Id.* at 337.

244. *Id.*

245. *Id.* at 345.

246. *Id.* at 341–45.

247. *Id.* at 339.

248. *Id.* at 336–39.

Burger, that the Commission had associational standing to challenge the North Carolina law on behalf of Washington apple growers and dealers.²⁴⁹ That was so even though the growers and dealers were not members of the Commission—indeed, the Commission had no members—as seemingly required by the three-part test for associational standing that the Court articulated for the first time in *Hunt*.²⁵⁰ The Court gave three reasons why the Commission, though not a membership entity, had associational standing.

First, the Commission “for all practical purposes perform[ed] the functions of a traditional trade association representing the Washington apple industry.”²⁵¹ Its purpose was to serve a “specialized segment” of the economy—apple growers and dealers—who were “the primary beneficiary of its activities.”²⁵² Under those circumstances, the Court thought that “it would exalt form over substance to differentiate between the Washington Commission and a traditional trade association representing the individual growers and dealers who collectively form its constituency.”²⁵³

Besides the Commission’s close resemblance to a “voluntary membership organization,”²⁵⁴ the Court in *Hunt* relied on its determination that the growers and dealers “possess[ed] all of the indicia of membership in an organization.”²⁵⁵ The Court explained, “They alone elect the members of the Commission; they alone may serve on the Commission; [and] they alone finance its activities, including the costs of this lawsuit, through assessments levied upon them.”²⁵⁶ Because of the control that growers and dealers had over the Commission, the Court concluded, “In a very real sense, . . . the Commission represents the . . . means by which they express their collective views and protect their collective interests.”²⁵⁷ In other

249. *Id.* at 341–46.

250. *Id.* at 342.

251. *Id.* at 344.

252. *Id.*

253. *Id.* at 345.

254. *Id.* at 342.

255. *Id.* at 344.

256. *Id.* at 344–45.

257. *UAW v. Brock*, 477 U.S. 274, 297 n.* (1986) (Powell, J., dissenting) (noting that, unlike Court’s organizational standing doctrine, in class actions “there must be an identity of interests among all plaintiffs before the court—an identity that can be counted upon to assure adequate representation.”); *cf.* *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) (holding that NAACP could assert its members’ rights because its interests were identical to its members, and so it was “but the medium through which its individual members seek to make more effective the expression of their own views”).

words, there was an “identity of interests” between the Commission and its constituents.²⁵⁸

The third circumstance that the Court relied upon in *Hunt* was the connection between the economic interests of the Commission and those of the growers and dealers. The Court observed that “the interests of the Commission itself may be adversely affected by the outcome of this litigation.”²⁵⁹ The adverse economic impact on the Commission arose because the assessments paid to the Commission were tied to the volume of Washington apples sold.²⁶⁰ If the North Carolina law decreased that volume, it could “reduce the amount of the assessments due the Commission.”²⁶¹ The Court concluded that “[t]his financial nexus between the interests of the Commission and its constituents” helped ensure the “concrete adverseness” required by Article III.²⁶²

In sum, the Court treated the Commission like the paradigmatic “voluntary membership association”—a “traditional trade

258. *Health Research Grp. v. Kennedy*, 82 F.R.D. 21, 26 (D.D.C. 1979) (Sirica, J.) (emphasis omitted) (“[D]espite the anomaly that the Commission [in *Hunt*] was a State-created, non-membership organization, it was totally a creature of the parties it purported to represent.”).

259. *Hunt*, 432 U.S. at 345.

260. *Id.*

261. *Id.*

262. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The Court in *Hunt* did not address whether the “financial nexus” discussed in the text accompanying this note enabled the Washington State Apple Advertising Commission to show that the Commission itself had injury in fact. *Cf. id.* at 342 (quoting, but not addressing, defendants’ argument that Commission “has suffered no ‘distinct and palpable injury’ to itself”). The Court apparently regarded that issue as unnecessary to decide because it had said in an earlier case, and repeated in *Hunt*, “Even in the absence of injury to itself, an association may have standing solely as the representative of its members.” *Hunt*, 432 U.S. at 342 (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). When questioned at oral argument, counsel for the Commission in *Hunt* said that, while there was no evidence that the challenged North Carolina statute had already lowered its income from assessments on the apple industry, “that income could easily be affected by this kind of restriction.” Transcript of Oral Argument, *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333 (1977) (No. 76–63), <https://www.oyez.org/cases/1976/76-63>. In any event, the “financial nexus” present in *Hunt* tied the case to *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). The Court in *Patterson* held that the NAACP had standing to assert its members’ right not to have their identity as members disclosed to Alabama officials. *Id.* at 458–60. The Court determined that the NAACP’s “nexus with them is sufficient to permit that it act as their representative before this Court.” *Id.* at 458–59. One component of that nexus was the financial connection between the members’ rights and the organization’s fortunes. The Court explained, “The reasonable likelihood that the Association itself through diminished financial support and membership may be adversely affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members.” *Id.* at 459–60.

association”—because it acted just like one and its constituents acted just like members of such an association.²⁶³ Plus, there was a “financial nexus” between the Commission and the constituents upon whom its standing rested.²⁶⁴

C. Application of Current Law to Patagonia’s Allegations of Associational Standing

Patagonia’s suit against Trump does not present the circumstances that the Court relied on in *Hunt* to allow a non-membership organization to assert associational standing. And Patagonia’s lack of associational standing is confirmed by lower court case law applying *Hunt* to non-membership organizations.

First, unlike a traditional trade association, Patagonia does not exist to represent the interests of the constituents on whose behalf it sues: its employees and sponsored athletes. Patagonia’s mission statement, according to its articles of incorporation, is to “[b]uild the best product, cause no unnecessary harm, [and] use business to inspire and implement solutions to the environmental crisis.”²⁶⁵

263. *Hunt*, 432 U.S. at 344. The Court in *Hunt* repeatedly implies that the paradigmatic voluntary membership association is a “traditional trade association.” *Id.*; see *id.* at 342 (“[T]he Commission is not a traditional voluntary membership organization such as a trade association.”); *id.* (“If the Commission were a voluntary membership organization—a typical trade association—its standing to bring this action as the representative of its constituents would be clear under prior decisions of this Court.”); *id.* at 344 (“The Commission, while admittedly a state agency, for all practical purposes performs the functions of a traditional trade association representing the Washington apple industry.”); *id.* at 345 (“Under the circumstances presented here, it would exalt form over substance to differentiate between the Washington Commission and a traditional trade association representing the individual growers and dealers who collectively form its constituency.”). The Court’s repeated comparison of the Commission to a traditional trade association in *Hunt* tied the case before it to *National Motor Freight Traffic Association v. United States*, 372 U.S. 246 (1963) (per curiam), a case that the *Hunt* Court cited in its standing analysis. *Hunt*, 432 U.S. at 343. The Court in *National Motor Freight Traffic Association* upheld the standing of trade associations to challenge an ICC order that adversely affected their member motor carriers. 372 U.S. at 247. Indeed, the Washington State Apple Advertising Commission closely resembled the trade associations in *National Motor Freight Traffic Association*, in that both the Commission and those trade associations were ultimately creatures of a statute that created them precisely to represent the constituents on whom they based their standing. See *Hunt*, 432 U.S. at 344; *Nat’l Motor Freight Traffic Ass’n*, 372 U.S. at 246; see also *infra* notes 317–29 (discussing *National Motor Freight Traffic Association*).

264. *Hunt*, 432 U.S. at 345.

265. Restated Articles of Incorporation of Patagonia Works § II.C, at 2 (2013), <https://businesssearch.sos.ca.gov/CBS/SearchResults?SearchType=CORP&SearchCriteria=patagonia+works&SearchSubType=Keyword>.

Patagonia's list of "responsibilities" as a holding company, like its mission statement, does not mention employees or sponsored athletes.²⁶⁶ As a "California benefit corporation,"²⁶⁷ it lists among its "public benefit purposes" the purpose of "provid[ing] a supportive work environment."²⁶⁸ But Patagonia does not claim that its purpose is to represent its employees' or sponsored athletes' interests. In no way are those individuals "the primary beneficiary of [Patagonia's] activities" except insofar as the company pays them.²⁶⁹ In that respect, of course, every employee or independent contractor is a beneficiary of his or her boss.

Moreover, Patagonia's employees and sponsored athletes do not "possess all of the indicia of membership in an organization."²⁷⁰ Patagonia does not allege, for instance, that these individuals elect its leadership or fund its activities.²⁷¹ On the contrary, Patagonia selects and pays its leadership. Patagonia is apparently a nice place to work.²⁷² But its employees and sponsored athletes do not exert so much control over it that it serves as "the means by which they express their collective views and protect their collective interests."²⁷³

Finally, there is no "financial nexus" between Patagonia's interests and its constituents like the one in *Hunt*.²⁷⁴ The law challenged in *Hunt* increased the costs of doing business in North Carolina for Washington apple growers and dealers.²⁷⁵ The Court determined that those increased costs could decrease the overall volume of Washington apples sold, which could in turn decrease the amount of assessments that the growers and dealers paid to the Commission.²⁷⁶ No similar economic harm could arise from Trump's

266. See *FAQ*, PATAGONIA WORKS <http://www.patagoniaworks.com/faq/> (last visited Jan. 7, 2019).

267. UDB Compl., *supra* note 1, ¶ 43, at 16.

268. Restated Articles of Incorporation of Patagonia Works § II.D.6, at 3 (2013), <https://businesssearch.sos.ca.gov/CBS/SearchResults?SearchType=CORP&SearchCriteria=patagonia+works&SearchSubType=Keyword>.

269. See *Hunt*, 432 U.S. at 344.

270. *Id.*

271. Cf. Accountable Capitalism Act, S. 3348, 115th Cong. § 6(b) (2018) (bill introduced by Sen. Elizabeth Warren containing provision that would require at least 40% of directors of a large corporation to be elected by its employees).

272. A *New York Times* article describes Patagonia as "a corporate Eden of sorts," with "solar panels and picnic tables in the parking lot, day care with a jungle gym by the main lobby and easy access to the beach, where employees surf during lunch break." Gelles, *supra* note 2.

273. See *Hunt*, 432 U.S. at 345.

274. See *id.*

275. *Id.* at 347.

276. *Id.* at 345.

reduction of Bears Ears. Trump's action cannot conceivably hurt Patagonia's profits or those of its employees.²⁷⁷ Thus, Patagonia's suit does not present the same sort of "financial nexus" that was present, and supported associational standing, in *Hunt*.²⁷⁸

In short, Patagonia is nothing like a traditional trade association and its employees and sponsored athletes are nothing like members of such an association. Nor does Patagonia's lawsuit against Trump implicate Patagonia's and its constituents' shared financial fortunes. At bottom, though distinctive "at the margins," Patagonia is much like any other for-profit entity.²⁷⁹ As such, Patagonia lacks standing to sue for its constituents.

This conclusion finds support in lower court case law rejecting assertions of associational standing by non-membership entities. For example, the D.C. Circuit held that *High Times* magazine lacked associational standing to sue the Drug Enforcement Administration on behalf of its readers.²⁸⁰ The court said it didn't matter that *High Times* shared its readers' interest in decriminalizing marijuana.²⁸¹ What mattered was that the readers had no role "in selecting [*High Times*] leadership, guiding its activities, or financing those activities."²⁸² Like for-profit organizations, non-profit organizations without members are regularly denied associational standing by lower courts. For example, the D.C. Circuit denied standing to the

277. In fact, Patagonia's lawsuit against Trump seems likely to have boosted the company's bottom line. See Cam Wolf, *Patagonia's Anti-Trump Statement Was Massively Good for Business*, GQ (Dec. 12, 2017), <https://www.gq.com/story/patagonia-trump-lawsuit-sales-uptick> (reporting that on the day after Patagonia filed its lawsuit and issued a press release about it, Patagonia's online sales were six times higher than usual, and remained elevated for the rest of the week); see also Elise Herron, *Patagonia CEO Says Her Conflict With "Despot" President Trump Was Great for Business*, WILLAMETTE WK. (Apr. 6, 2018), <http://www.wweek.com/technology/2018/04/06/patagonia-ceo-says-her-conflict-with-despot-president-trump-was-great-for-business/> (quoting Patagonia CEO, Rose Marcario, as stating that its lawsuit against Trump "has been great for business" and that the company was "going to have the best year ever").

278. See *Hunt*, 432 U.S. at 345.

279. CHOUINARD & STANLEY, *supra* note 2, at 5 ("Patagonia, if exceptional at all, is so only at the margins.").

280. *Gettman v. DEA*, 290 F.3d 430, 435 (D.C. Cir. 2002).

281. *Id.*

282. *Id.*; see also *Fleck & Assocs. v. City of Phoenix*, 471 F.3d 1100, 1106 (9th Cir. 2006) (holding that gay social club, a for-profit entity, lacked associational standing to sue for its customers in challenge to ordinance banning live sex acts at commercial establishments); *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25 (D.C. Cir. 2002) (denying associational standing to a "one-person business" that claimed to "represent[] an 'informal consortium' of various groups whose members are individual mutual fund investors and are threatened with injury by the [challenged] SEC order").

American Legal Foundation (ALF), a “nonprofit media law center which work[ed] to promote media fairness and accountability.”²⁸³ ALF sued the FCC on behalf of its “supporters” for failing to take action against assertedly distorted news broadcasts.²⁸⁴ The court explained that ALF “bears none of the indicia of a traditional membership organization discussed in *Hunt*.”²⁸⁵ This lower court case law correctly reflects that, under *Hunt*, it will be rare for a non-membership association to have associational standing.²⁸⁶

VI. THE COURT SHOULD REVISIT AND REPUDIATE THE *HUNT* TEST FOR ASSOCIATIONAL STANDING.

This Part of the Article argues that the Court should abandon the three-part *Hunt* test for associational standing. The *Hunt* test is anomalous and lacks precedential support. Moreover, the test does not ensure that plaintiff-organizations adequately represent the members or other constituents whose rights they seek to assert. Instead of using the *Hunt* test, federal courts should require the plaintiff-organization in each case to show it will adequately represent the constituents whose rights it seeks to assert. To simplify that showing, the Court should adopt a rebuttable presumption of adequacy when a plaintiff-organization can show it bears the “indicia of a [traditional] membership” organization identified in *Hunt*.²⁸⁷

283. Am. Legal Found. v. FCC, 808 F.2d 84, 87–91 (D.C. Cir. 1987).

284. *Id.*

285. *Id.* at 90; *see also, e.g.*, Pac. Legal Found. v. Watt, 529 F. Supp. 982, 993–94 (D. Mont. 1981) (holding that Pacific Legal Foundation did not have associational standing to represent its non-member “supporters”); Health Research Grp. v. Kennedy, 82 F.R.D. 21, 27 (D.D.C. 1979) (holding that contributors and supporters of two non-profit groups “have neither the indicia of membership nor any other connection with [those groups] sufficiently substantial to confer associational standing on either [group]”); *cf.* Or. Advocacy Ctr. v. Mink, 322 F.3d 1101, 1105, 1111 (9th Cir. 2003) (plaintiff-organization was a “federally authorized and funded law office established under the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (‘PAMII’), 42 U.S.C. §§ 10801–10851”; court held that it could sue for its “constituents”—i.e., “mentally incapacitated” criminal defendants—even though they were not formal members; court admitted that organization’s constituents “[did] not have all the indicia of membership that the *Hunt* apple growers and dealers possessed.”).

286. *See* Hope, Inc. v. Cty. of DuPage, 738 F.2d 797, 814 (7th Cir. 1984) (“The Supreme Court has *not* seen fit to extend representational capacity standing to entities other than associations which actually represent interests of parties whose affiliation with the representational litigant is that of membership with the representative or substantial equivalent of membership.”).

287. *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 344–45 (1977).

A. *The Hunt Test for Associational Standing Is Anomalous.*

The *Hunt* test for associational standing is neither fish nor fowl. It differs from third-party standing and similar doctrines, because it does not require the plaintiff to show injury in fact. Nor can it be justified as a form of purely representative standing, because it does not ensure adequate representation of those represented.

Hunt prescribes requirements for an association to sue for its members or other constituents “[e]ven in the absence of injury to itself.”²⁸⁸ By not requiring the plaintiff-organization to show injury to itself, the *Hunt* test differs from three other situations in which a party can assert the rights of others:

- In third-party standing cases, the plaintiff must show injury in fact to itself.²⁸⁹
- In cases where a party challenges a statute as overbroad—i.e., invalid as applied to third parties not before the court—the party invariably faces injury to itself.²⁹⁰
- In a class action, the plaintiffs representing the class must show injury in fact to themselves.²⁹¹

288. *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

289. *E.g.*, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972) (“[T]his Court has held that in exceptional situations a *concededly injured* party may rely on the constitutional rights of a third party in obtaining relief.”) (emphasis added) (citing *Barrows v. Jackson*, 346 U.S. 249 (1953)); *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (holding that doctor lacked standing to assert patients’ rights because challenged statute did not violate his own rights); *see also* *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998) (stating that when a criminal defendant asserts the rights of third parties, the defendant must show that the challenged action causes the defendant injury in fact); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1359 (2000) (stating that “third-party standing” is most often used “to refer to the claims of a constitutional challenger who asserts that ‘a single application of a law both injures him and [thereby] impinges upon the constitutional rights of [identifiable] third persons’”) (quoting Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 424 (1974)).

290. WRIGHT & MILLER, *supra* note 10, § 3531.9.4, at 807 (stating that, because of the injury in fact requirement, “[o]verbreadth standing may be denied if a plaintiff seeks to challenge a statute that does not apply to the plaintiff”); *see also* *Sabri v. United States*, 541 U.S. 600, 609 (2004) (“[O]verbreadth challenges call for relaxing familiar requirements of standing, to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand.”).

291. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 n.6 (2016) (“[N]amed plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which

By excusing the plaintiff-organization from showing personal injury in fact, the *Hunt* test omits the predicate for the exercise of federal judicial power.²⁹²

This feature makes the *Hunt* test one that lets the plaintiff-organization sue in a purely representative capacity. The plaintiff-organization serves a role like that of a guardian suing for a minor or incompetent person, or an executor or administrator suing for an estate. But a guardian needs to be appointed by someone else, typically a family member or a court.²⁹³ The same is true of executors and administrators.²⁹⁴ In contrast, associations allowed to sue under the *Hunt* test are self-appointed representatives.

One might reply that associations are not self-appointed but are, instead, “appointed” to represent their members when the members join.²⁹⁵ But that reply ignores that people join associations for many different reasons, sometimes just to get discounts.²⁹⁶ More fundamentally, the *Hunt* test does not require a court to determine whether implied (or constructive) appointment authorizes the particular plaintiff-organization’s suit. Indeed, the Court recognized as much in *UAW v. Brock*.²⁹⁷ The Court did not “dismiss out of hand the . . . concern that associations allowed to proceed under *Hunt* will

they belong” and which they purport to represent. (quoting *Simon v. E. Ky. Welfare Rights*, 426 U.S. 26, 40 n.20 (1976)); see also *Gollust v. Mendell*, 501 U.S. 115, 125–26 (1991) (interpreting a federal statute to require a plaintiff in shareholder derivative suit to “maintain some continuing financial stake in the litigation,” to avoid “serious constitutional doubt” whether Article III would allow otherwise).

292. *E.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018); see also *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

293. UNIF. PROBATE CODE § 5-201 (amended 2010) (addressing the appointment of a guardian for a minor); *id.* § 5-301 (addressing the appointment of a guardian for an incapacitated person by will or other writing).

294. *E.g.*, *id.* §§ 3-203(a)(1), 3-307(a), 3-314.

295. *Cf.* *UAW v. Brock*, 477 U.S. 274, 290 (1986) (“[T]he doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others.”).

296. See Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639, 688–95 (2002) (discussing wide variety of organizations and observing that some, such as AAA, “exist solely for the tangible benefits they provide to their members”). To cite another example, AARP is the largest membership organization in the United States. *The 5 Biggest Associations*, BISNOW (Apr. 23, 2015), <https://www.bisnow.com/archives/newsletter/association/4756-the-5-biggest-associations>. In this author’s experience, many people join AARP to get the discounts that it offers. That experience accords with its website, which emphasizes this aspect of membership. AARP, <https://www.aarp.org/benefits-discounts/?intcmp=DSO-HDR-BENEFITS-EWHERE> (last visited Jan. 7, 2019).

297. 477 U.S. at 290.

not always be able to represent adequately the interests of all their injured members.”²⁹⁸ The Court could hardly do otherwise, since application of the *Hunt* test does not require a case-by-case assessment of a plaintiff-association’s adequacy as a representative of its members.²⁹⁹

Furthermore, the requirements for associational standing that the *Hunt* test imposes are too lax to reliably ensure adequate representation.³⁰⁰ The test’s first requirement—a showing that one or more members would have standing in their own right—can be satisfied as long as a single member of the organization can show standing.³⁰¹ The *Hunt* test’s second requirement—that the lawsuit be “germane to the organization’s” interest—is often found without difficulty,” for it is quite undemanding, at least as understood by the lower courts.³⁰² For example, the D.C. Circuit has held that “[g]ermaneness is satisfied by a ‘mere pertinence’ between litigation subject and an organization’s purpose.”³⁰³ An association can usually meet the third requirement of the *Hunt* test—i.e., showing that the participation of individual members as parties is not required—simply by seeking declaratory or injunctive relief instead of damages.³⁰⁴

As Justice Powell explained in his dissent in *UAW v. Brock*, “the concept of [associational] representation is based on a theoretical identity between the organization and its members.”³⁰⁵ Yet that

298. *Id.*

299. *See* *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 345 (1977) (“[I]t would exalt form over substance to differentiate between the . . . Commission and a traditional trade association representing the individual[s] . . . who collectively form its constituency.”).

300. Donald F. Simone, Note, *Associational Standing and Due Process: The Need for an Adequate Representation Scrutiny*, 61 B.U. L. REV. 174, 184 (1981) (“The limited adequate representation scrutiny provided by the *Hunt* test . . . fails to meet the due process standards. It does not protect against the possibility of internal conflicts among members. Nor does it guarantee that the association and its membership share the same litigation goals.”).

301. *See* *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (“The association must allege that its members, or *any one of them*, are suffering immediate or threatened injury.”) (emphasis added); *id.* at 515 (“[T]he association must show that . . . *one or more* of its members are injured.”) (emphasis added); WRIGHT & MILLER, *supra* note 10, § 3531.9.5, at 879 (“[I]t appears to be accepted that an organization plaintiff need show injury to only a single member.”).

302. WRIGHT & MILLER, *supra* note 10, § 3531.9.5, at 900.

303. *Competitive Enter. Inst. v. Nat’l Highway Traffic Safety Admin.*, 901 F.2d 107, 111 (D.C. Cir. 1990) (quoting *Humane Soc. of the U.S. v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988)).

304. *See* WRIGHT & MILLER, *supra* note 10, § 3531.9.5, at 928.

305. *UAW v. Brock*, 477 U.S. 274, 297 (1986) (Powell, J., dissenting).

identity of interests is not ensured by the *Hunt* test. The *Hunt* test permits a suit that furthers the interests of a “quite small” number—indeed, one—of an association’s members or other constituents.³⁰⁶ The association “may therefore lack the incentive to provide the adequate representation needed by the court.”³⁰⁷ In addition, the association “may have reasons for instituting a suit—such as the publicity that attends a major case—other than to assert rights of its members.”³⁰⁸ The *Hunt* test differs from “the typical class action,” Justice Powell explained, in which “there must be an identity of interests among all plaintiffs before the court—an identity that can be counted upon to assure adequate representation.”³⁰⁹ Satisfaction of the *Hunt* test does not assure adequate representation and therefore cannot justify a plaintiff’s suing in a purely representative capacity.

In short, the *Hunt* test falls between the stools of cases in which a litigant possessing injury in fact is allowed to assert the rights of others and cases in which a plaintiff lacking injury in fact sues in a purely representative capacity. When a plaintiff has neither a concrete stake in the case nor a commitment solely to advance the interests of someone who does, that plaintiff does not belong in federal court.³¹⁰

B. *The Hunt Test Lacks Precedential Support.*

The notion that an association that lacks injury can “borrow” its members’ standing first arose in *Sierra Club v. Morton*.³¹¹ There, the Court said, “It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review.”³¹² This statement was dicta, because the Sierra Club did not seek to represent its injured members.³¹³ The Court nonetheless repeated the principle three years later in *Warth v. Seldin*, stating, “Even in the absence of injury to itself, an association may have

306. See *id.* at 296. (Powell, J., dissenting).

307. *Id.*

308. *Id.* at 297. (Powell, J., dissenting).

309. *Id.* at 296 n.* (Powell, J., dissenting).

310. See Brilmayer, *supra* note 233, at 309 (“[T]here are reasons to doubt whether self-appointed ideological plaintiffs should be presumed to be adequate representatives.”).

311. See WRIGHT & MILLER, *supra* note 10, § 3531.9.5, at 875 (stating that *Sierra Club v. Morton*, 405 U.S. 727 (1972), “established the proposition that if members are injured, an organization that has not been injured” may have representational standing; and describing this situation as one involving “borrowed member standing”).

312. *Sierra Club*, 405 U.S. at 739.

313. *Id.* at 730, 735.

standing solely as the representative of its members.”³¹⁴ This statement, like the similar one in *Sierra Club*, was dicta, because the Court held in *Warth v. Seldin* that the plaintiff-organizations’ members lacked standing in their own right.³¹⁵ The Court turned the dicta into a holding for the first time in 1977, when in *Hunt* it articulated the modern three-part test for associational standing and upheld the plaintiff’s standing to sue on behalf of its constituents without having determined that the plaintiff itself suffered injury in fact traceable to the defendants.³¹⁶

This author’s research has uncovered only one case before *Hunt* in which the Court expressly upheld an association’s standing to sue for its members without showing injury to itself: *National Motor Freight Traffic Association v. United States*.³¹⁷ Indeed, *National Motor Freight Traffic Association* is the only case that the Court cited when it said in *Warth v. Seldin* that “[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members.”³¹⁸ *National Motor Freight Traffic Association*, however, furnishes flimsy support for the *Hunt* test for associational standing.

In *National Motor Freight Traffic Association*, a three-judge district court dismissed a suit by associations of motor carriers challenging a decision of the Interstate Commerce Commission (ICC).³¹⁹ On appeal, the U.S. Supreme Court summarily affirmed the district court’s dismissal of the trade associations’ suit.³²⁰ Later, the Court denied a petition for rehearing but issued a one-paragraph per curiam opinion clarifying the basis of its summary affirmance.³²¹ In that later opinion, the Court observed that the district court had dismissed the suit for both lack of standing and lack of merit.³²² The Court said it agreed that the suit lacked merit but disagreed with the district court’s ruling that the trade associations lacked standing to

314. 422 U.S. 490, 511 (1975).

315. *Id.* at 512–17.

316. *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977).

317. *See* 372 U.S. 246, 247 (1963) (per curiam).

318. *Warth*, 422 U.S. at 511; *see also* *UAW v. Brock*, 477 U.S. 274, 281 (1986) (citing only *National Motor Freight Traffic Association*, *Sierra Club*, and *Warth* to support its statement that an association’s standing to sue for its members, “[e]ven in the absence of injury to itself,” had “long been settled”).

319. 205 F. Supp. 592, 597 (D.D.C. 1962), *aff’d mem.*, 371 U.S. 223 (1962), *on rehearing*, 372 U.S. 246 (1963) (per curiam).

320. *Nat’l Motor Freight Traffic Ass’n v. United States*, 371 U.S. 223, 223 (1962) (per curiam), *on rehearing*, 372 U.S. 246 (1963) (per curiam).

321. *Nat’l Motor Freight Traffic Ass’n v. United States*, 372 U.S. 246, 246 (1963) (per curiam).

322. *Id.* at 247.

bring the suit.³²³ The Court explained that the associations existed because of agreements approved by the ICC under a federal statute.³²⁴ They also “perform[ed] significant functions in the administration of the Interstate Commerce Act, including the representation of member carriers in proceedings before the Commission.”³²⁵ For those reasons, the associations “[were] proper representatives of the interests of their members.”³²⁶ The Court did not discuss whether the associations could show injury to themselves.

National Motor Freight Traffic Association thus involved plaintiff-associations that had been authorized to represent their members by statute, ICC order, and administrative practice.³²⁷ Those distinctive factors, relied upon by the Court in an opinion issued without plenary consideration, cause the per curiam opinion to be a weak foundation for the *Hunt* test.³²⁸

323. *Id.*

324. *Id.* (citing 49 U.S.C. § 5b (1958)).

325. *Id.*

326. *Id.*

327. See *R.I. Truck Owners Ass’n v. Smith*, No. 74-1641, 1975 WL 170014, at *2–3 (R.I. Super. Ct. Mar. 4, 1975) (discussing *National Motor Freight Traffic Association* and stating, “It is evident that associations of motor carriers have a special status under the Interstate Commerce Act and that because of the large volume of work entertained by the I.C.C., it must allow those associations to act in a representative capacity.”); cf. FED. R. CIV. P. 17(a)(1)(G) (authorizing a party to sue without joining the person for whose benefit the suit is brought when the party is “authorized by statute” to do so).

328. In its motion to affirm the three-judge district court’s ruling, the ICC devoted less than two pages to the standing issue. *United States’ Motion to Affirm* at 6–7, *Nat’l Motor Freight Traffic Ass’n v. United States*, 372 U.S. 246 (1963) (No. 479). The ICC presumably did not want to give the standing issue a high profile because it “recognize[d] that this precise issue ha[d] not been [previously] decided by th[e] Court.” *Id.* at 7. Consistent with a strategy of downplaying the novel standing issue, the ICC spent most of its submission defending the three-judge panel’s decision on the merits. *Id.* at 7–11. The other appellees did not address the standing issue at all in their motion to affirm. *Motion of Appellee Freight Forwarders to Affirm* at 3–4, *Nat’l Motor Freight Traffic Ass’n v. United States*, 372 U.S. 246 (1963) (No. 479). In opposing the motions to affirm, the National Motor Freight Traffic Association and other appellants cited only one U.S. Supreme Court decision in support of their claim of associational standing: *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Brief for Appellant at 2, 3, 5, *Nat’l Motor Freight Traffic Ass’n v. United States*, 372 U.S. 246 (1963) (No. 479). As discussed *infra* notes 334–47, however, in *Patterson* the plaintiff-association, the NAACP, plainly suffered injury in fact traceable to the challenged conduct as to which it sought to assert its members’ rights. See *Patterson*, 357 U.S. at 458–59. Accordingly, when the National Motor Freight Traffic Association and the other appellants petitioned for rehearing or, in the alternative, for clarification of the Court’s order of summary affirmance, they emphasized the novelty of the issue whether an association of carriers could seek review of ICC orders. *Petition for Rehearing or for Clarification of Order* at 2, *Nat’l Motor Freight Traffic Ass’n v. United States*, 372 U.S.

National Motor Freight Traffic Association seems to stand alone in expressly allowing an organization that lacked injury to itself to “borrow” its members’ standing.³²⁹ In other cases before *Sierra Club* where the Court expressly upheld the standing of associations to sue for their members, the association itself could show injury in fact.³³⁰ The leading cases involved the NAACP: *NAACP v. Alabama ex rel. Patterson*³³¹ and *NAACP v. Button*.³³² These NAACP cases not only involved plaintiffs with injury in fact but also had other features that aligned them with other cases involving third-party standing, as distinguished from associational standing.³³³

Patterson, in particular, was seminal.³³⁴ There, the Alabama Attorney General sued the NAACP in state court to shut down the NAACP’s operations in Alabama on the ground that those operations violated state law.³³⁵ To get evidence of the alleged violation, the Attorney General got a court order requiring the NAACP to produce the names and addresses of its members.³³⁶ The NAACP refused to

246 (1963) (No. 479). They said that the standing issue was one that “to the best of [their] knowledge, has never been considered by any federal court except the District Court in this case.” *Id.* Considering the limited briefing on, and the novelty of, the standing issue in *National Motor Freight Traffic Association*, the Court’s short per curiam opinion—which, recall, does not even address whether the plaintiff trade associations could show injury to themselves or the significance of that issue—warrants the narrowest possible reading. *Nat’l Motor Freight Traffic Ass’n*, 372 U.S. 246 (1963). Instead, the Court in *Warth* relied on that decision alone for the broad proposition, “Even in the absence of injury to itself, an association may have standing solely as the representative of its members.” *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

329. WRIGHT & MILLER, *supra* note 10, § 3531.9.5, at 875 (using the term “borrowed member standing”).

330. See William Burnham, *Aspirational and Existential Interests of Social Reform Organizations: A New Role for the Ideological Plaintiff*, 20 HARV. C.R.—C.L. L. REV. 153, 163 n.45 (1985) (stating that associational standing under Court’s modern case law appears to be “the only situation in which the titular litigant may litigate without any injury to itself.”); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 429–30 (1974) (article pre-dating *Hunt* stating that “the Court appears never to have heard a case in which a litigant’s only assertion of harm was that the challenged action deprived third parties of their constitutional rights”).

331. 357 U.S. 449, 458–59 (1958).

332. 371 U.S. 415, 428 (1963).

333. Cf. Marc Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393, 430 (1981) (observing that the Court treated the *Patterson* case, which author cites as “*NAACP v. Alabama*,” as “a case on third-party standing”).

334. *United Food & Commercial Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 551–52 (1996) (“The notion that an organization might have standing to assert its members’ injury has roots in *NAACP v. Alabama ex rel. Patterson*.”).

335. *Patterson*, 357 U.S. at 452.

336. *Id.* at 453.

produce its membership lists, leading the state court to hold it in civil contempt and fine it \$100,000 for violating the production order.³³⁷ The U.S. Supreme Court granted review and, on the merits, held that the production order violated the First Amendment rights of the NAACP's members.³³⁸ Before reaching the merits, the Court held that the NAACP had "standing" to assert its members' rights.³³⁹ The Court observed that it "ha[d] generally insisted that parties rely only on constitutional rights which are personal to themselves."³⁴⁰ It added, however, that its rule against third-party standing "is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court."³⁴¹ The Court found that to be true in the case before it:

If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion.³⁴²

Besides the members' inability to assert their own rights effectively, the Court determined that the NAACP could effectively represent its members' rights "because it and its members are in every practical sense identical."³⁴³ The NAACP was "but the medium through which its individual members seek to make more effective the expression of their own views."³⁴⁴ Finally, the Court relied on the connection between (1) the injury to its members' rights posed by the challenged order to produce its membership list and (2) the potential organizational injury to the NAACP itself: "The reasonable likelihood that the Association itself through diminished financial support and membership may be adversely affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its

337. *Id.* at 453–54.

338. *Id.* at 460–66.

339. *Id.* at 459.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

members.”³⁴⁵ Thus, the NAACP in *Patterson* met the requirements for third-party standing: It could show injury in fact, stemming from the contempt sanction imposed by the state court.³⁴⁶ In addition, it could show a close relationship with its members and a hindrance that kept members from asserting their own rights.³⁴⁷

The Court relied on its decision in *Patterson* to uphold the NAACP’s standing to assert its members’ rights in *NAACP v. Button*.³⁴⁸ In *Button*, the NAACP again confronted a state law that the State had interpreted to require the NAACP to cease operations in the State: The Virginia courts had held that the NAACP’s activities violated state law barring the “improper solicitation of legal business.”³⁴⁹ In its suit challenging the Virginia law, the NAACP asserted injury to the constitutional rights of itself and its members.³⁵⁰ The Court first held that the NAACP sufficiently alleged injury to itself.³⁵¹ Next, the Court held, relying on *Patterson*, that the NAACP also “ha[d] standing to assert the corresponding rights of its members.”³⁵² *Button* fits the Court’s description of third-party standing cases as including ones in which the Court “allow[s] standing to litigate the rights of third parties when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties’ rights.”³⁵³

In sum, the modern doctrine of associational standing applied in *Hunt*³⁵⁴ rests almost entirely on the Court’s one-paragraph per curiam opinion in *National Motor Freight Traffic Association*³⁵⁵ and *Patterson*,³⁵⁶ a case involving third-party standing. This precedent provides weak support at best.

345. *Id.* at 459–60.

346. *Id.*

347. *E.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004).

348. 371 U.S. 415, 428 (1963).

349. *Id.* at 425–26.

350. *Id.* at 428.

351. *Id.* (“We think petitioner may assert this right [to associate] on its own behalf, because . . . it is directly engaged in those activities . . . which the statute would curtail.”).

352. *Id.*

353. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (quoting *Warth v. Seldin* 422 U.S. 490, 510 (1975)).

354. 432 U.S. 333 (1977).

355. 372 U.S. 246 (1963).

356. 357 U.S. 449, 452 (1958).

C. There Is a Better Alternative to the Hunt Test for Associational Standing.

As explained above, the *Hunt* test is anomalous and unprecedented, and it does not ensure that the plaintiff-organization will adequately represent the members or other constituents whose rights it seeks to assert.³⁵⁷ But as this section explains, under some circumstances, including those presented in *Hunt* itself, an association can adequately represent its constituents, and should be allowed to do so when the constituents themselves would have standing to sue in their own right. The plaintiff-organization, however, should bear the burden of proving it will adequately represent its constituents as part of its overall burden of establishing standing.³⁵⁸ This Article proposes that the plaintiff-organization can establish a rebuttable presumption of adequacy by showing it meets the criteria that the Court actually relied on in upholding associational standing in *Hunt*.

To recap *Hunt*, the Court relied on three circumstances to conclude that the Washington State Apple Advertising Commission had associational standing.³⁵⁹ First, the Commission existed to promote the shared interests of a discrete segment of the population, including through suits like the one before the Court.³⁶⁰ Second, the constituents whose interests it sought to assert alone elected the Commission's leadership, could serve as leaders, and financed all of the Commission's activities, including the suit before the Court.³⁶¹ Finally, the outcome of the litigation would adversely affect the constituents in a concrete way that could also adversely affect the Commission itself.³⁶²

When those circumstances exist, they presumptively establish the identity of interests on which, as Justice Powell argued, associational standing should rest.³⁶³ Even then, it should be open to the defendant to show that the plaintiff-organization is unlikely to represent its constituents adequately. For example, the defendant might show that the lawsuit is driven primarily by a minority of particularly powerful constituents or by interests wholly unrelated to those of its

357. See *supra* notes 287–356 and accompanying text (discussing the *Hunt* test).

358. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (holding that plaintiff bears burden of proving standing).

359. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344–45 (1977).

360. *Id.* at 344.

361. *Id.* at 344–45.

362. *Id.* at 345.

363. *UAW v. Brock*, 477 U.S. 274, 297 & n.* (1986) (Powell, J., dissenting).

constituents.³⁶⁴ Even if the suit has the support of a majority of the constituents, an internal conflict of interests may make the plaintiff-organization an unsuitable representative.³⁶⁵ If the defendant shows that the plaintiff-organization might not be an adequate representative, the court must make a case-specific determination of adequacy, just as it would for named plaintiffs in a putative class action.³⁶⁶

This proposal—i.e., to use the circumstances actually relied upon in *Hunt* to create a rebuttable presumption of adequacy—has three virtues besides reliably ensuring an identity of interests between an organization and its constituents. First, it respects the actual holding in *Hunt*, while ignoring the lax, unprecedented three-part test that the Court formulated there.³⁶⁷ Second, it accords with the Court’s per curiam opinion upholding the standing of trade associations in *National Motor Freight Traffic Association*.³⁶⁸ Third, it accounts for cases in which the Court has let an organization assert its constituents’ rights with little or no attention to the organization’s standing.³⁶⁹

364. *Id.* (noting that the necessary identity of interests between the plaintiff-organization and its constituents could be lacking if only a few members care about the lawsuit); see also *Local 186, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Brock*, 812 F.2d 1235, 1238–39 (9th Cir. 1987) (denying associational standing to local union that challenged federal law terminating its secretary-treasurer because of his felony conviction); *WRIGHT & MILLER*, *supra* note 10, § 3531.9.5, at 908 (describing *Teamsters v. Brock* as apparently resting on “potential conflict between the interests of an organization’s leadership and members’ interests”).

365. See, e.g., *Harris v. McRae*, 448 U.S. 297, 320–21 (1980) (church group lacked standing to sue for members who would choose to have abortions “as a matter of religious practice” because members held conflicting views on abortion); *Retired Chicago Police Ass’n v. City of Chicago*, 76 F.3d 856, 865 (1996) (stating that internal conflict “raises a concern that the association will not be fully committed to the litigation”).

366. See FED. R. CIV. P. 23(a)(4) (stating that class action can be maintained only if “the representative parties will fairly and adequately protect the interests of the class”).

367. *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977) (articulating the three-part test).

368. 372 U.S. 246, 247 (1963), discussed *supra* notes 317–29 and accompanying text.

369. E.g., *Dep’t of Transp. v. Ass’n of Am. R.R.*, 135 S. Ct. 1225, 1230 (2015) (suit by trade association asserting rights of members; no discussion of standing); *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 569 U.S. 641, 646–48 (2013) (same); *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 663–66 (1993) (discussing standing of trade association’s members without discussing trade association’s standing to assert them); *Schweiker v. Gray Panthers*, 453 U.S. 34, 40 n.8 (1981) (devoting one sentence to discussing, and upholding, standing of

D. There Is Authority for Associational Standing.

The last section argued that the Court should jettison the *Hunt* test for associational standing in favor of one based on the actual holding in *Hunt*. If the Court continues to recognize associational standing, the Court should address its authority to do so. The issue of authority arises because associational standing is an exception to the rule against a plaintiff's asserting the rights of others.³⁷⁰ The Court used to classify that rule as a judicially created "prudential" rule of standing.³⁷¹ The Court cast doubt on that classification, however, in *Lexmark International, Inc. v. Static Control Components, Inc.*³⁷² So if the rule against asserting the rights of others is not a prudential one that courts have developed, what is the source of this rule, and of its exceptions? This section briefly and tentatively answers that question.

The answer begins by observing that some associational standing cases are really third-party standing cases. They are the ones in which the plaintiff-organization and its constituents have both suffered an injury that harms or blocks the relationship between them. The paradigm example is *NAACP v. Alabama ex rel. Patterson*, in which the NAACP challenged a state court order that required it to disclose its membership lists and under which the NAACP was fined for non-compliance.³⁷³

Henry Monaghan has argued that many third-party standing cases should be understood as ones in which litigants actually assert

organization representing the elderly to assert members' rights); *Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977) (upholding standing of stock exchanges to assert their members' rights; short discussion of exchanges' standing in note); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 406 (1971) (including as plaintiff an organization of users of Overton Park); *Am. Trucking Ass'n v. United States*, 364 U.S. 1, 5, 17–18 (1960) (suit included trade associations as plaintiffs; Court addressed standing of members without addressing standing of associations); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 406 F.2d 837, 838 (8th Cir. 1969), *rev'd*, 397 U.S. 150 (1970) (suit including trade association as one plaintiff).

370. *E.g.*, *United Food & Commercial Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 557 (1996).

371. *Id.*

372. 572 U.S. 118, 127 & n.3 (2014) (holding that, although Court had previously said "zone-of-interests test" reflected rule of "prudential standing," the test instead requires a determination of "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim," and noting that, although it had "suggest[ed]" that doctrine of third-party standing is likewise prudential, third-party standing's "proper place in the standing firmament can await another day").

373. 357 U.S. 449, 453 (1958), discussed *supra* notes 334–47 and accompanying text.

their own rights.³⁷⁴ Specifically, they are “asserting a substantive due process right to interact with a third party right holder free from unjustifiable governmental interference.”³⁷⁵ Professor Monaghan cited *Patterson* as an example.³⁷⁶ Even if Professor Monaghan’s proposed constitutional “right to interact” does not account for all cases upholding third-party standing, it does reorient the inquiry away from the oddly discretionary nature of third-party standing—with which the Court in *Lexmark* was so concerned³⁷⁷—to the more objective, defensible question of whether the plaintiff has a viable cause of action, a reorientation that scholars such as Heather Elliot, William Fletcher, and James Pfander have endorsed.³⁷⁸

As Professor Monaghan noted, this “first party” explanation for many third-party standing cases does not account for all cases.³⁷⁹ He described the remaining cases as ones that allow the litigant to serve as “a judicially licensed private attorney general.”³⁸⁰ Professor Monaghan doubted that federal courts can license private attorneys general to assert third-party rights.³⁸¹ More important for our purposes, he thought it necessary to assume that if judicial authority did exist, “any private attorney general licensed by the Court will have suffered cognizable injury in fact.”³⁸² Thus, his approach does not account for cases like *Hunt* and *National Motor Freight Traffic*

374. Monaghan, *supra* note 224, at 299.

375. *Id.* at 282.

376. *Id.* at 288, 314.

377. *Lexmark Int’l, Inc.*, 572 U.S. at 125–26 (stating that “prudential” grounds for declining jurisdiction are “in some tension with our recent reaffirmation of the principle that a federal court’s obligation to hear and decide cases within its jurisdiction is virtually unflagging”) (internal quotation marks omitted).

378. See Heather Elliott, *The Structure of Standing at 25*, 65 ALA. L. REV. 269, 270–71 (2013) (supporting Fletcher’s idea that the question of standing should be treated as a question on the merits); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (proposing the idea that “standing should simply be a question on the merits of a plaintiff’s claim”); James E. Pfander, *Standing, Litigable Interests, and Article III’s Case-or-Controversy Requirement*, 65 UCLA L. REV. 170, 212 (2018) (proposing that the “focus” should be “on whether the plaintiff has a ‘litigable interest’”). *But cf.* Robert J. Pushaw, Jr., *Fortuity and the Article III “Case”: A Critique of Fletcher’s The Structure of Standing*, 65 ALA. L. REV. 289, 293 (2013) (arguing that “standing should hinge on whether the plaintiff is presenting a true Article III ‘Case,’ which requires a showing that her federal legal rights have been invaded fortuitously (i.e., involuntarily as a result of a chance occurrence)”).

379. Monaghan, *supra*, note 224, at 310–11.

380. *Id.* at 282.

381. *Id.* at 314 (stating that “recognition of *jus tertii* standing” could be a “constitutional imperative” in some cases but was “far more problematic” outside of “that limited framework”).

382. *Id.* at 315 n.203.

Association, in which a plaintiff-organization is allowed to sue for its members or other constituents “[e]ven in the absence of injury to itself”—or at least in the absence of a judicial determination that the plaintiff-organization has suffered injury to itself.³⁸³

In some of these unaccounted-for cases, a statute may expressly or impliedly authorize an organization to sue in a purely representative capacity. Recall that in *National Motor Freight Traffic Association*, the plaintiff trade associations were created under a federal statute and were allowed by the ICC to participate in administrative proceedings on behalf of their members.³⁸⁴ One could argue that their authority to sue for their members was implicitly granted by the statute under which they were created.³⁸⁵

The Court has held that Congress can expressly authorize organizations to sue for their members. The Court so held in *United Food & Commercial Workers Union Local 751 v. Brown Group*.³⁸⁶ There, the Court upheld as constitutional a federal statute that let unions sue for the employees they represented.³⁸⁷ The Court rejected the argument that the union could not sue because the statute did not give the union any rights.³⁸⁸ Thus, the Court’s decision reflects that Congress can *expressly* authorize organizations to sue in a purely representative capacity.

The Court’s current case law, however, constrains interpreting federal statutes *implicitly* to authorize associational standing. In *Warth v. Seldin*, the Court said that a federal statute can override the prudential rule against third-party standing only “expressly or by clear implication.”³⁸⁹ In a later case the Court seemed to take an even more restrictive approach, suggesting that a prudential rule of standing—like the rule against third-party standing—“applies unless it is expressly negated” by a statute.³⁹⁰ The Court may, however, modify its “clear statement” rule if it revisits the “prudential” nature of the rule against third-party standing.³⁹¹

383. *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

384. *See supra* notes 317–29 and accompanying text (discussing *National Motor Freight Traffic Association v. United States*, 372 U.S. 246 (1963) (per curiam)).

385. *Cf. Warth*, 422 U.S. at 501 (stating that, in cases letting plaintiffs assert the legal rights of third parties, “the Court has found, in effect, that the constitutional or statutory provision in question implies a right of action in the plaintiff”).

386. 517 U.S. 544, 546 (1996).

387. *Id.* at 551–58.

388. *Id.* at 549–50.

389. *Warth*, 422 U.S. at 509–10.

390. *Bennett v. Spear*, 520 U.S. 154, 163 (1997).

391. *See supra* notes 370–71 and accompanying text (discussing the “prudential” rule of standing).

Just as a federal statute can authorize an organization to sue in a representative capacity, so can a state statute. Indeed, this may explain the Court's decision in *Hunt*.³⁹² Recall that the plaintiff in *Hunt*, the Washington State Apple Advertising Commission, was created by state statute.³⁹³ The Commission had "the statutory duty of promoting and protecting the State's apple industry."³⁹⁴ Its statutory powers included the power to sue and be sued.³⁹⁵ Collectively, the state statutes governing the Commission could reasonably be interpreted to authorize the Commission's suit in *Hunt*, given that the suit advanced the Commission's statutory duty.³⁹⁶

But if you accept that interpretation of *Hunt*, the question becomes whether a federal court can give effect to a state statute authorizing an entity to sue in a representative capacity. The answer appears to be "sometimes." At least indirect support for that answer is provided by Federal Rule of Civil Procedure 17(b), which generally has federal courts consult state law to determine a party's capacity to sue or be sued.³⁹⁷ Additional, admittedly indirect support is supplied by *Hollingsworth v. Perry*.³⁹⁸ In that case, the Court suggested that state law could appoint a private person to serve as an agent to defend the constitutionality of a state law in a federal court, as long as the law established a true principal-agent relationship, with its concomitant fiduciary duties.³⁹⁹ Perhaps the need for a true principal-agent relationship is meant to ensure that the plaintiff-agent adequately represents, and is controlled by, the principal. If so, it is consistent with Article III's demand for a plaintiff with a "concrete stake" in the outcome⁴⁰⁰ and the Due Process Clause's demand that the plaintiff faithfully and zealously represents the interests of the party who is not before the court.⁴⁰¹ Put another way, the principal-

392. 432 U.S. 333, 335, 382 (1977).

393. See *supra* notes 237–64 (summarizing the *Hunt* case) and accompanying text; see also *Hunt*, 432 U.S. at 336–37 (explaining the Washington State Apple Advertising Commission's statutory duty).

394. *Hunt*, 432 U.S. at 336–37.

395. *Id.* at 339 n.3.

396. *Id.* at 344.

397. FED. R. CIV. P. 17(b).

398. 570 U.S. 693, 712–14 (2013); cf. *Wisconsin ex rel. Bolens v. Frear*, 231 U.S. 616, 620–21 (1914) (private relator asserting public rights in challenging a state law as unconstitutional could not seek U.S. Supreme Court review of state supreme court's decision without state's consent because relator was a "mere agent" of the state).

399. *Perry*, 570 U.S. at 712–14.

400. *Friends of the Earth, Inc. v. Laidlaw Emtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000).

401. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

agent relationship ensures the identity of interests that Justice Powell believed should underlie associational standing.⁴⁰²

Besides federal and state statutes, the “federal common law of procedure” might justify associational standing in some cases.⁴⁰³ In an early case applying the rule against asserting third parties’ rights, the Court said there were exceptions to the rule “where, by statute or the *settled practice of the courts*, the plaintiff is permitted to sue for the benefit of another.”⁴⁰⁴ Similarly, in a modern case discussing the general rule against asserting third parties’ rights, the Court said,

[T]he entire doctrine of ‘representational standing,’ of which the notion of ‘associational standing’ is only one strand, rests on the premise that in certain circumstances, particular relationships (recognized either *by common-law tradition* or by statute) are sufficient to rebut the background presumption . . . that litigants may not assert the rights of absent third parties.⁴⁰⁵

Perhaps the common-law tradition could support associational standing in some cases.

In short, several sources of authority may support associational standing. They include a constitutional protection for the relationship between an organization and its constituents; federal and state statutes expressly or impliedly authorizing organizations to sue for constituents; and the federal common law of procedure. The Court’s decision in *Lexmark* suggests it might clarify the source of authority for associational standing when it revisits the rule against asserting the rights of others.⁴⁰⁶

402. *UAW v. Brock*, 477 U.S. 274, 297 & n.* (1986) (Powell, J., dissenting).

403. 19 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4505, at 67 n.67 (3d ed. 2008) (using “federal common law of procedure” to mean “judge-made rules of practice and procedure,” and giving as an example remittitur practice).

404. *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 406 (1900) (emphasis added).

405. *United Food & Commercial Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 557 (1996) (emphasis added); *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 *SUFFOLK U.L. REV.* 881, 886 (1983) (stating that courts apply prudential standing rules “as a set of presumptions derived from *common-law tradition* designed to determine whether a legal right exists”) (emphasis added).

406. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127–28 n.3 (2014).

CONCLUSION

Patagonia lived up to its image as an innovative, activist company when it sued President Trump in federal court for reducing the Bears Ears National Monument. Also, consistently with that image, Patagonia will make bold arguments for its standing to bring the suit. Although this Article concludes that Patagonia's standing arguments should not succeed, Patagonia's suit provides a vehicle for reexamining some of the U.S. Supreme Court decisions on which Patagonia's standing arguments depend. This Article has argued that the Court should clarify that one of its decisions on organizational standing, *Havens Realty Corp. v. Coleman*, does not apply to suits to vindicate public rights, like Patagonia's suit. The Article has also argued that the Court should revisit and repudiate the test for associational standing that it established in *Hunt v. Washington State Apple Advertising Commission* and on which Patagonia will rely.