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## Associations and Cities as (Forbidden) Pure Private Attorneys General

Heather Elliott

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ASSOCIATIONS AND CITIES AS (FORBIDDEN) PURE  
PRIVATE ATTORNEYS GENERAL

HEATHER ELLIOTT\*

ABSTRACT

*The Supreme Court interprets Article III's case-or-controversy language to require a plaintiff to show injury in fact, causation, and redressability. A plaintiff who meets that tripartite test has standing to sue and thus a personal stake in pursuing the litigation. Accordingly, in Sierra Club v. Morton, the Supreme Court prohibited pure private attorneys general: litigants who would sue without the requisite personal stake. This limitation extends to organizations. They, too, must show standing on their own account or, under Hunt v. Washington Apple Advertising Commission, identify a member with Article III standing and show how the lawsuit is germane to the organization's purpose.*

*Yet when Hunt interacts with the complexities of modern standing doctrine, it becomes clear that many associations, particularly those that are large or have broad purposes, can show standing for virtually any lawsuit. Moreover, recent scholarship has plausibly suggested that municipalities can be treated as associations under Hunt; municipal purposes are so broad, and some cities are so big, that they could litigate almost any case they wish. But the purpose of the ban on pure private attorneys general is to avoid giving any plaintiff a*

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\* Alumni, Class of '36 Professor of Law, the University of Alabama School of Law. Many thanks to Dean Mark Brandon, the Law School, and the University for their support of this research. I received helpful comments from John Acevedo, Yonathan Arbel, Bill Andreen, Carol Andrews, Meghan Boone, Bill Brewbaker, Deepa Das Acevedo, Ed DuMont, Adam Feibelman, Tara Grove, Andy Hessick, Ron Krotoszynski, Ann Lipton, Ben McMichael, Kathleen Morris, Jonathan Nash, Stuart Rachels, Shalini Ray, Meredith Render, Heather Roberts, Adam Steinman, Fred Vars, and participants in the Regulation Workshop at Tulane Law School and the Murphy Institute at Tulane University. Gabriela Olemberg provided invaluable research assistance.

*roving commission to enforce the law. Thus, Sierra Club and Hunt are in serious tension.*

*This unnoticed conflict is further evidence of the notorious incoherence of Article III standing itself and might sensibly trigger a rethinking of the entire doctrine. Such reform seems highly unlikely, however, given nearly fifty years of standing's reign. Alternatively, Congress—which is far better placed than the courts to make necessary factual determinations—could take steps to resolve the conflict between Sierra Club and Hunt. But Congress has other priorities. More modestly, the Court could make some changes at the margins of Hunt and Sierra Club, to ameliorate the tension between the two strands of standing doctrine.*

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## INTRODUCTION

As interpreted by the Supreme Court, Article III of the United States Constitution permits lawsuits to proceed in federal court only if the plaintiff has standing to sue: the plaintiff must have suffered an injury in fact fairly traceable to the actions of the defendant and redressable at least in part by the court.<sup>1</sup> Thus, if hypothetical plaintiff Chris Lee is injured by pollutants emitted from a coal-fired power plant, Lee would have standing to sue the plant for violations of the federal Clean Air Act.<sup>2</sup>

Moreover, an environmental group in that same area could also sue to enforce the Clean Air Act either by showing standing on its own account or by relying on Lee's standing.<sup>3</sup> *Hunt v. Washington Apple Advertising Commission* permits an organization to sue when it has a member with standing and when the purpose of the suit is germane to the group's purpose.<sup>4</sup>

But if Lee is not injured by the plant's emissions and sues merely to punish the company for violating the law, the suit will be dismissed for lack of standing. In *Sierra Club v. Morton*, the Supreme Court rejected the idea of a pure "private attorney general": a litigant who, though having no concrete stake in the litigation, would nonetheless be permitted to sue wrongdoers to ensure that the law was obeyed.<sup>5</sup>

The term pure "*private attorney general*" contrasts the private litigant with state or federal attorneys general, who are generally

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

2. *See, e.g.*, *Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001) (finding injury from "credible threat to the plaintiff's physical well-being from airborne pollutants").

3. *See, e.g.*, *St. Bernard Citizens for Env'tl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 354 F. Supp. 2d 697, 700-02 (E.D. La. 2005) (finding that organization could sue because a member suffered injury from "breath[ing] and smell[ing] polluted air").

4. 432 U.S. 333, 343 (1977).

5. 405 U.S. 727, 737-38 (1972). As discussed below, the Court has discussed "private attorneys general" favorably in certain contexts. *See infra* Part I.B.3. But the Court means only a litigant who sues *both* for herself and for the public; she may invoke the public interest only after showing Article III standing. *See* William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2148-49 (2004). My concern here is with the ban on "pure" private attorneys general: those who would litigate in the public interest *without* the requisite personal stake. *See* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 814-18 (2009).

able to sue to enforce the law and protect the public interest.<sup>6</sup> So, for example, the United States can sue to enforce violations of the Clean Air Act anywhere in the country,<sup>7</sup> but a private party who lacks Article III standing may not. Nor may associations litigate as pure private attorneys general; if an organization lacks standing on its own account or under *Hunt*, it fails the Article III test just as an individual would.<sup>8</sup> Such pure private attorneys general, the Court has said, raise the specter of roving enforcers of the law who would take the courts far beyond their Article III purview.<sup>9</sup>

But what about an organization with a sufficiently broad purpose and a sufficiently large membership? Would not such an organization be able to satisfy *Hunt* in an almost infinite number of situations? After all, a very large organization is likely to have, somewhere in its membership, someone who has suffered the relevant harm. If the organization also has an extremely broad purpose, then, for virtually any topic, it could meet *Hunt*'s requirement that the lawsuit be germane to its purpose. Such an organization would seem to be able to bring any lawsuit it wanted, becoming a roving enforcer of the law.

This is not simply a theoretical question. AARP, for example, has thirty-eight million members and a very broad mission<sup>10</sup> and has been held to have standing under *Hunt*.<sup>11</sup> And some scholars have recently made plausible arguments that municipalities have associational standing under *Hunt*.<sup>12</sup> Such standing would be very broad

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6. See 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.11-.1 (3d ed. 2008) (discussing federal and state governments' standing in federal court).

7. See, e.g., *United States v. LTV Steel Co.*, 187 F.R.D. 522, 523 (E.D. Pa. 1998) (ruling on the United States's action against a Pittsburgh company for violations of the Clean Air Act).

8. 432 U.S. at 343. *Hunt* is inapplicable when individual participation is required for the lawsuit to proceed (for example, when damages are at issue). *Id.* at 344.

9. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) ("The federal courts have abjured appeals to their authority which would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973))).

10. AARP's public statement of its mission is exceedingly broad: "to empower people to choose how they live as they age." *About Our Policy*, AARP, <http://aarp.org/about-aarp/policies> [<https://perma.cc/6XJA-MAPR>].

11. *AARP v. EEOC*, 226 F. Supp. 3d 7, 17 (D.D.C. 2016).

12. See *infra* notes 233-41 and accompanying text.

for some cities: New York City, for example, has a population of about 8.4 million and general home-rule powers, meaning it can act to protect the health, safety, and general welfare of its citizens.<sup>13</sup> Although there are presumably some limits on AARP and New York City at the margins, their standing to sue under *Hunt* can be vast.

Moreover, even smaller organizations can take advantage of modern standing doctrine to act nearly as pure private attorneys general. Organizations are free to recruit new members who have an injury in fact, allowing them to tailor membership to satisfy *Hunt*.<sup>14</sup> And courts have increasingly recognized injuries that affect large segments of the population (injury from increased *risk* of future harm, for example, or injury from procedural violations by regulatory agencies). So long as at least one of the many people suffering a risk-based or procedural injury is a member, an organization can predicate standing on that member.<sup>15</sup> A small organization with a broad enough purpose, then, could find *Hunt* standing fairly readily.

*Hunt* and modern standing doctrine thus interact to permit at least some associations—and perhaps many municipalities—to act as the forbidden pure private attorney general, a tension in the doctrine that this Article is the first to reveal.<sup>16</sup>

How can this conflict be solved, if at all? First, the Court could take this doctrinal conflict as further evidence of the bankruptcy of standing doctrine. Almost since its inception, critics have highlighted the doctrine's failings.<sup>17</sup> Standing doctrine has become

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13. See N.Y. CONST. art. IX, § 2; *QuickFacts: New York City, New York*, U.S. CENSUS BUREAU (July 1, 2018), <https://www.census.gov/quickfacts/newyorkcitynewyork> [<https://perma.cc/2SLD-JWZ8>]; *infra* notes 286-93 and accompanying text.

14. See *infra* note 141 and accompanying text.

15. See *infra* notes 135-38 and accompanying text.

16. See, e.g., Katherine Mims Crocker, *An Organizational Account of State Standing*, 94 NOTRE DAME L. REV. 2057, 2074 (2019) (arguing that a state's "purpose" can satisfy *Hunt*).

17. See, e.g., Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief*, 83 YALE L.J. 425, 426 (1974); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977). The criticisms have continued without cease. See Hope M. Babcock, *The Problem with Particularized Injury: The Disjuncture Between Broad-Based Environmental Harm and Standing Jurisprudence*, 25 J. LAND USE & ENVTL. L. 1, 3 (2009); Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2286 (2018); William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL'Y F. 247, 249 (2001); Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 677-78 (1990); Heather Elliott, *Balancing as Well as Separating Power: Congress's Authority to Recognize New Legal Rights*, 68 VAND. L. REV. EN BANC 181, 182-83 (2015) [hereinafter Elliott, *Balancing*]; Heather Elliott,

increasingly “incoherent,”<sup>18</sup> “manipulable,”<sup>19</sup> and “doctrinal[ly] confus[ed]”<sup>20</sup>—what one scholar has called “a quagmire.”<sup>21</sup> Accordingly, lower courts produce conflicting results on similar facts.<sup>22</sup> The previously unnoticed tension between the ban on pure private attorneys general and the doctrine of associational standing further highlights the incoherence and unpredictability of the doctrine. The Court could abandon standing doctrine and, as many have urged before, condition access to the federal courts on prudential and statutory considerations. But standing doctrine has been entrenched for nearly half a century, and the current Court seems unlikely to take such a revolutionary step.

Second, Congress could amend jurisdictional statutes to solve the conflict. Congress can consider systemic issues regarding access to and burdens on the courts, confer causes of action on appropriate plaintiffs, adjust associational standing to reflect concerns about federalism and separation of powers, and the like.<sup>23</sup> Of course, Congress is unlikely to prioritize such changes.<sup>24</sup>

Modest juridical modification of *Hunt* and *Sierra Club* seems to be the most likely solution. While courts are institutionally unsuited

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*Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 161 (2011) [hereinafter Elliott, *Inability*]; Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 459 (2008) [hereinafter Elliott, *Functions*]; William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 305 (2002); Richard J. Pierce, Jr., *Lujan v. Defs. of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1198-200 (1993); Mark Seidenfeld & Allie Akre, *Standing in the Wake of Statutes*, 57 ARIZ. L. REV. 745, 745 (2015); Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 845-46 (2017); Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1023-24 (2009); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1458 (1988) [hereinafter Sunstein, *Privatization*]; Cass R. Sunstein, *Standing Injuries*, 1993 SUP. CT. REV. 37, 38-40 [hereinafter Sunstein, *Injuries*].

18. Fletcher, *supra* note 17, at 221.

19. Sunstein, *Privatization*, *supra* note 17, at 1458.

20. *Id.*

21. Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1505 (2008).

22. See generally Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999).

23. As I discuss below, the First Amendment rights of speech, association, and petition constrain but do not preclude Congress's involvement in regulating Article III courts' jurisdiction. See *infra* notes 341-45 and accompanying text.

24. See generally TOM DAVIS ET AL., *THE PARTISAN DIVIDE: CONGRESS IN CRISIS* (2014).



to draw the kinds of lines Congress could draw,<sup>25</sup> they could, for example, make a formal distinction between membership associations and municipalities<sup>26</sup> or add indicia of expertise to the *Hunt* requirements.<sup>27</sup>

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The Article proceeds in three parts. Part I lays out the doctrinal background. Part II shows that some associations and municipalities are able to act as nearly pure private attorneys general, creating a genuine tension in the doctrine.<sup>28</sup> Part III then turns to potential solutions.

#### I. ARTICLE III STANDING

Article III assigns to the Judicial Branch the authority to resolve “Cases” and “Controversies.”<sup>29</sup> Thus, the courts have come to observe both constitutional and prudential limitations on their jurisdiction arising from ripeness,<sup>30</sup> mootness,<sup>31</sup> the rule against advisory

25. See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

26. *City of Olmstead Falls v. FAA*, 292 F.3d 261, 267-68 (D.C. Cir. 2002) (“The City does not have ‘members’ who have voluntarily associated, nor are the interests it seeks to assert here germane to its purpose.” (emphasis omitted)).

27. *Sierra Club v. Morton*, 405 U.S. 727, 741-55 (1972) (Douglas, J., dissenting); *id.* at 755 (Brennan, J., dissenting); *id.* at 755-60 (Blackmun, J., dissenting).

28. I do not discuss whether *Hunt* applies or should apply to states, which can sue in *parens patriae*, see *infra* note 246 and accompanying text, and are also given “special solicitude” under Article III, see *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). A recent symposium presented variety of perspectives on state standing. See Symposium, *Federal Court, Practice and Procedure: State Standing*, 94 NOTRE DAME L. REV. 1883 (2019).

29. U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases ... arising under this Constitution, the Laws of the United States, and Treaties made ... under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - [by] a State [against] Citizens of another State; - between Citizens of different States, - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof; - and foreign States, Citizens or Subjects.”), amended by U.S. CONST. amend. XI.

30. See, e.g., *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 732-34 (1998) (finding the case not yet ripe because U.S. Forest Service logging and clear-cutting plan did not yet apply to any specific tracts of land).

31. See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (holding that the case was

opinions,<sup>32</sup> and the political question doctrine.<sup>33</sup> In the last forty years, the Supreme Court has determined that “perhaps the most important of these” restrictions is the requirement that the plaintiff have standing to sue.<sup>34</sup> These justiciability doctrines together implement “the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.”<sup>35</sup> Pure private attorneys general—whether individuals or associations—are said to take the courts far beyond those limits.

In the remainder of this Part, I give a short overview of standing doctrine generally and of the separation-of-powers concerns raised by the doctrine, then turn to the prohibition on private attorneys general and the specifics of associational standing.

### A. *Standing Basics*

Although the elements of standing doctrine are relatively simple to state, their application can be complex and controversial. After laying out the doctrine, I describe some of the expansive criticisms of the doctrine.

#### 1. *Basic Doctrine*

Current standing doctrine requires a plaintiff to meet a tripartite test of injury in fact, causation, and redressability.<sup>36</sup> The test emerged in its current tripartite form in 1978,<sup>37</sup> the result of tightening criteria for Article III standing throughout the 1970s.<sup>38</sup>

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mooted by the plaintiff student’s enrollment in his final semester of law school).

32. See Letter from John Jay, Chief Justice of the Supreme Court, and Associate Justices to George Washington, President of the United States (Aug. 8, 1793), in RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 79 (5th ed. 2003).

33. See, e.g., *Baker v. Carr*, 369 U.S. 186, 217 (1962) (recognizing six situations in which cases are nonjusticiable for raising a political question, including cases in which there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it”).

34. *Allen v. Wright*, 468 U.S. 737, 750 (1984).

35. *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1179 (D.C. Cir. 1983) (Bork, J., concurring); accord *Allen*, 468 U.S. at 750.

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

37. See *Duke Power Co. v. Carolina Env’tl. Study Grp.*, 438 U.S. 59, 74 (1978).

38. See Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine?*

Under the modern test, a plaintiff must first show “injury in fact”; her injury must be “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.”<sup>39</sup> Economic injuries satisfy this prong of the test,<sup>40</sup> as do harms to property.<sup>41</sup> Noneconomic harms, such as aesthetic and recreational injuries, can also satisfy the injury prong.<sup>42</sup> But the Court has rejected claims of injury that it has found too abstract<sup>43</sup> or too remote.<sup>44</sup> The Court also rejects what it calls “generalized grievance[s],” where the plaintiff complains about something that “is ‘undifferentiated and common to all members of the public.’”<sup>45</sup>

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*An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 595-96 (2010); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1134-35 (2009); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 230 (1992); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1372-74 (1988). As recently as 1962, the Court framed standing using much less constraining language: “the gist of the question of standing” is whether “the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Baker*, 369 U.S. at 204; *see also* *Sierra Club v. Morton*, 405 U.S. 727, 758 (Blackmun, J., dissenting) (describing “the customary criteria” of standing as “the existence of a genuine dispute; the assurance of adversariness; and a conviction that the party whose standing is challenged will adequately represent the interests he asserts”).

39. *Lujan*, 504 U.S. at 560 (internal quotation marks omitted).

40. *See, e.g.*, *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) (“For standing purposes, a loss of even a small amount of money is ordinarily an ‘injury.’” (citation omitted)); *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005) (“Monetary harm is a classic form of injury-in-fact.”).

41. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 522 (2007) (holding that the loss of coastline to sea-level rise amounted to “particularized injury in [Massachusetts’s] capacity as a landowner”).

42. *See, e.g.*, *Sierra Club*, 405 U.S. at 738 (“[T]he interest alleged to have been injured ‘may reflect aesthetic, conservational, and recreational as well as economic values.’” (internal quotation marks omitted) (quoting *Data Processing Serv. v. Camp*, 397 U.S. 150, 154 (1970))).

43. *See* *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 226-27 (1974) (“[E]very provision of the Constitution was meant to serve the interests of all. Such a generalized interest, however, is too abstract to constitute a ‘case or controversy’ appropriate for judicial resolution.”).

44. *City of Los Angeles v. Lyons*, 461 U.S. 95, 110 (1983) (holding that plaintiff had no standing to seek an injunction against Los Angeles Police Department practice of using strangleholds, even though he had been subjected to the practice in the past, because he could not show a sufficient likelihood of being subjected to the practice in the future).

45. *FEC v. Akins*, 524 U.S. 11, 35 (1998) (Scalia, J., dissenting) (quoting *United States v. Richardson*, 428 U.S. 166, 177 (1974)).

Second, the injury must be “fairly traceable” to the actions of the defendant; although the plaintiff need not show that the defendant is the *sole* cause of the injury she has suffered, she must show the defendant is at least partially responsible.<sup>46</sup> So, for example, in *Warth v. Seldin*, the plaintiffs who sued to challenge a city’s exclusionary zoning law lacked standing because they could not show that the law, rather than independent decisions by developers, caused the lack of affordable housing.<sup>47</sup>

Third, the plaintiff must show that a favorable decision will redress her injury, at least in part. Thus *Warth* can be construed also as a failure to redress: invalidating the statute would not remedy the plaintiffs’ injuries.<sup>48</sup> As *Warth* makes clear, causation and redress can be opposite sides of the same coin. Remedy is, however, a separate requirement.<sup>49</sup> Even if a plaintiff shows that she has suffered an injury caused by the defendant, she will lack standing if the court is unable to order any suitable relief.<sup>50</sup>

The determination of standing is apparently simple but exceedingly complex at the margins. As the Court has recognized, the “doctrine incorporates concepts concededly not susceptible of precise definition.”<sup>51</sup> Moreover, it is easy to confuse the standing question with other questions, such as whether a plaintiff has stated a cause

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46. *See, e.g., Massachusetts*, 549 U.S. at 517, 524-25 (rejecting the EPA’s argument that causation was lacking in challenge to EPA’s failure to regulate greenhouse gases; even if other causes contributed to global climate change, EPA’s inaction still made “a meaningful contribution” and thus supported standing).

47. 422 U.S. 490, 506 (1975) (“[P]etitioners’ descriptions of their individual financial situations and housing needs suggest ... that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents’ assertedly illegal acts.”). This, of course, is a grudging description of causation: while striking down the exclusionary zoning law might not be *sufficient* to cause affordable housing to be built, it is certainly a *necessary* condition. *See id.* The Court has more generally given little guidance on what the causation analysis should entail.

48. *Id.* at 507 (“[Plaintiffs] rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation ... might improve were the court to afford relief.”).

49. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *see also Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 105, 107 (1998) (declining to decide whether plaintiff had suffered injury in fact because plaintiff would, in any case, fail the redressability prong of the standing test).

50. *E.g., Steele Co.*, 523 U.S. at 105-06 (holding that organization failed to satisfy Article III standing test because harms allegedly caused by the defendant could not be remedied by declaratory relief, injunctive relief, payment of litigation costs, or civil penalties payable to the United States Treasury).

51. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

of action. Standing is a threshold inquiry into *jurisdiction* and is importantly distinct from the *merits* question of whether the plaintiff states a claim, and yet the distinction can be difficult to make.<sup>52</sup>

The Court also continues to expand the requirements of standing. It is now clear, for example, that standing must be shown for each claim a plaintiff seeks to bring.<sup>53</sup> Similarly, although plaintiffs were originally required only to identify their concrete injuries (leaving the issue of remedy to the court's discretion),<sup>54</sup> the Supreme Court later determined that standing must be shown for each type of relief sought.<sup>55</sup> Relatedly, the Court previously suggested that, once one plaintiff had standing, the participation of other parties was permissible even if their Article III standing was not clear.<sup>56</sup> In other words, once one party had proven that a case or controversy existed, others could join the case regardless of their standing.<sup>57</sup> But the Court has now clarified that this is true only if the relief sought by all parties is identical; if one party seeks even slightly different relief, then that person must show standing on her own, regardless of the standing of other parties.<sup>58</sup>

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52. See *Steel Co.*, 523 U.S. at 89, 97 n.2. See generally Fletcher, *supra* note 17.

53. *Davis v. FEC*, 554 U.S. 724, 734 (2008) (“[S]tanding is not dispensed in gross.” (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996))). This view is not inevitable, however. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 266 n.30 (1963) (Brennan, J., concurring) (“[T]he complaint in every case thus far challenging an establishment [of religion] has set forth at least a colorable claim of infringement of free exercise. When the complaint includes both claims, and neither is frivolous, it would surely be overtechnical to say that a parent who does not detail the monetary cost of the [Establishment Clause violation] to him may ask the court to pass only upon the free-exercise claim, however logically the two may be related.”).

54. *Bell v. Hood*, 327 U.S. 678, 684 (1946) (“[W]here legal rights have been invaded [and a cause of action is available, a] federal court[] may use any available remedy to make good the wrong done.”).

55. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (holding that the plaintiff's standing to seek damages did not transfer to standing to seek an injunction).

56. *McConnell v. FEC*, 540 U.S. 93, 233 (2003) (“It is clear ... that the Federal Election Commission ... has standing, and therefore we need not address the standing of the intervenor-defendants, whose position here is identical to the FEC's.”), *overruled on other grounds* by *Citizens United v. FEC*, 558 U.S. 310 (2010).

57. See *id.*

58. *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) (“[A]n intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests.”).

## 2. Basic Criticisms

The complexity and continued expansion of the doctrine mean that results in the lower courts and in the Supreme Court itself are unpredictable.<sup>59</sup> Critics have accordingly called the doctrine “a morass,”<sup>60</sup> “incoherent,”<sup>61</sup> “manipulable,”<sup>62</sup> permeated with “doctrinal confusion,”<sup>63</sup> and without historical basis.<sup>64</sup> They have also argued that the doctrine permits merits decisions hidden as jurisdictional decisions<sup>65</sup> and imposes a “pointless constraint on courts.”<sup>66</sup> Indeed, dissenting members of the Court have accused majorities of using standing as “a cover” for improper analyses<sup>67</sup> and described the extremes of standing analysis as “a word game played by secret rules.”<sup>68</sup> The Court itself even stated that “[s]tanding has been called one of ‘the most amorphous [concepts] in the entire domain of public law,’”<sup>69</sup> in part because the words “cases and controversies ... have an iceberg quality, containing beneath their surface simplicity submerged complexities.”<sup>70</sup>

Commentators even accused courts of engaging in substantive due process through standing analysis,<sup>71</sup> contending that the doctrine permits courts to make important decisions about constitutional balance and separation of powers while pretending that

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59. See generally *Pierce*, *supra* note 22.

60. Chemerinsky, *supra* note 17, at 677.

61. Fletcher, *supra* note 17, at 221.

62. Sunstein, *Privatization*, *supra* note 17, at 1458.

63. *Id.*

64. See, e.g., *Winter*, *supra* note 38, at 1418-25.

65. See, e.g., Tushnet, *supra* note 17, at 663.

66. Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 75 (2007) (discussing standing and other justiciability doctrines).

67. *Allen v. Wright*, 468 U.S. 737, 767 (1984) (Brennan, J., dissenting).

68. *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

69. *Id.* at 99 (majority opinion) (second alteration in original) (quoting *Hearings on S. 2097 Before the Subcomm. on Constitutional Rights of the S. Judiciary Comm.*, 89th Cong. 498 (1966) (statement of Professor Paul A. Freund)).

70. *Id.* at 94 (internal quotations omitted).

71. See, e.g., Sunstein, *Privatization*, *supra* note 17, at 1480 (arguing that a strict view of standing produces results much like that of the *Lochner* era, “when constitutional provisions were similarly interpreted so as to frustrate regulatory initiatives in deference to private-law understandings of the legal system”); see also Fletcher, *supra* note 17, at 233 (“[O]ne may even say that the ‘injury in fact’ test is a form of substantive due process.”); Sunstein, *supra* note 38, at 167 (“[T]he injury-in-fact requirement should be counted as a prominent contemporary version of early twentieth-century substantive due process.”).

they are actually making technical decisions at the threshold.<sup>72</sup> Those decisions may constrain judicial power in ways inconsistent with the constitutional plan.<sup>73</sup> Many critics have argued that recent standing doctrine has improperly “reduc[ed] the permissible role of *Congress* in government policymaking.”<sup>74</sup> Congress should be able to write statutes in which *Congress* decides on proper remedies and enforcement actions.<sup>75</sup> The courts, by deciding when suits may go forward, interfere with that power.

Indeed, the barriers to congressional action in this arena are now formidable. Although in *Warth* the Court said that standing could be satisfied by “statutes creating legal rights,”<sup>76</sup> thus allowing Congress to confer standing on new plaintiffs, the Court later held that Article III prevents Congress from conferring standing on anyone who would not meet the *Court’s* requirements.<sup>77</sup> Thus, as the Court held in *Lujan*, Congress may create legal causes of action for those who suffer injuries in fact.<sup>78</sup> But it may not ignore Article III standing limitations.<sup>79</sup> The Court has emphasized this as recently

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72. See, e.g., Nichol, *supra* note 17, at 305 (contending that the injury-in-fact standard “should neither be used to restrict the powers of Congress to authorize jurisdiction, nor to force Article III authority into channels marked principally by the Justices’ own unexamined and unexplained preferences”); see also Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 101 (1984) (noting that, in addition to separation-of-powers issues, standing cases have implicated federalism and localism issues).

73. E.g., Chemerinsky, *supra* note 17, at 690 (“[T]here is no basis for the implicit assumption ... that less judicial review necessarily enhances separation of powers.”).

74. Pierce, *supra* note 17, at 1170; see Nichol, *supra* note 17, at 305; Smith, *supra* note 17, at 878 (“[C]onstitutionalizing prudential limits sometimes significantly harms congressional efforts to expand access to federal courts, especially Congress’s ability to create and enforce rights.”); see also David Krinsky, *How to Sue Without Standing: The Constitutionality of Citizen Suits in Non-Article III Tribunals*, 57 CASE W. RES. L. REV. 301, 308 (2007).

75. See Pierce, *supra* note 17, at 1201.

76. *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (emphasis added) (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)).

77. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). As I have argued, leaving the question of who may sue *entirely* in Congress’s hands is at least somewhat problematic, because Congress has the incentive to “shunt[] a tricky question into the court” in ways that might disturb the balance of power among the branches. Elliott, *Functions*, *supra* note 17, at 499. But the standing doctrine goes much further than required to protect against this danger. See *id.* at 499-501.

78. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992) (“Congress[] [can] elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.” (emphasis added)).

79. *Id.* at 576 (“Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement[,] ... they would be discarding a

as 2016.<sup>80</sup> Even if Congress purports to authorize “any person” to sue to enforce the law, the Court has said that such language merely reflects Congress’s intent to permit suits only as broadly as Article III authorizes.<sup>81</sup>

### *B. Private Attorneys General*

Standing doctrine prohibits the “pure” private attorney general: a plaintiff who would sue solely in the public’s interest, without having a concrete stake in the case. In this Subpart, I discuss the idea of the pure private attorney general, the Court’s rejection of it, and the remaining concept of the impure private attorney general.

#### *1. The Idea of the Pure Private Attorney General*

In the middle of the twentieth century, the Court toyed with the idea of a broad view of Article III, which would have allowed pure private attorneys general. Professor William Rubenstein tracks the origin of the idea to several mid-twentieth-century cases that mentioned either a private attorney general or a “King’s proctor”; citizens would be able to sue to protect the public, just as the Attorney General can.<sup>82</sup> The idea was also supported by academics:

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principle fundamental to the separate and distinct constitutional role of the Third Branch.” (emphasis added); *see also* *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016); *Grove*, *supra* note 5, at 782 (“[A]lthough Congress may, consistent with Article III, authorize the Executive Branch to assert the abstract ‘injury to the interest in seeing the law obeyed,’ Congress may not confer similarly broad standing on private parties.” (quoting *FEC v. Akins*, 524 U.S. 11, 24 (1998)). *See generally* Elliott, *Inability*, *supra* note 17.

80. *Spokeo*, 136 S. Ct. at 1547-48 (“It is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue a plaintiff who would not otherwise have standing.” (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)).

81. *E.g.*, *Bennett v. Spear*, 520 U.S. 154, 164-66 (1997).

82. *See* Rubenstein, *supra* note 5, at 2133-35 (“[T]he private attorney general[] made its first appearance in the legal literature in a 1943 decision by Judge Jerome Frank for the U.S. Court of Appeals for the Second Circuit.... In the decision’s key passage, Judge Frank concluded that Congress could authorize a private citizen to file suit even if the sole purpose of the case were to vindicate the public interest as opposed to some private interest of the litigant: ‘Such persons, so authorized, are, so to speak, private Attorney Generals.’ And thus the concept was hatched—sort of. The practice of private lawyers supplementing the enforcement of public laws was hardly novel .... Two years prior to Judge Frank’s decision for the Second Circuit, Judge Edgerton, of the D.C. Circuit, commenting on a similar type of litigant, stated, ‘[H]e appears only as a kind of King’s proctor, to vindicate the public interest.’” (alteration in



Professor Louis Jaffe, for example, argued that it was essentially irrelevant for Article III jurisdiction that a plaintiff pursued anything on his own account.<sup>83</sup> Whatever limits there might be on judicial power, he argued, those limits were not sensibly connected to “the character of the plaintiff and his claim for justice.”<sup>84</sup>

In other words, in Professor Jaffe’s view, the “plaintiff’s [personal stake in the case] (or lack of it) has no bearing on these questions.”<sup>85</sup> Instead, something besides the plaintiff’s stake would determine whether a case or controversy existed, including the desirability of citizen participation in government through litigation and the need for judicial intervention to protect individual rights in “cases where discrimination or repression is latent [and thus] where no particular individual is as yet a demonstrable object of such unconstitutional action.”<sup>86</sup>

A few Justices would have adopted Professor Jaffe’s approach. The second Justice Harlan would have held that pure private attorneys general “*are not constitutionally excluded* from the federal courts.”<sup>87</sup> Justice Blackmun, joined by Justices Brennan and Douglas, suggested something less broad: *associations* should be able to sue in the public interest.<sup>88</sup>

Such a broad authorization was not without its problems for these Justices, but those problems were not of a *constitutional* nature. Instead, “[t]he problem ultimately presented ... is ... to determine in what circumstances, consonant with the character and proper

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original) (footnotes omitted) (citing, inter alia, *Assoc. Indus. of New York v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943); *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 28 (D.C. Cir. 1941) (Edgerton, J., concurring); *FCC v. Nat’l Broad. Co.*, 319 U.S. 239, 265 n.1 (1943) (Douglas, J., dissenting))).

83. See Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1033 (1968).

84. *Id.* at 1041.

85. *Id.* at 1046-47.

86. *Id.* at 1045-46.

87. *Flast v. Cohen*, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting) (emphasis added).

88. *Sierra Club v. Morton*, 405 U.S. 727, 757-58 (1972) (Blackmun, J., dissenting) (“I would permit an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate environmental issues.”); *id.* at 741 (Douglas, J., dissenting) (“I share the views of my Brother Blackmun.”); *id.* at 755 (Brennan, J., dissenting) (“I agree that the Sierra Club has standing for the reasons stated by my Brother Blackmun.”).

functioning of the federal courts, such suits should be permitted.”<sup>89</sup> Thus, in Justice Harlan’s view, cases involving pure private attorneys general could be constrained by relying on Congress to authorize causes of action for such plaintiffs.<sup>90</sup>

## 2. *The Ban on Pure Private Attorneys General*

Despite these arguments, the Supreme Court made clear in 1972 that it would require the plaintiff in federal court to show a concrete interest in the lawsuit, barring the pure private attorney general. In *Sierra Club v. Morton*, the Sierra Club sued to stop the construction of a Disney ski resort in the Mineral King Valley of California.<sup>91</sup> The Club sued because of its general interest in promoting environmental values, and did not identify any members who had actually visited the Valley, a failing the Court found fatal.<sup>92</sup> The Court found Sierra “Club’s longstanding concern with and expertise in” environmental issues insufficient to give rise to standing under Article III;<sup>93</sup> if concern and expertise were all it took, far too many plaintiffs could invoke the authority of the federal courts.<sup>94</sup>

Instead, the Sierra Club had to show injury either to itself or its members.<sup>95</sup> The requisite injury could be harm to the members’ aesthetic or recreational values, but a showing of harm was mandatory.<sup>96</sup> Because the Sierra Club had not identified any injured members, it could not proceed.<sup>97</sup>

Under the modern doctrine, then, a plaintiff—even if she seeks to vindicate public interests—must satisfy the tripartite standing test of injury in fact, causation, and redressability in order to have access to federal courts. The Court has rooted this requirement in

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89. *Flast*, 392 U.S. at 120 (Harlan, J., dissenting).

90. *Id.* at 131.

91. 405 U.S. at 730.

92. *Id.* at 735.

93. *Id.* at 736.

94. *Id.* at 739-40 (“[I]f a ‘special interest’ in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any bona fide ‘special interest’ organization ... [or] any individual citizen with the same bona fide special interest.”).

95. *Id.* at 734-35.

96. *Id.*

97. *Id.*

the constitutional separation of powers. The judicial branch exists, the *Warth* Court emphasized, “only to redress or otherwise to protect against injury to the complaining party.”<sup>98</sup> Otherwise, “the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.”<sup>99</sup>

The ban on pure private attorneys general partakes of the overarching separation-of-powers theory of standing doctrine, which helps assure “the proper—and properly limited—role of the courts in a democratic society.”<sup>100</sup>

Pure private attorneys general, the Court believes, take the courts far beyond their constitutional purview, “conver[ting them] into judicial versions of college debating forums.”<sup>101</sup> As noted above,

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98. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

99. *Id.* at 500.

100. *Id.* at 498; *see also* *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (“The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.”). The ban on pure private attorneys general is not universally recognized as a requirement of a democratic republic. California long permitted pure private attorneys general under California Business and Professions Code section 17204, which authorized suit “by any person acting for the interests of itself, its members or the general public” to enforce the provisions of California’s Unfair Competition Law. CAL. BUS. & PROF. CODE § 17204 (West 2003) (amended in 2004 to require a showing of injury). California common law still permits plaintiffs to sue without particularized injury if they seek a writ of mandamus to compel the performance of a public duty. *See, e.g.,* *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1011 (Cal. 2011) (“[W]here the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the [petitioner] need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.” (quoting *Bd. of Soc. Welfare v. County of Los Angeles*, 27 Cal. 2d 98, 100-01 (1945) (second alteration in original)); *see also* Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003, 1007-08, 1007 n.22 (2001) (identifying Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, North Dakota, and South Dakota as states that have environmental statutes that can be enforced by citizens without a threshold showing of personal injury). Moreover, Israel’s Supreme Court, when it sits as the High Court of Justice, imposes no standing limitations. Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 106-10 (2002).

101. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982); *see also* *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 598 (2007).

this is a constitutional restriction that Congress cannot alter by statute.<sup>102</sup>

The rule is no different for associations, even though we might think that associations are particularly good litigators in the public interest.<sup>103</sup> Indeed, we might in some circumstances think that organizations are the *only* likely litigators; in the environmental and voting contexts, for example, harms may be so diffuse that no individual will ever be motivated to sue, yet a lawsuit may provide extensive societal benefit.<sup>104</sup> Nevertheless, the Sierra Club or the ACLU or the NAACP cannot bring suit simply because it believes litigation is desirable for the larger public. As discussed in Part I.C, the organization must either have standing on its own account or under the associational standing doctrine of *Hunt*.

### 3. “Impure” Private Attorneys General

Notably, the Court does not reject the general idea of a private attorney general, just the idea of a *pure* one.<sup>105</sup> If a plaintiff survives

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102. See Gladstone, *Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (“In no event ... may Congress abrogate the Art. III minima.”); *supra* note 88 and accompanying text; see also *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997); Elliott, *Balancing*, *supra* note 17, at 188-93 (arguing that *Boerne* stands in the way of congressional efforts to find standing by statute). *But see* Seidenfeld & Akre, *supra* note 17, at 747-52 (arguing that Congress’s power to find facts gives it more authority to define injury in fact and causation than has been recognized).

103. See, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 891 (1983) (“[I]f the purpose of standing is ‘to assure that concrete adverseness which sharpens the presentation of issues,’ the doctrine is remarkably ill designed for its end. Often the very best adversaries are national organizations such as the NAACP or the American Civil Liberties Union that have a keen interest in the abstract question at issue in the case, but no ‘concrete injury in fact’ whatever.” (quoting *Flast v. Cohen*, 392 U.S. 83, 99-101 (1968))); see *supra* notes 82-83 and accompanying text.

104. See, e.g., Christopher H. Schroeder, *Rights Against Risks*, 86 COLUM. L. REV. 495, 498-99 (1986) (“[E]xposures to [certain pollutants] ... pose small risks to any single individual. Yet the size of the exposed population or the lifetime exposure of single individuals makes ‘statistical deaths’ or ‘statistical carcinomas’ virtually certain.”).

105. See Rubenstein, *supra* note 5, at 2130-31; see also Daniel J. Meltzer, *Detering Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 251 (1988); Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 LAW & CONTEMP. PROBS. 179, 194 (1998). Thus, class action plaintiffs have been compared to private attorneys general because they vindicate their own interests as well as those of others. See, e.g., Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167, 167-70 (1997); Bryant Garth et al.,

the standing test, he then may act as a “private attorney general” and “argue the public interest in support of his claim.”<sup>106</sup> Thus, the Court may speak of parties’ “right to recover in their own interest *and* as ‘private attorneys general.’”<sup>107</sup> Indeed, there is no requirement even that the injury giving rise to standing be related to the *legal* claim the plaintiff wants to raise, so long as the injury alleged will be remedied by the relief sought.<sup>108</sup>

While Congress is forbidden to extend standing beyond the Court-circumscribed limits of Article III, Congress is permitted to promote citizen suits by the *impure* private attorney general and, accordingly, has in many statutes authorized the recovery of attorneys’ fees.<sup>109</sup> In *Newman*, the Court explains that such fees are necessary to compensate the plaintiff for pursuing a suit that benefits both the plaintiff *and* the public.<sup>110</sup> The availability of such fees does not confer standing, however.<sup>111</sup>

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*The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 353-57 (1988); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 90-93. *But see* Geoffrey C. Hazard, Jr., *Modeling Class Counsel*, 81 NEB. L. REV. 1397, 1403-06 (2003) (arguing that while the private attorney general analogy “has been an interesting idea and makes sense as a negative proposition, i.e., that class counsel’s roles are *not* like that of ordinary counsel.... as an affirmative proposition, the concept of private attorney general is not only unhelpful, it is also misleading”).

106. *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972).

107. *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 147 (1968) (Fortas, J., concurring) (emphasis added), *overruled on other grounds by* *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).

108. *E.g.*, *Duke Power Co. v. Carolina Env’tl. Study Grp.*, 438 U.S. 59, 72-75 (1978) (granting environmental plaintiffs standing, based on environmental and health injuries, to challenge the constitutionality of the Price-Anderson Act’s limitation on financial liability for nuclear plant accidents); *see also, e.g.*, *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1173 (10th Cir. 2004) (“But there is no requirement that the legal basis for the interest of a plaintiff that is ‘injured in fact’ be the same as, or even related to, the legal basis for the plaintiff’s claim.”).

109. *See, e.g.*, *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401-02 (1968) (per curiam) (interpreting attorneys’ fees provision of the Civil Rights Act of 1964 § 204(b), Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000a-3(b) (2012))).

110. *Id.* (“If successful plaintiffs were routinely forced to bear their own attorneys’ fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.”).

111. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 107 (1998) (“[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit.”).

### C. Associational Standing

The Court has long acknowledged that organizations may be appropriate litigants.<sup>112</sup> In *NAACP v. Button*, for example, the NAACP had standing because the organization itself had been harmed,<sup>113</sup> what courts call “direct standing.”<sup>114</sup> The NAACP could also sue on behalf of any members who had also suffered injury, permitting organizational standing that is derivative of the organization’s members’ interests.<sup>115</sup>

Associations are not simply appropriate litigants; they may also be the best or only litigants in certain situations.<sup>116</sup> As the Court noted in *Button*, for groups that lack political power, “association for litigation may be the most effective form of political association.”<sup>117</sup> The Court has recognized that people often join an organization “to create an effective vehicle for vindicating interests that they share with others.”<sup>118</sup> Indeed, because standing doctrine more readily permits suits by regulated entities (companies or individuals whose activities will be limited by government regulation) than by regulatory beneficiaries (those who will benefit from the restrictions imposed by government regulation),<sup>119</sup> even though

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112. “Association” or “organization” are not narrowly defined; even Wright & Miller’s discussion of associational standing seems to assume no definition is needed. 13A WRIGHT ET AL., *supra* note 6, § 3531.9.5. Corporations, at least publicly traded ones, probably are not “associations” of shareholders, *see id.*, though as noted below corporations can be members of associations, *see infra* notes 132-33 and accompanying text. *But see* Charles H. Steen & Michael B. Hopkins, *Corporate Governance Meets the Constitution: A Case Study of Nonprofit Membership Corporations and Their Associational Standing Under Article III*, 17 REV. LITIG. 209, 218 (1998) (noting that, if a nonprofit is organized as a corporation, its members “stand in the place of shareholders”). Legislatures should also not be considered “associations” in the *Hunt* sense, though this may be because their members lack standing to sue in many of the circumstances they might want to. *Cf. Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019) (holding that one house of the Virginia legislature lacked standing on its own account to represent interests of state).

113. 371 U.S. 415, 428 (1963).

114. *See, e.g., Meek v. Martinez*, 724 F. Supp. 888, 901 (S.D. Fla. 1987).

115. *Button*, 371 U.S. at 428.

116. *See supra* notes 103-04 (discussing difficulty of individual suit in cases of broadly diffused injury).

117. *Button*, 371 U.S. at 431.

118. *Int’l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 290 (1986).

119. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) (“[When] the plaintiff is himself an object of the action (or forgone action) at issue.... there is ordinarily little question

there are collective-action barriers to suits by regulatory beneficiaries.<sup>120</sup> The rest of this Subpart explains both direct and member-derived associational standing.

### 1. *Direct Standing for Associations*

Just as a human individual may sue if she shows injury in fact, causation, and redressability, so too may an organization if it shows the same on its own account.<sup>121</sup> An organization may show standing by demonstrating that it has lost or will lose funding or members because of the actions of the defendant and that a favorable ruling from the court will alleviate those losses.<sup>122</sup> An organization may also show injury and causation by alleging that the defendant's actions have required the organization to expend additional resources and that a favorable ruling from the court will alleviate the need to expend those resources.<sup>123</sup> Some courts appear to have approved a quite flexible approach to this second category, leading to criticism.<sup>124</sup>

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that [he has standing;] ... when, [however,] the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.”).

120. See Schroeder, *supra* note 104, at 535-36.

121. See, e.g., Warth v. Seldin, 422 U.S. 490, 511 (1975) (“[A]n [organization] may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.”).

122. See, e.g., *id.*

123. See, e.g., Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (finding that the organization was forced to spend resources rooting out defendant's allegedly discriminatory housing practices, detracting from its affordable-housing counseling activities); Common Cause/New York v. Brehm, 344 F. Supp. 3d 542, 548 (S.D.N.Y. 2018) (finding standing where organization was forced to divert resources from registering new voters to helping reinstate voters who had been purged from voting rolls).

124. See Ryan Baasch, *Reorganizing Organizational Standing*, 103 VA. L. REV. ONLINE 18, 19-20 (2017) (allowing an organization to “identif[y] an activity that conflicts with its mission and ... ma[ke] volitional counter-expenditures in response” causes a “self-inflicted injur[y]” that does not suffice for Article III (third alteration in original)); see also Fair Hous. Council v. Roommate.com, LLC, 666 F.3d 1216, 1225-27 (9th Cir. 2012) (Ikuta, J., concurring and dissenting) (criticizing perceived laxity in Ninth Circuit's standards for direct organizational standing). *But see*, e.g., Nat'l Treasury Emps. Union v. United States, 101 F.3d 1423, 1430 (D.C. Cir. 1996) (describing union's expenditures to combat the Line-Item Veto Act as potentially “unnecessary alarmism constituting a self-inflicted injury”).

## 2. Member-Derived Standing for Associations

As the *Button* case indicated, organizations may also satisfy Article III standing requirements by relying on a member's standing.<sup>125</sup> Requiring associations to find members with the requisite concrete connection to the lawsuit may be salutary for those organizations; rather than conducting their affairs in a rarefied atmosphere of experts and lawyers, the organization must find a member on the ground who can satisfy the Article III requirements.<sup>126</sup> Because the member need take no active role in the lawsuit, however, she may easily serve only as a figurehead rather than as a meaningful participant.<sup>127</sup>

Though association standing has already been recognized in earlier cases,<sup>128</sup> the requirements for member-derived standing were clarified in *Hunt v. Washington State Apple Advertising Commission*, where the Court set out a three-pronged test for associational standing: there must be (1) a member with Article III standing, (2) whose presence is not necessary to the lawsuit, and (3) the lawsuit must be germane to the organization's purpose.<sup>129</sup> The remainder of this Subpart discusses these requirements.

### a. Member with Standing

The basic requirements under the member-with-standing prong arise from the standing doctrine described in Part I.A. But there are some wrinkles related to the organizational nature of the plaintiff.

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125. *NAACP v. Button*, 371 U.S. 415, 428 (1963).

126. See Nathaniel B. Edmonds, Comment, *Associational Standing for Organizations with Internal Conflicts of Interest*, 69 U. CHI. L. REV. 351, 356 (2002); Vivian Weston Lathers, Comment, *Associational Third-Party Standing and Federal Jurisdiction Under Hunt*, 64 IOWA L. REV. 121, 131 (1978).

127. Cf. Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165, 168 (1990); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 406 (2000).

128. *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Nat'l Motor Freight Ass'n v. United States*, 372 U.S. 246, 247 (1963).

129. 432 U.S. 333, 343 (1977).



Most importantly, the organization must have members,<sup>130</sup> though it does not have to be a formal membership organization.<sup>131</sup> The members can be human beings, of course, but they can also be corporations<sup>132</sup> or other associations.<sup>133</sup> A would-be associational plaintiff that is not actually organized as a membership association, however, cannot invoke *Hunt*.<sup>134</sup>

The organization must then identify at least one member who has been injured in the concrete and particularized way required by the standing cases, whose injury is fairly traceable to the actions of the defendant, and whose injury can be redressed, at least in part, by the proposed remedy.<sup>135</sup> The organization need not show that a

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130. See, e.g., *Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 152, 159 (2d Cir. 2012) (holding that a private, nonprofit disability services contractor could not invoke *Hunt* because the contractor was not a membership organization in any sense). The D.C. Circuit rejected an attempt to claim everyone on an organization's mailing list as a member. See *Gettman v. DEA*, 290 F.3d 430, 434-35 (D.C. Cir. 2002).

131. *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25 (D.C. Cir. 2002) (holding that an organization can use *Hunt* if it "is the functional equivalent of a traditional membership organization").

An organization is the functional equivalent of a traditional membership organization if "(1) it ... serve[s] a specialized segment of the community; (2) it ... represent[s] individuals that have all the 'indicia of membership' including (i) electing the entity's leadership, (ii) serving in the entity, and (iii) financing the entity's activities; and (3) its fortunes [are] tied closely to those of its constituency." *Wash. Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 208 (D.D.C. 2007) (quoting *Fund Democracy*, 278 F.3d at 25).

There appears to be some dispute in the cases about whether an organization that *is* a formal membership organization may nevertheless have to show that it "serve[s] a specialized segment," has leadership elected by the members, and has "fortunes ... tied closely to those of its constituency." *Id.*; see *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 261 F. Supp. 3d 99, 107 (D. Mass. 2017) (noting unsettled question). Compare *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 29 (D.D.C. 2009) ("The inquiry into the indicia of membership ... is necessary only when an organization is not a traditional membership organization." (internal quotation marks omitted)), with *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 598 (D.C. Cir. 2015) (holding that the organization had already shown it was "a traditional membership organization with a defined mission that serves a discrete, stable membership with a definable set of common interests" but then inquiring into the internal functioning of the organization, including the role of membership in controlling organization).

132. See, e.g., *Nat'l Constructors Ass'n v. Nat'l Elec. Contractors Ass'n*, 498 F. Supp. 510, 515, 522 (D. Md. 1980).

133. See, e.g., *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 8-10 (1988).

134. See *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 286-90 (3d Cir. 2014) (rejecting organizational standing in part because "organizational documents state[d] that [the organization] [did] not have members"); see also *AARP v. EEOC*, 267 F. Supp. 3d 14, 23 (D.D.C. 2017) (collecting cases).

135. See *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

significant proportion of its membership is affected; one member suffices.<sup>136</sup> An organization with associations for members may rely on the standing of “its members’ members,”<sup>137</sup> and an organization may even be able to sue to help nonmembers if its members would have third-party standing to represent the interests of those nonmembers.<sup>138</sup>

The Supreme Court has also indicated that the member must be identified,<sup>139</sup> and so organizations ordinarily file affidavits from individuals who affirm that they are members of the organization and testify to facts that they believe meet the standing test.<sup>140</sup> The organization will typically solicit its membership to find a member with standing or will recruit someone with standing to become a member of the organization.<sup>141</sup> An association that fails to satisfy the member-with-standing prong typically has named no member

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136. *Id.* at 511 (“The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action.”).

137. 13A WRIGHT ET AL., *supra* note 6, § 3531.9.5.

138. *Id.* Third-party standing can arise in a number of circumstances. *See id.* § 3531.9.4. For example, a plaintiff who has suffered an injury in fact may seek to redress that injury by invoking the rights of a third party who faces a “hindrance” in protecting her own rights and to whom the plaintiff has a “close” relationship. *E.g.*, *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (permitting a white man convicted of murder to invoke the rights of black citizens excluded for allegedly discriminatory reasons from the jury that convicted him).

139. *See, e.g.*, *Ala. Leg. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1268-70 (2015); *Sierra Club v. Morton*, 405 U.S. 727, 736-37 (1972). The member’s actual name need not be given, if there is good reason to withhold it. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459-60 (1958). It may also be impossible to identify which member has been harmed, even if it is certain that such a member exists; there is some debate in the caselaw over whether an organization can proceed in reliance on that unnamed yet certain member. *See infra* notes 211-25 (discussing standing based on risk).

140. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-83 (2000).

141. *See, e.g.*, *Citizens Coal Council v. Matt Canestrone Contracting, Inc.*, 40 F. Supp. 3d 632, 641-42 (W.D. Pa. 2014) (finding standing where organization concededly recruited new members to satisfy the *Hunt* doctrine); *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 889-90 (C.D. Cal. 2010) (focusing on the fact that the proffered members had joined the organization by the time it filed the lawsuit), *vacated on other grounds* 658 F.3d 1162 (9th Cir. 2011). *But see* *Wash. Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 208 (D.D.C. 2007) (rejecting Washington Legal Foundation’s claim to be a membership organization by noting that the claim was “weakened” because proffered members had been recruited after decision to litigate had been taken). As discussed below, organizations can therefore *create* standing where it was previously lacking by recruiting as members individuals who satisfy Article III. *See infra* Part II.B.3.

at all<sup>142</sup> or has named members who themselves lack Article III standing.<sup>143</sup> This requirement is not demanding.<sup>144</sup>

*b. Case Can Proceed Without Member*

Even though the organization must proffer members with standing to satisfy *Hunt*, the actual participation of those individuals must be unnecessary for the suit to continue.<sup>145</sup> For example, in a suit where individualized proof of damages is required, and where such “damages run[] solely to [the association’s] members,”<sup>146</sup> an association may not be permitted to proceed as plaintiff; each member seeking damages would need to appear as a party to prove his or her entitlement to the remedy.<sup>147</sup> Similarly, the presence of individual members may be necessary—and associational standing proper—when the nature of the claim requires individualized proof of facts.<sup>148</sup> Because this prong of *Hunt* is prudential,<sup>149</sup> however, Congress can authorize organizations to litigate without the direct participation of the organizations’ members.<sup>150</sup>

Courts have also sometimes declined to allow cases to proceed under *Hunt* when a conflict existed among members over the litigation or between the members of the organization.<sup>151</sup> But

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142. See, e.g., *Sierra Club*, 405 U.S. at 735, 739.

143. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562-64 (1992) (holding that Defenders of Wildlife and other environmental organizations lacked standing because the proffered members lacked standing); see also *Sierra Club v. EPA*, 873 F.3d 946, 948, 950-51 (D.C. Cir. 2017) (finding that, of three members named, two lived in areas not subject to the challenged regulations, and the third lived in an area where the regulations, even if applicable, could have no adverse effect).

144. 18A WRIGHT ET AL., *supra* note 6, § 4456 (“Such standing is apt to be justified by showing a relatively slight impact on a small number of identified members.”).

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

146. *United Food & Commercial Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 546 (1996).

147. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975) (explaining that the suit over profits and losses of construction firms required the participation of each firm, so the membership organization could not bring suit on behalf of the firms).

148. E.g., *Mo. Prot. & Advocacy Servs., v. Carnahan*, 499 F.3d 803, 810 (8th Cir. 2007) (finding that the question of whether individuals had mental capacity to vote, yet had been adjudged incompetent to vote, required participation of those individuals).

149. *United Food*, 517 U.S. at 555.

150. *Id.* at 558.

151. E.g., *Harris v. McRae*, 448 U.S. 297, 320-321 (1980) (rejecting a religious group’s standing under *Hunt* to raise a free exercise challenge to the Hyde Amendment, which

conflicts within the membership over litigation are often not fatal to organizational standing.<sup>152</sup>

*c. Organizational Purpose*

Finally, the organization must show that the purpose of the lawsuit is germane to the association's mission.<sup>153</sup> This prong of the *Hunt* test recognizes that people often form organizations "to create an effective vehicle for vindicating interests that they share with others."<sup>154</sup> If the lawsuit is germane to the organization's purpose, one can expect that the membership would—at least in principle—support the lawsuit. So, for example, an association of apple growers may sue on behalf of its members for apple-growing-related issues,<sup>155</sup> but presumably not over private school vouchers or abortion or other non-apple-growing-related issues.

There are two issues: determining what the organization's mission is, and then deciding whether the lawsuit at issue is germane to that mission.

*i. Organizational Mission*

Some commentators have suggested that narrowness is inherent in the concept of a public interest organization: "All social reform organizations, whether nonprofit corporations or unincorporated associations, are formed for a particular purpose, be it fair housing, separation of church and state, or protection of the environment."<sup>156</sup>

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severely limits federal funding of abortion, because of the diversity of views on abortion within the group and the necessarily individual nature of a free exercise claim).

152. *E.g.*, *Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1409 (9th Cir. 1991) ("[W]e reject the suggestion that unanimity of membership be required in organizations seeking standing."); *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 286 (D.C. Cir. 1988). *See generally* Edmonds, *supra* note 126.

153. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 33, 343 (1977); *see also, e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958).

154. *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 290 (1986).

155. *See Hunt*, 432 U.S. at 343; *see also United Food*, 517 U.S. at 553 (discussing *Brock*, 477 U.S. at 281-86).

156. 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, 185 (1985) (footnote omitted).

Some courts assume the same. The District Court of Utah, for example, stated that organizations have “singleness of purpose.”<sup>157</sup>

But courts appear more likely to treat an organization’s purpose flexibly. The D.C. Circuit said that “the [Supreme] Court nowhere has suggested that mention of a given purpose in an organization’s organic papers is talismanic.”<sup>158</sup> As another judge put it, an organization need not use “any ‘magic words’ in its charter.”<sup>159</sup> And the purpose need not be a narrow one. The Third Circuit has said, “[We have found] no authority indicating that an association cannot satisfy the ‘germaneness’ requirement unless its purpose is narrow or specific.”<sup>160</sup>

Courts *have* rejected efforts by public interest law firms to invoke *Hunt* to their own benefit.<sup>161</sup> But it is not clear whether such firms fail under *Hunt* because they are not membership organizations or because their purposes are too amorphous.<sup>162</sup> As Judge Wald wrote, *Hunt* “prevent[s] associations from being merely law firms with standing.”<sup>163</sup>

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157. Mountain States Legal Found. *ex rel.* Ellis v. Dole, 655 F. Supp. 1424, 1426 (D. Utah 1987). *But see* Mussington v. St. Luke’s-Roosevelt Hosp. Ctr., 824 F. Supp. 427, 431 (S.D.N.Y. 1993) (“[T]wo of the organizations have purposes too broad to confer standing in this case.”).

158. Humane Soc’y v. Hodel, 840 F.2d 45, 59 (D.C. Cir. 1988).

159. Minn. Fed’n of Teachers v. Randall, 891 F.2d 1354, 1364 (8th Cir. 1989) (Heaney, J., concurring in part and dissenting in part).

160. Hosp. Council of W. Pa. v. City of Pittsburgh, 949 F.2d 83, 88 (3d Cir. 1991); *see also* Am. Charities for Reasonable Fundraising Regulation, Inc. v. Olsen, No. 2:08-cv-00875DAK, 2009 WL 5175202, at \*6 (D. Utah Dec. 18, 2009) (“Defendant argues that Plaintiffs’ members have no definable set of common interests because, in large part, its membership is too diverse and its structure too amorphous. American Charities, however, is seeking to protect interests that are central to their existence as a representative organization and are at least part of the reason that its members became members of the organization.”); Forum for Acad. & Institutional Rights, Inc. v. Rumsfeld, 291 F. Supp. 2d 269, 294 (D.N.J. 2003) (“The germaneness prong is satisfied because [the organization]’s mission is sufficiently broad to encompass the interests championed in this suit.”).

161. *See, e.g.*, Wash. Legal Found. v. Leavitt, 477 F. Supp. 2d 202, 207-08 (2007).

162. *See* McKinney v. U.S. Dep’t of Treasury, 799 F.2d 1544, 1556-57 (Fed. Cir. 1986); *see also* Wash. Legal Found., 477 F. Supp. 2d at 208, 212 (rejecting the Washington Legal Foundation’s claim to represent Medicare Part D subscribers).

163. *Humane Soc’y*, 840 F.2d at 58.

*ii. Germaneness*

Most courts have held that the test for germaneness is not a demanding one because the members of the organization will limit the organization's reach: "If the 'forces that cause individuals to band together' guarantee some degree of fair representation, they surely guarantee as well that associational policymakers will not run roughshod over the strongly held views of association members in fashioning litigation goals."<sup>164</sup> The D.C. Circuit thus described the germaneness requirement as "relatively loose,"<sup>165</sup> the Ninth Circuit called it "undemanding,"<sup>166</sup> and the Second Circuit thought "it significant that the *Hunt* Court used the word 'germane,' rather than the phrase 'at the core of,' or 'central to.'"<sup>167</sup> Dissenting members of the Supreme Court have criticized the majority for giving too little teeth to this aspect of *Hunt*.<sup>168</sup>

Even a loose version of the germaneness test excludes organizations at the margin. The Ninth Circuit, for example, rejected organizational standing for a cattle-ranching organization when it sought to bring a lawsuit regarding environmental issues, noting that the

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164. *Id.* at 56.

165. *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 286 (D.C. Cir. 1988); *see also* *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 597 (D.C. Cir. 2015) (holding that the litigation must be "pertinent" to the organization's purpose).

166. *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1159 (9th Cir. 1998).

167. *Bldg. & Constr. Trades Council of Buffalo & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 148 (2d Cir. 2006); *see also* *Am. Ins. Ass'n v. Selby*, 624 F. Supp. 267, 271 (D.D.C. 1985) ("An association's litigation interests must be truly unrelated to its organizational objectives before a court will declare that those interests are not germane."); *Med. Ass'n of Ala. v. Schweiker*, 554 F. Supp. 955, 965 (M.D. Ala. 1983) (stating that germaneness test requires that "the injury to [an association's] members has some reasonable connection with the reasons the members joined the organization and with the objectives of the organization"); *Nat'l Constructors Ass'n v. Nat'l Elec. Contractors Ass'n*, 498 F. Supp. 510, 521 (D. Md. 1980) (defining the germaneness standard as allowing suits by groups whose purposes are "pertinent or relevant to" the claim at issue); Crocker, *supra* note 16, at 2081 (citing cases).

A district court interpreted a Tenth Circuit decision regarding germaneness to require members to be injured "*qua* members" in order to proceed under *Hunt*. *See* *Mountain States Legal Found. ex rel. Ellis v. Dole*, 655 F. Supp. 1424, 1428 (D. Utah 1987) (citing *MSLF v. Costle*, 630 F.2d 754 (10th Cir. 1980)). But the Tenth Circuit held that there was no injury in fact at all. *See* *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 767 (10th Cir. 1980).

168. *See, e.g.*, *Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 296-97 (1986) (Powell, J., dissenting) (criticizing the Court's "formalistic" treatment of the germaneness prong and encouraging a meaningful inquiry).

organization's purpose was related to "trade and marketing."<sup>169</sup> The key, according to Judge Wald of the D.C. Circuit, is to "prevent[] litigious organizations from forcing the federal courts to resolve numerous issues as to which the organizations themselves enjoy little expertise and about which few of their members demonstrably care."<sup>170</sup>

But even a demanding germaneness requirement will provide little limit on organizational standing if an organization can have a broad purpose. And, as noted above, few courts seem inclined to reject an organization's asserted purpose based on how broad or narrow it is.<sup>171</sup>

### *3. Issues with Associations as Representative Litigants*

When an association litigates using member-derived standing, it acts to some extent in a representative capacity, and questions have been raised about the nature of that representation. Some argued, for example, that Congress had laid out the requirements for representative action by defining class actions in the Federal Rules of Civil Procedure.<sup>172</sup> The Court rejected this argument, contrasting the "ad hoc union" of a litigation class with an ongoing association that can "draw upon a pre-existing reservoir of expertise and capital."<sup>173</sup> Associations, the Court held, permit individuals "to create an effective vehicle for vindicating interests that they share

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169. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, 415 F.3d 1078, 1104 (9th Cir. 2005); *see also* *Minn. Fed'n of Teachers v. Randall*, 891 F.2d 1354, 1359 (8th Cir. 1989) (rejecting teachers' union's suit challenging tax expenditures as violative of Establishment Clause because the union's "charter fail[ed] to mention any interest in taxes").

170. *Humane Soc'y v. Hodel*, 840 F.2d 45, 57 (D.C. Cir. 1988); *see also* *Minn. Fed'n of Teachers*, 891 F.2d at 1361 (Heaney, J., concurring in part and dissenting in part) ("[T]he sole purpose of the germaneness test is merely to prevent organizations from pursuing litigation concerning subjects about which they have little expertise or concerning grounds *other than* those which have brought their membership together." (emphasis added)).

171. *See supra* Part I.C.2.c.i.

172. *Brock*, 477 U.S. at 288-89 (describing the defendant's argument that plaintiff union should be required to meet the class action requirements of Federal Rule of Civil Procedure 23).

173. *Id.* at 289; *see also* *Fisch*, *supra* note 105, at 167-70; *Garth et al.*, *supra* note 105, at 353-57; *Hazard*, *supra* note 105, at 1403-06; *Redish*, *supra* note 105, at 90-93.

with others.”<sup>174</sup> Organizations need only meet the requirements set forth in *Hunt*; they need not show numerosity, commonality, typicality, or adequacy of representation, as Rule 23 requires of a class action litigant.<sup>175</sup>

As the Court went on to note in *Brock*, the decision to allow associations to sue as representational litigants without guarantees of adequate representation does not raise due process issues should an argument later arise to preclude an association’s member from suing over the same issue.<sup>176</sup> This issue appears to have received little attention in the courts.<sup>177</sup>

## II. PURE PRIVATE ATTORNEYS GENERAL UNDER *HUNT*

If all associations were relatively small and had relatively focused purposes, the *Hunt* doctrine would be uncontroversial; who could complain about the Sierra Club litigating to protect the Mineral King Forest once the Club identified members who actually used the forest? Indeed, some cases assume that organizations *are* relatively focused. For example, an informal association can invoke *Hunt* if it has sufficient indicia of the traditional membership organization, which includes “serv[ing] a *specialized* segment of” individuals.<sup>178</sup>

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174. *Brock*, 477 U.S. at 290 (“The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all.” (internal quotation marks and citation omitted)).

175. FED. R. CIV. P. 23(a).

176. *Brock*, 477 U.S. at 290 (“Should an association be deficient in [representing its members], a judgment won against it might not preclude subsequent claims by the association’s members without offending due process principles.”); *see, e.g.*, *Martin v. Wilks*, 490 U.S. 755, 758-59 (1989), *superseded by* 42 U.S.C. § 2000e-2 as held by *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994); *Hansberry v. Lee*, 311 U.S. 32 (1940); *see also* 13A WRIGHT ET AL., *supra* note 6, § 3531.9.5; 18A WRIGHT ET AL., *supra* note 6, § 4456.

177. 13A WRIGHT ET AL., *supra* note 6, § 3531.9.5 (noting that “the law is poorly developed” on this question). For one case that wrestles with the complexities raised for preclusion by associational standing, *see* *Headwaters Inc. v. U.S. Forest Serv.*, 382 F.3d 1025 (9th Cir. 2004), *withdrawn and superseded on denial of reh’g en banc*, 399 F.3d 1047 (9th Cir. 2005). In particular, *see* Judge Berzon’s dissent, *id.* at 1032, and her later panel opinion, 399 F.3d 1047, 1050.

178. *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 26 (D.C. Cir. 2002) (emphasis added) (quoting *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 344 (1977)).



And one justification for associations as litigators is that they “have *specialized* expertise and research resources.”<sup>179</sup>

But, as noted above, most courts have addressed standing under *Hunt* in a way that permits quite broad purposes.<sup>180</sup> Some organizations may therefore be able to use *Hunt* to litigate almost any lawsuit. If so, *Hunt* permits associations—such as pure private attorneys general—to have a roving commission to enforce the law, which *Sierra Club* is meant to prohibit.

In the remainder of this Part, I show how associational standing doctrine interacts with modern developments in standing doctrine to allow some groups to act as nearly pure private attorneys general. In other words, I show how *Hunt* collides with *Sierra Club*.

#### A. Organizational Size and Breadth

Despite a few cases implying that some organizations can be too big to fit into the *Hunt* framework,<sup>181</sup> I can find no case where a court rejected a membership organization under *Hunt* for being too large. For example, courts have found that AARP has standing under *Hunt*,<sup>182</sup> and, if any organization were going to be rejected for size, it would be AARP. AARP is by far the largest membership organization in the United States, with a current membership of almost thirty-eight million people.<sup>183</sup> If AARP were a nation-state, it would be in the top forty by population—larger than either Australia or Canada.<sup>184</sup>

Moreover, although at least one court has described AARP’s mission as “defined,”<sup>185</sup> AARP’s own public statements of its mission

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179. *Brock*, 477 U.S. at 289 (emphasis added) (quoting Dale Gronemeir, Comment, *From Net to Sword: Organizational Representatives Litigating Their Members’ Claims*, 1974 U. ILL. L.F. 663, 669).

180. See *supra* notes 153-55 and accompanying text.

181. See, e.g., *Am. Legal Found. v. FCC*, 808 F.2d 84, 91 (D.C. Cir. 1987); *Associated Gen. Contractors v. Otter Tail Power Co.*, 611 F.2d 684, 691 (8th Cir. 1979).

182. E.g., *AARP v. EEOC*, 226 F. Supp. 3d 7, 17 (D.D.C. 2016).

183. *Id.*

184. *Countries in the World by Population (2019)*, WORLDOMETERS, <http://www.worldometers.info/world-population/population-by-country/> [<https://perma.cc/A8EP-3Y44>].

185. *AARP*, 226 F. Supp. 3d at 17 (“[AARP] has a defined mission: to enhance the quality of life for individuals as they age; to further independence, dignity, and purpose for individuals as they age; and to improve the image of aging.” (internal quotation marks and citations omitted)).

appear quite broad: a “mission to empower people to choose how they live as they age,”<sup>186</sup> which includes “help[ing] people turn their goals and dreams into real possibilities, strengthen[ing] communities and fight[ing] for the issues that matter most to families[,] such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse.”<sup>187</sup> As noted above, organizations are not required to use “talismanic”<sup>188</sup> or “magic words’ in [their] charters,”<sup>189</sup> and AARP itself uses the inclusive construction “such as” in listing possible areas of interest.<sup>190</sup>

Thus, if AARP were to bring a lawsuit about climate change, it certainly could make a plausible argument that climate change threatens its members’ ability “to choose how they live as they age.”<sup>191</sup> Imagine, for example, a member of AARP who has purchased a retirement home on a barrier island off the coast of South Carolina, a home that is threatened by rising sea levels and increased risk of hurricanes.<sup>192</sup> That person could readily meet the injury-in-fact requirement and—depending on the defendant and the causation and redressability requirements—AARP could invoke that member’s standing under *Hunt*.

What issue, then, is excluded by AARP’s stated mission? Given that one must be at least fifty years old to join AARP,<sup>193</sup> and that the organization’s purpose is linked to aging, it might not be germane to AARP’s mission to bring a lawsuit that, for example, deals with education policy. Yet grandparents frequently contribute to

186. AARP, *supra* note 10.

187. Press Release, AARP, New AARP Survey Assesses the Issues that Matter Most to African-Americans 50+ (June 2, 2014), <https://press.aarp.org/2014-06-02-New-AARP-Survey-Assesses-the-Issues-that-Matter-Most-to-African-Americans-50> [<https://perma.cc/W2XE-PTQ8>].

188. *Humane Soc’y v. Hodel*, 840 F.2d 45, 59 (D.C. Cir. 1988).

189. *Minn. Fed’n of Teachers v. Randall*, 891 F.2d 1354, 1364 (8th Cir. 1989).

190. AARP, *supra* note 187.

191. AARP, *supra* note 10.

192. See ‘*Geography of Risk*’ Calculates Who Pays When a Storm Comes to Shore, NPR (Oct. 17, 2019), <https://www.npr.org/2019/10/17/770812863/geography-of-risk-calculates-who-pays-when-a-storm-comes-to-shore> [<https://perma.cc/RTJ4-NPAR>] (“Americans have chosen to build \$3 trillion worth of property in some of the riskiest places on earth—the barrier islands and coastal flood plains of the Atlantic and Gulf Coast.”).

193. *Why Join AARP?*, AARP, <https://www.aarp.org/membership/> [<https://perma.cc/L3J5-D595>].

their grandchildren's educations, and education helps one follow particular life paths over others, which, in turn, affects how one chooses to age.<sup>194</sup> Indeed, some people over the age of fifty attend college.<sup>195</sup> Particularly in jurisdictions that treat the "germaneness" requirement flexibly,<sup>196</sup> AARP would presumably have great flexibility in what lawsuits it could bring.

No other traditional nonprofit organization comes close to AARP's size,<sup>197</sup> but political parties in the United States do. Some theorists have argued for generally treating political parties as membership organizations,<sup>198</sup> and some courts have applied *Hunt* to political parties.<sup>199</sup> Depending on who counts as members, the Democratic Party or Republican Party could have memberships in the tens of millions. Although most of the cases involve state parties and candidates,<sup>200</sup> and no court, as far as I can tell, has held that a party

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194. See John F. Waslik, *The Best Way to Help a Grandchild with College*, N.Y. TIMES (May 27, 2016), <https://www.nytimes.com/2016/05/28/your-money/the-best-way-to-help-a-grandchild-with-college.html> [<https://perma.cc/8NEH-Q4T3>].

195. See Laurie Quinn, *Going Back to College After 50: The New Normal?*, FORBES (July 1, 2018), <https://www.forbes.com/sites/nextavenue/2018/07/01/going-back-to-college-after-50-the-new-normal/> [<https://perma.cc/XP3L-B3L8>].

196. See *supra* notes 156-62 and accompanying text.

197. According to at least one Internet listing of large associations, AARP is by far the biggest membership association, followed by, using 2015 numbers from the American Society of Association Executives, the National Rifle Association (NRA) with 4.5 million members and the National Education Association (NEA) with 3.2 million members. AM. SOC'Y OF ASS'N EXECS., THE POWER OF ASSOCIATIONS 11 (2015), <https://www.thepowerofa.org/wp-content/uploads/2012/03/powerofassociations-2015.pdf> [<https://perma.cc/DN6C-QSRT>]. The NRA's original purpose was "to promote and encourage rifle shooting on a scientific basis" and describes itself today "as America's foremost defender of Second Amendment rights ... and the premier firearms education organization in the world." *A Brief History of the NRA*, NAT'L RIFLE ASS'N (internal quotations omitted), <https://home.nra.org/about-the-nra> [<https://perma.cc/F7AD-FVZN>]. The NEA's "mission is to advocate for education professionals and to unite [their] members and the nation to fulfill the promise of public education to prepare every student to succeed in a diverse and interdependent world." *NEA's Vision, Mission, and Values*, NAT'L EDUC. ASS'N, <http://www.nea.org/home/19583.htm> [<https://perma.cc/6NRZ-LMNJ>].

198. See, e.g., Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 817-18 (2000).

199. *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006) (using *Hunt*, in dicta, to find standing for a party based on the interests of a candidate); *Smith v. Boyle*, 959 F. Supp. 982, 986 (C.D. Ill. 1997) (finding *Hunt* standing for the Illinois Republican Party based on its members).

200. See, e.g., *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007); *Benkiser*, 459 F.3d at 587; *Boyle*, 959 F. Supp. at 986. *But see* *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 97-99 (1973) (discussing Democratic National Committee challenge to a television network's political advertising policies).

can predicate standing on its voters,<sup>201</sup> *Hunt* arguably permits the Democratic and Republican Parties to proceed as associations with standing based on their members.

First, should either party organize as a national-level membership organization, the doctrine would presumably accept that party as an association.<sup>202</sup> As explained above, courts do not impose significant limitations on the ways in which an association functions so long as it is *actually* a membership organization.<sup>203</sup> Any member of the party in the country could then serve to satisfy the membership-with-standing prong. And, although both parties are currently state based,<sup>204</sup> an association can be made up of other associations.<sup>205</sup> Given that courts have regularly held that state political parties have standing under *Hunt* based on their members,<sup>206</sup> the national parties—assuming their state parties are *members* of the national parties—would have *Hunt* standing as well.

Although most cases applying *Hunt* to the parties have involved voting or candidate issues,<sup>207</sup> the parties could conceivably invoke their platforms as stating their organizational purposes and assert extremely broad purposes under *Hunt*. Both parties' platforms cover the gamut of issues in American politics: the economy (including trade, taxes, job creation, and wages), energy, criminal justice, environment, infrastructure, technology, the financial system, marriage, abortion, religious liberty, gun policy, drug policy, voting,

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201. See, e.g., *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 811 (S.D. Ind. 2006) (holding that the Indiana Democratic Party could not invoke the interests of those who might vote Democratic: "Neither 'desiring' to vote for a candidate nor actually voting for that candidate constitutes membership or the substantial equivalent of membership in a political party").

202. As of 2019, both parties appear primarily to be organized through state-level parties, which themselves may be composed of county-level parties. See REPUBLICAN NAT'L COMM., THE RULES OF THE REPUBLICAN PARTY 1 (2016), [https://prod-cdn-static.gop.com/media/documents/2016-Republican-Rules-Reformatted2018\\_1533138132.pdf](https://prod-cdn-static.gop.com/media/documents/2016-Republican-Rules-Reformatted2018_1533138132.pdf) [<https://perma.cc/VLA9-DFJF>]; *Find Local GOP*, ALA. REPUBLICAN PARTY, <https://algop.org/our-party/find-local-gop> [<https://perma.cc/HS37-7XCA>]; *Party Organization*, DEMOCRATIC NAT'L COMM., <https://web.archive.org/web/20190326201502/https://democrats.org/about/party-organization/> [<https://perma.cc/NT3U-K46R>]; *Why Alabama Democrats?*, ALA. DEMOCRATS., <https://www.aldemocrats.org/about> [<https://perma.cc/7D5A-SU3V>].

203. See *supra* notes 130-31 and accompanying text.

204. See *supra* note 202.

205. See *supra* notes 137-38 and accompanying text.

206. See, e.g., *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006).

207. See *supra* notes 198-99.

agriculture, homeownership, education, health insurance and healthcare policy, retirement, immigration, civil rights, urban policy, human rights, military policy (including veterans), and foreign policy.<sup>208</sup> Given these broad platforms, the parties, such as AARP, might well be able to litigate any issue they choose, so long as at least one identified member satisfied the Article III standing test.

AARP and the major political parties are the only truly huge membership organizations, but even a small organization can satisfy *Hunt* if it can *gain* a member with standing. Courts have rejected arguments that associations have illicitly “manufactured” lawsuits by recruiting members with injury in fact.<sup>209</sup> Thus, although a large organization might have an easier time identifying a member with standing, a small organization can grow in a way that permits it to satisfy *Hunt*. If such an organization has a sufficiently broad purpose, it too could approach pure private attorney general status, simply by recruiting new members with the requisite injury as needed.

A smaller organization with a sufficiently broad purpose could also approach such status by exploiting recent wrinkles in standing doctrine. Remember that an organization seeking standing under *Hunt* must proffer a member with standing—with injury in fact, traceability, and redressability.<sup>210</sup> Although we often think of “injury” as encompassing direct physical, economic, recreational, or aesthetic harm, the federal courts have made clear that *risk* of

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208. See DEMOCRATIC PLATFORM COMM., 2016 DEMOCRATIC PARTY PLATFORM (2016), [https://democrats.org/wp-content/uploads/2018/10/2016\\_DNC\\_Platform.pdf](https://democrats.org/wp-content/uploads/2018/10/2016_DNC_Platform.pdf) [<https://perma.cc/7BDQ-57KU>]; REPUBLICAN NAT'L COMM., REPUBLICAN PLATFORM 2016, <https://prod-cdn-static.gop.com/static/home/data/platform.pdf> [<https://perma.cc/QV45-HFFV>].

209. See *Citizens Coal Council v. Matt Canestrone Contracting, Inc.*, 40 F. Supp. 3d 632, 641-42 (W.D. Pa. 2014) (finding standing where an organization concededly recruited new members to satisfy the *Hunt* doctrine; the court stated, “There is simply nothing inappropriate with an organization engaging in a grassroots effort to recruit members who share common interests with the mission of the organization”). Courts have forbidden organizations to proceed when the timing of new membership led to circumvention of deadlines or statutes of limitation. See, e.g., *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 436-37 (D.C. Cir. 1989) (holding that allowing standing based on new members would circumvent timing for filing petitions for review under the Resource Conservation and Recovery Act when the members did not join until after petitions were filed).

210. See *Duke Power Co. v. Carolina Env'tl. Study Grp.*, 438 U.S. 59, 74 (1978).

future harm can suffice as an injury.<sup>211</sup> Once risk can give rise to standing, it becomes far easier for an association to identify a member with standing because risks are often widely shared. Some courts even allowed the organization to proceed *without* identifying a specific member on the assumption that all the group's members have standing: "When the alleged harm is prospective, we have not required that the organizational plaintiffs name names because every member faces a probability of harm in the near and definite future."<sup>212</sup>

The Supreme Court may have rejected the permissibility of statistical standing based on risk of future harm. In *Summers v. Earth Island Institute*,<sup>213</sup> which involved challenges to U.S. Forest Service salvage-timber sales, the Court denied standing based on a statistical argument,<sup>214</sup> which the Court said "would make a mockery of our prior cases."<sup>215</sup> However, *Summers* did not actually involve the kind of statistical risk involved in the lower-court cases

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211. See, e.g., *Bryant v. Yellen*, 447 U.S. 352, 366-68 (1980). For discussions of the problems of the Court's stingy approach to risk-based standing, see Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 698 (2006); F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 57-58 (2012); Amanda Leiter, *Substance or Illusion? The Dangers of Imposing a Standing Threshold*, 97 GEO. L.J. 391, 394-95 (2009); Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494, 511-15 (2008) [hereinafter Nash, *Precautionary Principle*]; Jonathan Remy Nash, *Standing's Expected Value*, 111 MICH. L. REV. 1283, 1285 (2013) [hereinafter Nash, *Expected Value*].

212. Fla. State Conference of the NAACP v. Browning, 522 F.3d 1153, 1160 (11th Cir. 2008); see also *Nat. Res. Def. Council v. EPA*, 464 F.3d 1, 3 (D.C. Cir. 2006). The *Natural Resources Defense Council* court held that the NRDC had satisfied *Hunt* because it had introduced statistical evidence that the EPA's rule regarding the chemical methyl bromide would lead to an increased lifetime risk of death of 1 in 200,000. *Id.* at 7. Because the NRDC had "nearly half a million members," "two to four" of those members would "develop cancer as a result of the rule." *Id.* Of course, this represents a misunderstanding of the science of risk: it is possible that *no* NRDC members will get cancer, or that twenty will. See L. Maaike Helmus & Kelly M. Babchishin, *Primer on Risk Assessment and the Statistics Used to Evaluate Its Accuracy*, 44 CRIM. JUST. & BEHAV. 8, 9 (2017) ("[I]t is not possible to know with certainty whether [the event] will occur, until and unless it does (and gets detected)."); see also Nash, *Expected Value*, *supra* note 211, at 1298-1303.

213. 555 U.S. 488, 494-96 (2009). The Court held that Earth Island lacked standing, because it had identified no members who used the relevant tracts of land. *Id.* Earth Island had identified one member who used one tract, but that tract was then withdrawn from the contested sale. *Id.* The Court would not allow Earth Island to substitute another member who used a tract still included in the sale. *Id.* at 495-96.

214. *Id.* at 497.

215. *Id.* at 498.

discussed earlier; Earth Island did not need statistics to determine which of its members actually used the relevant tracts affected by the salvage sales.<sup>216</sup> In a true situation of risk, we cannot specifically identify *anyone* who will be so affected—science just tells us that *someone* is likely to be.

Most courts that address issues of risk and standing focus not on the ultimate consequence (death, illness, etc.), but on the increased risk of those consequences. In other words, individuals may show standing based on the increased risk they face, as the Supreme Court has recognized, rather than being required to show that they actually *will* die or get sick.<sup>217</sup> Although only a few individuals will ultimately become ill or die, *many* people face the risk. The Court has also noted that immediate injury can occur when one is faced with risk, if one must expend funds to monitor the risk.<sup>218</sup>

And, because associations have standing wherever their members have standing, associations may base their standing on the risks that their members face. Indeed, as some have suggested,

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216. Earth Island either had members who used the relevant tracts or it did not; there is no “risk” that its members will use the tracts in the future because they either will or they will not. Jonathan Nash argues that the case does not even *purport* to reject statistical standing. Nash, *Expected Value*, *supra* note 211, at 1294-96. Courts, however, have interpreted *Summers* to do so. *See Swanson Grp. Mfg. v. Jewell*, 790 F.3d 235, 244 (D.C. Cir. 2015) (“[A] statistical probability of injury to an unnamed member is insufficient to confer standing on the organizations.” (citing *Summers*, 55 U.S. at 498-99)).

217. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988) (“The likelihood of enforcement, with the concomitant probability that a landlord’s rent will be reduced below what he or she would otherwise be able to obtain in the absence of the Ordinance, is a sufficient threat of actual injury.”); *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) (requiring “a realistic danger” of injury). It is thus well established that risk of future harm can suffice for injury in fact, while considerable debate remains about the *level* of risk sufficient to meet the Article III standard. *See, e.g., Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006); *Nat. Res. Def. Council v. EPA*, 440 F.3d 476 (D.C. Cir. 2006), *vacated on reh’g*, 464 F.3d 1 (D.C. Cir. 2006); *Harris v. Bd. of Supervisors*, 366 F.3d 754, 761 (9th Cir. 2004); *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002) (“[A] credible threat of harm is sufficient to constitute actual injury for standing purposes.”); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234 (D.C. Cir. 1996) (“The more drastic the injury that government action makes more likely, the lesser the increment of probability necessary to establish standing.”); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 556 (5th Cir. 1996) (“That this injury is couched in terms of future impairment rather than past impairment is of no moment.”); *Dimarzo v. Cahill*, 575 F.2d 15, 18 (1st Cir. 1978).

218. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 154-55 (2010) (finding that the ongoing risk of transmission of modified genes to the plaintiff farmers’ crops required “certain measures to minimize the likelihood of potential contamination” and constituted injury in fact).

associations may be *better* plaintiffs in such contexts than the individual members given the collective action problems in responding to risk.<sup>219</sup> Risks can be widely spread, so that an organization with a relatively small number of members will nonetheless be likely to have a member within the relevant at-risk population. That organization will thus be able to satisfy *Hunt* if it can satisfy the germaneness prong; the broader the organization's purpose, the more likely it will have associational standing.

The limiting principle here is the scope of issues that might be subject to a risk analysis and thus give rise to standing based on a member's risk. Courts have allowed risk to satisfy the standing doctrine in a variety of areas: environmental risk,<sup>220</sup> enforcement risk,<sup>221</sup> workplace risk,<sup>222</sup> economic risk,<sup>223</sup> food-borne risk,<sup>224</sup> and medical risk.<sup>225</sup> The interaction of risk-based standing and *Hunt* therefore readily permits suit by groups with broad purposes.

The Supreme Court has also conferred broad standing in the procedural context. In *Lujan v. Defenders of Wildlife*, the Court acknowledged that the Article III standing test, if applied strictly, would preclude most lawsuits against the government for failure to comply with procedural statutes such as the Administrative Procedure Act and the National Environmental Policy Act; as a result, the test was applied less strictly in those cases.<sup>226</sup> Under this idea of "procedural standing," a plaintiff must still show that she has a concrete interest in the agency action, akin to meeting the injury-in-fact requirement.<sup>227</sup> But she need not meet the same requirements of traceability and redress as plaintiffs in other cases because it is impossible to show that following the proper procedures will result in averting the potential injury.<sup>228</sup>

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219. See *supra* note 104 and accompanying text.

220. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 505-06 (2007).

221. See, e.g., *Babbitt*, 442 U.S. at 293-94.

222. See, e.g., *Nat. Res. Def. Council v. FDA*, 710 F.3d 71, 80 (2d Cir. 2013).

223. See, e.g., *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988).

224. See, e.g., *Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir. 2003).

225. See, e.g., *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 570 (6th Cir. 2005).

226. 504 U.S. 555, 572 n.7 (1992).

227. *Id.* at 572 (explaining that the plaintiff must be able "to allege a[] discrete injury flowing from th[e procedural] failure").

228. *Id.* at 572 n.7 ("Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's



Such expansive procedural standing, such as risk-based standing, could readily give even a small organization with a broad purpose access to the federal courts under *Hunt* if the organization seeks to challenge a procedural failing. The organization would need only find one of the many people with a concrete interest in the particular government project, recruit that person as a member, and invoke that member's concrete interest.

Finally, one can readily hypothesize an organization with a purpose that precisely overlaps with the pure private attorney general's desire to litigate. Imagine an Organization of Americans for the Rule of Law (OARL), whose explicit purpose is to protect our democratic republic from recent assaults on its integrity by suing anyone OARL concludes has committed an egregious violation of legal standards.<sup>229</sup> OARL is organized in a way that undoubtedly fits the courts' doctrine on membership organizations, so that it can invoke *Hunt* as a basis of standing.<sup>230</sup> OARL could become very popular, so that it quickly grows quite large and thus is likely to have a member with standing for any particular violation of the rule of law. Or OARL could successfully recruit a member with standing for each lawsuit it seeks to bring.

The members themselves would have to have Article III standing: they could not be mere interested bystanders, outraged by violations of the law.<sup>231</sup> But it is not hard to imagine finding a suitable member with standing for most lawsuits OARL might wish to bring. For example, recent Emoluments Clause litigation, has argued that President Trump's hotels (including the restaurants within them) have illegally profited from his office; at least one of those cases relies on the harm caused to employees at competing restaurants to satisfy Article III associational standing requirements.<sup>232</sup> If those

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failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.”).

229. See, e.g., TIMOTHY SNYDER, *THE ROAD TO UNFREEDOM: RUSSIA, EUROPE, AMERICA COVER COPY*, 9-12 (2018) (arguing that western democratic institutions are under assault, and that we face a turning point “between equality and oligarchy, individuality and totality, and truth and falsehood”).

230. See *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

231. *Lujan*, 504 U.S. at 572-74.

232. Second Amended Complaint ¶ 13, *Citizens for Responsibility & Ethics in Wash. v. Trump*, No. 1:17-cv-00458-RA, 2017 WL 2734681 (S.D.N.Y. May 10, 2017).

employees joined OARL, then OARL could pursue the Emoluments Clause litigation.

On this description, would OARL not be the quintessential pure private attorney general? Yet, under *Hunt* and the cases that interpret *Hunt*, OARL would appear to be an acceptable membership organization, able to litigate based on its members' standing.

### B. Cities

Cities<sup>233</sup> provide perhaps the most interesting case of institutional standing for an amorphous group, in part because of a recent surge of academic attention to cities as impact litigators.<sup>234</sup> Indeed, over the last two decades, cities have emerged as important plaintiffs. More than 2000 U.S. cities and counties sued Purdue Pharma over the opioid crisis.<sup>235</sup> Miami, Baltimore, Oakland, Los Angeles,

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233. While my discussion here focuses on cities, the analysis arguably applies to any local political jurisdiction, including counties. I do not discuss organizational standing for states, as states may sue in *parens patriae* and receive “special solicitude” in standing analysis. *See supra* note 28. I also do not discuss organizational standing for Native American tribes, because the question of whether tribes can sue in *parens patriae* appears vexed. *See* Bradford C. Mank, *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation*, 2012 MICH. ST. L. REV. 869, 899-900, 900 n.237. If tribes cannot sue in *parens patriae*, then the arguments made regarding municipalities in the articles cited below could presumably be extended to them. *See infra* note 247.

234. *See* Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 59 (2014); Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 389 (2006); Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L.J. 1903, 1903 (2013); Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 1 (2012); Michael Sarbanes & Kathleen Skullney, *Taking Communities Seriously: Should Community Associations Have Standing in Maryland?*, 6 MD. J. CONTEMP. LEGAL ISSUES 283, 284 (1995) (discussing the possibility of standing for community associations); Eli Savit, *States Empowering Plaintiff Cities*, 52 U. MICH. J.L. REFORM 581, 602, 604-06 (2019); Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1229-32 (2018). *See generally* Kathleen S. Morris, *Cities Seeking Justice: Local Government Litigation in the Public Interest*, in HOW CITIES WILL SAVE THE WORLD: URBAN INNOVATION IN THE FACE OF POPULATION FLOWS, CLIMATE CHANGE AND ECONOMIC INEQUALITY 189 (Ray Brescia & John Travis Marshall eds., 2016) [hereinafter *Cities Seeking Justice*].

235. Lenny Bernstein, et al., *Purdue Pharma Reaches Tentative Deal in Federal, State Opioid Lawsuits*, WASH. POST (Sept. 11, 2019, 1:50 PM), [https://www.washingtonpost.com/health/purdue-pharma-reaches-tentative-settlement-in-federal-lawsuit-and-some-state-litigation/2019/09/11/ce6cb942-d4b8-11e9-9343-40db57cf6abd\\_story.html](https://www.washingtonpost.com/health/purdue-pharma-reaches-tentative-settlement-in-federal-lawsuit-and-some-state-litigation/2019/09/11/ce6cb942-d4b8-11e9-9343-40db57cf6abd_story.html) [<https://perma.cc/H8JF-YT85>] (describing settlement of opioid litigation “with 23 states and more than 2,000

and Chicago sued banks over the 2008 mortgage crisis.<sup>236</sup> New York City and eight California municipalities sued ExxonMobil over global climate change.<sup>237</sup> Several cities joined states to challenge the Trump administration's citizenship question for the 2020 census.<sup>238</sup> The City of San Francisco even has an Affirmative Litigation Task Force, which operates like a nonprofit public interest law firm within the City Attorney's Office and has litigated a wide variety of prominent issues, including marriage equality, immigrants' rights, financial consumer protection, consumer privacy, and wage theft.<sup>239</sup>

The increasing number of impact litigation cases brought by cities has led to increasing attention, both in cases<sup>240</sup> and in academic literature,<sup>241</sup> to the standing of cities to litigate. Because they can be large and have broad purposes, can cities approach the status of

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cities and counties").

236. Robert Barnes, *Supreme Court Says Cities Can Sue Big Banks over Housing Bubble Damages*, WASH. POST (May 1, 2017), [https://www.washingtonpost.com/politics/courts\\_law/cities-may-sue-big-banks-over-predatory-lending-damage-supreme-court-rules/2017/05/01/cf8c108a-2e79-11e7-9534-00e4656c22aa\\_story.html](https://www.washingtonpost.com/politics/courts_law/cities-may-sue-big-banks-over-predatory-lending-damage-supreme-court-rules/2017/05/01/cf8c108a-2e79-11e7-9534-00e4656c22aa_story.html) [<https://perma.cc/LE3M-X88V>]; see also *Cities Seeking Justice*, *supra* note 234, at 190.

237. Natasha Geiling, *The List of Cities Suing Major Fossil Fuel Companies over Climate Change Just Got Longer*, THINKPROGRESS (Jan. 23, 2018, 2:30 PM), <https://thinkprogress.org/richmond-california-climate-lawsuit-478382e0d16e/> [<https://perma.cc/QAL3-T672>].

238. Larry Neumeister, *States, Cities Sue U.S. Government over Census Citizenship Question*, CHI. TRIBUNE (Apr. 3, 2018, 12:55 PM), <https://www.chicagotribune.com/nation-world/ct-census-citizenship-question-lawsuit-20180403-story.html> [<https://perma.cc/LZ52-B48Z>].

239. *Affirmative Litigation*, CITY ATTY OF S.F., <https://www.sfcityattorney.org/aboutus/teams/affirmative-litigation> [<https://perma.cc/DC52-2HW6>]. The Task Force works with students from Yale University's "San Francisco Affirmative Litigation Project ... [which] is a partnership between Yale Law School and the San Francisco City Attorney's Office ... [that] conceive[s], develop[s], and litigate[s] some of the most innovative public-interest lawsuits in the country—lawsuits that tackle problems with local dimensions but national effects." *San Francisco Affirmative Litigation Project*, YALE L. SCH., <https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/san-francisco-affirmative-litigation-project> [<https://perma.cc/24R5-KNA2>].

240. See, e.g., *Camden Cty. Bd. of Chosen Freeholders v. Berretta, U.S.A. Corp.*, 273 F.3d 536, 539 (3d Cir. 2001) (denying standing because the connection between injury and defendant's action was too tenuous); *City of Birmingham v. Citigroup Inc.*, No. CV-09-BE-467-S, 2009 WL 8652915, at \*1, \*4-5 (N.D. Ala. Aug. 19, 2009) (same).

241. See generally Caruso, *supra* note 234; Engel, *supra* note 234; Savit, *supra* note 234; Swan, *supra* note 234.

pure private<sup>242</sup> attorney general under *Hunt*? This Subpart addresses these questions.<sup>243</sup>

Cities, of course, may have direct standing to sue. Cities suing Big Pharma, for example, have made direct standing arguments by pointing to the huge costs imposed by the opioid crisis.<sup>244</sup> San Francisco similarly alleged that it was directly harmed by California's then-existing ban on marriage between same-sex couples; the city cited costs expended on social services and loss of revenue.<sup>245</sup>

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242. Those who act for cities are ultimately controlled by elections; they do not seem "private" in the way that, for example, the Sierra Club is a private (as opposed to public) organization. But because cities do not have access to the courts in the same way that states and the federal government do, *see infra* notes 244-50 and accompanying text, and because my focus here is on those who argue that cities should be treated in the same way as private associations, *see infra* notes 260-62 and accompanying text, I make the (admittedly imperfect) decision to treat cities as potential private attorneys general.

243. The standing question must be separated from the question of whether the municipality has *capacity* to sue under state law. Here a brief primer on local government law is helpful. In general, municipalities have no authority other than that delegated to them by state governments. 1 PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* § 2:6 (5th ed. 2019). Many states delegate power in gross, giving municipalities the power of "home-rule." *Id.* In such states, municipalities may exercise any power the state has, unless specifically preempted by state law. *Id.* At least one state has a constitutional provision prohibiting state preemption. *See* COLO. CONST. art. XX, § 6 (providing home rule and stating that municipal laws "shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith"). Municipalities in home-rule states thus always have the *capacity* to initiate lawsuits. *See* SALKIN, *supra*, § 2.6.

Other states delegate power far more narrowly. In states that follow "Dillon's Rule," municipalities may exercise only such powers as are delegated to them in state legislation, statute by statute. 1 JAMES A. KUSHNER, *SUBDIVISION LAW & GROWTH MANAGEMENT* § 1.18 (2d ed. 2011). Municipalities in such states would have to point to the state statutes authorizing them (either explicitly or implicitly) to bring particular lawsuits. *See, e.g.*, ALA. CODE § 11-1-2 (1975) ("Every county is a body corporate, with power to sue or be sued in any court of record."); *id.* § 11-40-1 ("All municipal organizations now existing in the State of Alabama ... and all towns and cities that may hereafter be incorporated under the provisions of this title shall be bodies politic and corporate ... and each under such name as the 'City of .....' or 'Town of .....' as the case may be, shall sue and be sued.").

244. *See* Nino C. Monea, *Cities v. Big Pharma: Municipal Affirmative Litigation & the Opioid Crisis*, A.B.A. (2019), [https://www.americanbar.org/groups/state\\_local\\_government/publications/urban\\_lawyer/2019/spring/opioid/](https://www.americanbar.org/groups/state_local_government/publications/urban_lawyer/2019/spring/opioid/) [<https://perma.cc/56FA-9NYW>]. A New York City complaint, for example, alleged that New York has "spen[t] millions of dollars on substance abuse treatment programs, hospital services, emergency medical services and law enforcement." J. David Goodman & William Neuman, *New York City Sues Drug Companies over Opioid Crisis*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/nyregion/nyc-de-blasio-opioid-lawsuit.html> [<https://perma.cc/YYK5-2NVH>].

245. Complaint in Intervention for Declaratory, Injunctive or Other Relief at 4, *Perry v. Schwarzenegger*, No. 09-CV-2292 VRW, 2009 WL 2628360 (N.D. Cal. Aug. 20, 2009) (citing "health care, welfare benefits, and other social services to citizens whose mental and physical

But when cities do not have direct standing, they apparently have no *parens patriae* standing as the federal government or the states do.<sup>246</sup> Some cities have therefore turned to *Hunt*.<sup>247</sup> But are the citizens of municipalities “members” of cities in the same way that the Sierra Club has members?<sup>248</sup> And do cities have “purposes” in the same way that corporations and nonprofit organizations do?<sup>249</sup> Although the common-sense response might be “no,”<sup>250</sup> the way the cases have evolved in the lower courts suggests that cities may, in fact, meet the *Hunt* test.

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health suffers because of discrimination and to citizens who become dependent on public resources when families disintegrate” and loss of “revenue that would be generated by the weddings of same-sex couples and associated tourism”).

246. *Parens patriae* literally means “parent of the country.” *Parens patriae*, OXFORD ENG. DICTIONARY, <https://www.oed.com/view/Entry/137815?redirectedFrom=parens+patriae#eid> [<https://perma.cc/C26G-39D9>]. The *parens patriae* doctrine allows the federal and state governments to sue on behalf of their citizens when a sufficiently broad swath of citizens is harmed and the government sues to protect their health and welfare. *Parens Patriae*, BLACK’S LAW DICTIONARY (11th ed. 2019); see 13B WRIGHT ET AL., *supra* note 6, § 3531.11 (dating doctrine of federal *parens patriae* to *In re Debs*, 158 U.S. 564 (1895)); *id.* § 3531.11.1 (describing Alfred L. Snapp & Son v. Puerto Rico *ex rel. Barez*, 458 U.S. 592, 607 (1982), as the leading case on state *parens patriae*). See generally F. Andrew Hessick, *Quasi-Sovereign Standing*, 94 NOTRE DAME L. REV. 1927 (2019). Cities have contended that they too can invoke the health and welfare of their citizens as a basis for standing in federal courts; but most courts to address the question have concluded that municipalities have no authority to proceed in *parens patriae*. See Caruso, *supra* note 234, at 69-71 (collecting and analyzing cases). Indeed, one commentator stated flatly that “[t]he federal courts have unequivocally held that political subdivisions cannot bring claims as *parens patriae* because their power is derivative, not sovereign.” Engel, *supra* note 234, at 365; see also Savit, *supra* note 234, at 602-06. There is some uncertainty in the case law about whether the ability to sue in *parens patriae* is inherent in the sovereign status of the state or is merely a special form of representational litigation. Compare *Snapp*, 458 U.S. at 602 (“[There are] a set of interests that the State has in the well-being of its populace.”), with *Massachusetts v. EPA*, 549 U.S. 497, 538 (2007) (Roberts, C.J., dissenting) (“[A] State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III.”).

247. *E.g.*, *City of Stamps v. ALCOA, Inc.*, No. 05-1049, 2006 WL 2254406, at \*5-6 (W.D. Ark. Aug. 7, 2006) (allowing city to proceed under *Hunt*).

248. See *Sierra Club v. Morton*, 405 U.S. 727, 730 (1972).

249. See Burnham, *supra* note 156, at 185.

250. See, *e.g.*, *City of Olmsted Falls v. FAA*, 292 F.3d 261, 267-68 (D.C. Cir. 2002) (“The City’s analogy of its representation of its citizens to a private organization’s representation of its members misconceives the very concept of associational standing.... The City does not have ‘members’ who have voluntarily associated, nor are the interests it seeks to assert here germane to its *purpose*.”).

### 1. *Membership in Cities*

The argument that cities have members seems, at first, to rely on a false analogy. One is simply not a “member” of a city the way one might be a member of the Sierra Club or the ACLU. If I ask my neighbor what her relationship to the city of Tuscaloosa is, she might say “I live in Tuscaloosa” or “I am a resident of Tuscaloosa,” but it seems highly unlikely that she would say “I am a member of Tuscaloosa.”<sup>251</sup>

An underlying intuition may be that I am not as free to quit Tuscaloosa as I am to quit the Sierra Club. So, for example, *Collins English Dictionary* says that “[a] member of an organization such as a club or a political party is a person who has *officially joined* the organization.”<sup>252</sup> It is far easier for me to join or quit the Sierra Club than it is for me to join or quit the city of Tuscaloosa, and thus the voluntary nature of my Sierra Club membership can be distinguished from my less voluntary “membership” in Tuscaloosa. Contrary to the intuition that volition should be considered a characteristic of membership in the *Hunt* sense, however, I am considered a member of many things that I have not officially chosen to be part of: I am a member of society and a member of the public.<sup>253</sup>

And, indeed, freedom to join or quit the membership of an association has not actually been considered necessary for associational standing. *Hunt* itself involved an organization with compulsory “membership”: “Nor do we find it significant in determining whether the Commission may properly represent its constituency that ‘membership’ is ‘compelled’ in the form of mandatory assessments.”<sup>254</sup> The Court compared membership in the Apple Advertising Commission to membership in a union or a state bar association, which is often mandatory, “[y]et in neither instance would it be

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251. *Cf.* *Yates v. United States*, 135 S. Ct. 1074, 1089 (2015) (Alito, J., concurring) (“But who wouldn’t raise an eyebrow if a neighbor, when asked to identify something similar to a ‘record’ or ‘document,’ said ‘crocodile?’”).

252. *Member*, COLLINS ENG. DICTIONARY (emphasis added), <https://www.collinsdictionary.com/dictionary/english/member> [<https://perma.cc/5ZBU-LN8N>].

253. *See, e.g., Member*, n. and adj., OXFORD ENG. DICTIONARY, <http://www.oed.com/view/Entry/116296> [<https://perma.cc/JVZ8-DXED>] (giving as example under the word “member,” “I should be happy, if I were a useful member of society” (quoting 1 MARIA EDGEWORTH, MORAL TALES FOR YOUNG PEOPLE 78 (1801))).

254. *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 345 (1977).

reasonable to suggest that such an organization lacked standing to assert the claims of its constituents.”<sup>255</sup>

The *Hunt* Court noted the ways in which the Apple Advertising Commission was like a traditional membership organization:

They alone elect the members of the Commission; they alone may serve on the Commission; they alone finance its activities, including the costs of this lawsuit, through assessments levied upon them. In a very real sense, therefore, the Commission ... provides the means by which [its members] express their collective views and protect their collective interests.<sup>256</sup>

These factors, and not the voluntariness of the membership, were relevant to the Court in determining whether the Commission could assert the claims of its members.<sup>257</sup>

Are cities the same? One arguably has as much or more choice about one’s decision to remain in a city as the apple growers in *Hunt* had regarding their membership in the Apple Advertising Commission; to quit the Commission, an apple grower would have had to stop growing apples and, to quit a city, one would have to move.<sup>258</sup> And, like the apple growers, city voters (though not all city *residents*) elect the leaders of the city and city taxpayers (though not all city residents) fund the city’s activities.<sup>259</sup>

Some cases support treating cities as membership organizations.<sup>260</sup> A number of governmental entities, including the Apple

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255. *Id.*

256. *Id.* at 344-45.

257. *See id.*

258. *See id.* at 336-37.

259. Swan, *supra* note 234, at 1258. (“[C]ity residents alone elect, comprise, and at least partially finance their local government. This gives city residents a better claim to ‘membership’ than many members of litigating associations, who may donate to an organization but have no real further hand in its activities.”) Note that Professor Swan uses the term “residents”; while some local jurisdictions allow noncitizens to vote, in most localities voting rights are restricted not only to those who are residents but also to those who are citizens of the United States. *E.g.*, Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 *LAW & INEQ.* 271, 276 (2000); David M. Howard, Note, *Potential Citizens’ Rights: The Case for Permanent Resident Voting*, 95 *TEX. L. REV.* 1393, 1393-95 (2017). And, of course, many people (especially those under eighteen) reside in cities without voting or paying taxes.

260. It is worth noting that an elitist set of assumptions seems to underlie the idea of citizens as “members” in the membership-organization sense. Professor Swan, for example,

Advertising Commission in *Hunt* itself, have been permitted to proceed under *Hunt*, which suggests that cities, as governmental entities, should also be able to invoke *Hunt*.<sup>261</sup> And cities have already invoked associational standing with some success.<sup>262</sup> Arguably, then, a city could invoke the *Hunt* test to sue based on the injury of one of its citizens.

At the same time, however, defining the “membership” of a municipality presents trick questions. Who counts as a “member”? All residents of the municipality? All residents who are citizens? All residents who are of voting age? What about cities that impose commuter taxes—are those commuters also “members” of the

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says, “People tend to ‘emotionally affiliate with their city of residence,’ and ‘[a] city can argue that its residents chose where to live’ and who ‘to affiliate with,’ and thus, in some sense, have also chosen ‘to be represented by [] that city.’” Swan, *supra* note 234, at 1258 (alterations in original) (quoting Caruso, *supra* note 234, at 76). This assumes that the resident is wealthy enough to be able to think about changing cities. Yet, of course, many people live in cities because they were born there or because their families moved them there, and due to lack of resources have never been able to leave. Thus, if *Hunt* applies to municipalities, a city would be able to show standing under *Hunt* by claiming to represent the interests of its “members,” even if those “members” might actually want to live elsewhere. However, as noted above, the voluntariness of membership plays no role in *Hunt*, which itself involved an involuntary organization. See *supra* notes 254-57 and accompanying text.

261. See, e.g., *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1110-11 (9th Cir. 2003) (protection and advocacy agency); *Westlands Water Dist. v. U.S. Dep’t of the Interior*, 850 F. Supp. 1388, 1414 (E.D. Cal. 1994) (water district); *Meek v. Martinez*, 724 F. Supp. 888, 901 (S.D. Fla. 1987) (advocacy agency).

262. See *City of Milwaukee v. Saxbe*, 546 F.2d 693, 697-99 (7th Cir. 1976) (recognizing the applicability of *Hunt* to cities but finding that the city did not satisfy *Hunt* factors in this case); *City of Stamps v. ALCOA, Inc.*, No. 05-1049, 2006 WL 2254406, at \*5-6 (W.D. Ark. Aug. 7, 2006) (applying the *Hunt* analysis and recognizing standing). At least two courts have clearly rejected *Hunt* standing for cities. See *City of Olmsted Falls v. FAA*, 292 F.3d 261, 267-68 (D.C. Cir. 2002); *Bd. of Supervisors v. Va. Dep’t. of Soc. Servs.*, 731 F. Supp. 735, 741-42 (W.D. Va. 1990).

Those arguing for the application of the associational standing doctrine to municipalities also frequently point to Justice Brennan’s concurrence in *Snapp*, where, in the course of approving *parens patriae* standing for Puerto Rico, Justice Brennan approvingly cited standing for municipalities. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 612 (1982) (Brennan, J., concurring). But the city he refers to had established standing on its own account, not by using the *Hunt* factors. See *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109-11 (1979). Brennan did suggest that states, municipalities, and private associations should all be treated similarly. *Snapp*, 458 U.S. at 611-12 (Brennan, J., concurring) (“At the very least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations.”). But Justice Brennan referred only to *direct* organizational standing. *Id.* at 611 (“A private organization may bring suit to vindicate its own concrete interest in performing those activities for which it was formed.”).



municipality?<sup>263</sup> Membership in the Sierra Club is straightforward; membership in a municipality requires more definition.

Moreover, as others have pointed out, associational standing makes cities better off than states suing in *parens patriae*:<sup>264</sup> *parens patriae* requires the state to show that it sues to vindicate the rights of “an identifiable group of individual residents,”<sup>265</sup> while associational standing can arise from one single member. This asymmetry suggests that the use of associational standing for cities is at least somewhat problematic.<sup>266</sup>

## 2. Cities’ Purposes

The germaneness prong of *Hunt* presents the same analysis as the member-with-standing prong: an initial examination prompts one to say, “Of course cities don’t have purposes in the way that membership organizations do.”<sup>267</sup> But the case law, if not definitive, remains open to the argument that cities can invoke *Hunt*.<sup>268</sup>

Municipalities do not intuitively fit the mold of an association that “provides the means by which [its members] express their collective views and protect their collective interests.”<sup>269</sup> As noted above, some commentators assume that organizations have “a *particular* purpose, be it fair housing, separation of church and state, or protection of the environment.”<sup>270</sup> Cities, of course, have far broader purposes than this.

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263. I am indebted to Jonathan Nash for these questions.

264. See Crocker, *supra* note 16, at 2079-80; Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 112-13 (2018).

265. *Snapp*, 458 U.S. at 607.

266. One solution, of course, is to extend associational standing to states as well. This is Professor Crocker’s argument. See Crocker, *supra* note 16, at 2059. Applying associational standing to *states* would make my argument regarding nearly pure private attorneys general even stronger; California, for example, has nearly forty million residents, much larger than any city (and ever so slightly larger than AARP). Compare *Quick Facts: California, United States*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/CA,US/PST045219> [<https://perma.cc/36DL-QJKK>], with AM. SOC’Y OF ASS’N EXECS., *supra* note 197, at 11.

267. See *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 345 (1977); cf. Crocker, *supra* note 16, at 2072 (describing the idea of a state’s purpose as “metaphysical”).

268. See *infra* Part II.B.

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

270. Burnham, *supra* note 156, at 185 (emphasis added).

A city with home-rule powers, for example, has quite broad powers.<sup>271</sup> Indeed, the original idea of home rule was to “giv[e] the cities to whom such rule was granted full-fledged sovereignty over local affairs, thus bringing about dual state and local sovereignty along the national plan of federal and state governments.”<sup>272</sup> Even though “such local sovereignty has never developed,”<sup>273</sup> cities with home-rule powers engage not only in the activities we typically associate with cities—such as providing water and sewer services, police protection, emergency services, public transit, garbage collection, parks, schools, libraries, and food inspection—but also in activities as far-flung as providing fiber-optic cable networks,<sup>274</sup> owning and managing art museums,<sup>275</sup> expanding antidiscrimination protections,<sup>276</sup> and increasing the minimum wage,<sup>277</sup> though states do act to remove certain areas from local authority.<sup>278</sup> Even cities without home-rule powers<sup>279</sup> are not much less kaleidoscopic in their purposes.<sup>280</sup> Most states have conferred on their municipalities expansive powers of governance.<sup>281</sup>

But such breadth of purpose is not at all fatal to the application of *Hunt*. As noted above, courts generally interpret *Hunt*'s germaneness prong expansively.<sup>282</sup> And organizational purpose can be very broad.<sup>283</sup> It therefore seems quite possible that federal courts could permit cities to proceed under *Hunt*.

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271. See *supra* note 243.

272. OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW § 35 (1982).

273. *Id.*

274. See *Will San Francisco's City-Wide Fiber Optic Network Succeed? 10 Tech Pros Weigh In*, FORBES (Jan. 9, 2018, 8:45 AM), <https://www.forbes.com/sites/forbestechcouncil/2018/01/09/will-san-franciscos-city-wide-fiber-optic-network-succeed-10-tech-pros-weigh-in/> [<https://perma.cc/V25J-UCBE>].

275. See Alan Greenblatt, *Detroit Museum Not the First to Consider Selling Out*, NPR (June 2, 2013, 3:23 PM), <https://www.npr.org/2013/06/02/187545463/detroit-museum-not-the-first-to-consider-selling-out> [<https://perma.cc/8Q7K-BCQL>].

276. See Lauren E. Phillips, Note, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2226 (2017).

277. *Id.*

278. See *id.* at 2227-28; see also Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1164-65 (2018).

279. See *supra* note 243 (discussing Dillon's Rule).

280. See KUSHNER, *supra* note 243, § 1.18.

281. See REYNOLDS, *supra* note 272, § 35.

282. See *supra* notes 164-68 and accompanying text.

283. See *supra* notes 156-60 and accompanying text.

### 3. *Cities as Pure Private Attorneys General*

If, indeed, *Hunt* can be applied to justify standing for cities, then cities—like AARP, national political parties, groups that recruit new members when they want to sue, groups that take advantage of standing doctrine’s recognition of risk-based and procedural injuries, and the hypothetical Organization of Americans for the Rule of Law<sup>284</sup>—could conceivably act as pure private attorneys general. Cities exercise the police power: they protect the health, safety, and welfare of their citizens.<sup>285</sup> Cities can also be very large.

Take New York City. It has a population of 8.4 million people,<sup>286</sup> so it is quite likely that the city could find one resident with the requisite injury for a particular lawsuit. It also (technically) has home rule so any lawsuit is likely to be germane to its purpose.<sup>287</sup> New York City would therefore have very wide latitude in the suits it can bring, using *Hunt* as a basis for standing.<sup>288</sup> And if New York City can bring almost any lawsuit, has it not become a pure private attorney general—private at least in the sense that it is not the attorney general of the United States or of New York State?

Of course, there are presumably some limits on New York City’s standing under *Hunt*. For example, even if New York City identified a citizen—or thousands of them—who owned property in Florida and spent part of the year there, it might not be appropriate to recognize the city’s associational standing to bring a lawsuit regarding property rights or climate change affecting those Florida properties. This not only seems outside the city’s purpose, but also because—if it fits under New York City’s police power to care about

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284. See *supra* Part II.A.

285. See *supra* notes 271-81 and accompanying text.

286. *Population—Current and Projected Populations*; NYC CITY PLANNING, <http://www1.nyc.gov/site/planning/planning-level/nyc-population/current-future-populations.page> [<https://perma.cc/KFU5-2LYL>].

287. See N.Y. CONST. art. IX, § 2. But see Jesse McKinley, *Why Can’t New York City Govern Its Own Affairs?*, N.Y. TIMES (July 25, 2018), <https://www.nytimes.com/2018/07/25/nyregion/nyc-home-rule-state-laws.html> [<https://perma.cc/EB8J-A4JW>] (contending that state preemption has limited home rule in New York State). Even if state preemption has placed substantial limits on areas that New York City may directly regulate, such preemption presumably does not limit the areas in which the city can show a purpose or interest under *Hunt*. See *id.* (noting that, in areas where local laws are preempted, New York City has lobbied state government to enact laws that comport with the city’s goals).

288. See *supra* text accompanying notes 271-83.

the health, safety, and welfare of its citizens even in Florida—there are comity and extraterritoriality issues with permitting New York City to use the courts to litigate about conditions in Florida.<sup>289</sup> But it would seem appropriate for New York City to sue about events in Florida that might come home to the city itself, such as disease-causing events that would cause New York City healthcare expenses to rise.<sup>290</sup>

New York City may also be more constrained than an association would be in recruiting new members to give it standing for a particular lawsuit.<sup>291</sup> Such recruitment is more difficult for a municipality, because it is more difficult for a person to change her residence than it is for her to join a membership organization. Therefore, there may be more inherent limits on the *flexibility* of municipalities in invoking *Hunt*. Cities do, however, recruit new members with some success.<sup>292</sup>

Apart from geographic limits and difficulties in gaining new “members,” however, New York City (or any other large city) could arguably decide to litigate in order to vindicate the full range of issues that capture its attention. And, as demonstrated by the litigation already pursued by cities, the issues are endless: the opioid crisis, gun violence, marriage equality, immigration, climate change, wage theft, discriminatory lending, and the national

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289. See, e.g., *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582-83 (1986). Issues regarding extraterritorial regulation by cities have traditionally arisen in the land-use context, though recent city efforts have extended to other policy issues. See Steven M. Wise et al., *The Power of Municipalities to Enact Legislation Granting Legal Rights to Nonhuman Animals Pursuant to Home Rule*, 67 SYRACUSE L. REV. 31, 51-54 (2017) (discussing local ordinances resulting in extraterritorial effect regarding equal treatment for those in domestic partnerships, the provision of a living wage for city residents, and the banning of the sale of foie gras).

290. The question of extraterritoriality also has echoes in recent debates on nationwide injunctions, where “one district court judge ... declare[s] a federal statute, regulation, or policy invalid and prevent[s] the Executive Branch from enforcing it anywhere or against anyone.” Alan M. Trammel, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 68 (2019).

291. See *supra* notes 135-38 and accompanying text.

292. E.g., Meredith Cohn, *Surgical Robot Maker Gains New Investment After Moving to Baltimore Opportunity Zone from Silicon Valley*, MSN (Nov. 6, 2019), <https://www.msn.com/en-us/news/technology/surgical-robot-maker-gains-new-investment-after-moving-to-baltimore-opportunity-zone-from-silicon-valley/ar-AAJWzKQ> [<https://perma.cc/D92C-3A5W>] (citing tax breaks and other incentives for company to relocate to Baltimore).

census.<sup>293</sup> Cities therefore are poised—if *Hunt* applies to them—to become nearly pure private attorneys general.

### *C. Conflict in the Doctrine*

As discussed above, the Supreme Court has long held that the Constitution forbids pure private attorneys general—litigants who sue simply to vindicate the rule of law. Instead, all plaintiffs must show the requisite personal stake to satisfy the Article III standing test.<sup>294</sup> After all, the Court has emphasized that “[t]he judicial power ... is not an unconditioned authority to determine the constitutionality of legislative or executive acts”<sup>295</sup> and instead “is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.”<sup>296</sup>

But if *Hunt* allows extremely broad associational standing, as the above analysis has shown, certain organizations and cities start to look a lot like plaintiffs with a roving commission to sue in the public interest. In other words, they look a lot like the pure private attorneys general that *Sierra Club* supposedly forbids.<sup>297</sup> That no one appears to have noticed this is of a piece with the general incoherence of the standing doctrine.

#### *1. The Tension Between Hunt and Sierra Club*

The ban on pure private attorneys general is part of the Court’s larger mission with standing doctrine: that it helps maintain “the proper—and properly limited—role of the courts in a democratic society.”<sup>298</sup> Courts are supposed to stick “to questions presented in an adversary context and in a form historically viewed as capable of

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293. See *supra* notes 233-39 and accompanying text.

294. See *supra* Part I.B.2.

295. *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 598 (2007) (alteration in original) (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982)).

296. *Valley Forge*, 454 U.S. at 471 (quoting *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)).

297. See *Sierra Club v. Morton*, 405 U.S. 727, 737-41 (1972).

298. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); see Elliott, *Functions*, *supra* note 17, at 499-501.

resolution through the judicial process.”<sup>299</sup> Hearing cases brought by pure private attorneys general, the Court said in *Sierra Club*, takes courts beyond their Article III boundaries.<sup>300</sup>

Yet, if my analysis above is correct, *Hunt* permits at least some, and perhaps many, organizations and municipalities to act as nearly pure private attorneys general. Indeed, associational standing likely generates more litigation than would occur in its absence. As discussed above, individual litigation, particularly in situations of widely spread harms, is subject to problems of transaction costs and free riding.<sup>301</sup> It is for precisely these reasons that class actions were created (though that device has not overcome these collective action problems).<sup>302</sup> Organizations, to some extent, can also overcome the collective action problems that beset individuals,<sup>303</sup> and bring lawsuits that no individual would have proper incentive to bring.<sup>304</sup> Associations, like litigation classes, help overcome barriers to collective action and permit litigation that might not otherwise occur.<sup>305</sup>

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299. *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

300. *Sierra Club*, 405 U.S. at 739-40.

301. See *supra* note 104 and accompanying text.

302. See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (“The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 81 (2007); *supra* Part 1.C.3 (discussing relationship between associational standing and class actions).

303. See DENNIS C. MUELLER, PUBLIC CHOICE II 308-10 (1989).

304. The Court rejected the argument that association lawsuits are required to proceed as class actions under Federal Rules of Civil Procedure 23 and 24 and noted that *Hunt*'s 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. “The only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all.”

*Int'l Union v. Brock*, 477 U.S. 274, 290 (1986) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187 (1951) (Jackson, J., concurring)).

305. See Leslie, *supra*, note 302, at 74; see also *supra* notes 109-10 and accompanying text (discussing attorneys' fees in public-interest litigation).

Moreover, *Hunt* requires associations to proffer only one member with standing.<sup>306</sup> Professor Tara Grove has argued that standing “curtails private prosecutorial discretion”: a private litigant must show injury in fact, can sue only defendants that caused her injury, and (for the most part) can seek relief only for the harms she alleges to herself.<sup>307</sup> As Professor Grove acknowledges, associations, especially national associations, have more latitude, because they can more readily find a member with standing.<sup>308</sup> When that latitude is combined with a large membership (or aggressive membership recruitment) and a broad purpose, associations approach the status of the pure private attorney general.

So, on the one hand, the *Sierra Club* Court clearly stated that pure private attorneys general may not sue in federal court.<sup>309</sup> Yet, on the other hand, the *Hunt* Court appears to have permitted organizations and municipalities, at least those with sufficient size and breadth of purpose, to litigate almost any suit they choose—and potentially to generate *more* such suits than would occur if only individuals could sue.<sup>310</sup> The tension between the two strands of doctrine is obvious.

## 2. *This Is Typical Standing Incoherence*

The conflict between *Hunt* and *Sierra Club* is no surprise. As noted above, standing doctrine has been widely criticized as incoherent.<sup>311</sup> The heretofore-unrecognized tension between *Sierra Club* and *Hunt* is another example of this incoherence. It is black letter law that no one can sue just because they are interested in seeing the law enforced.<sup>312</sup> And it is black letter law that organizations can sue when they have a member with standing and the suit is germane to the organization’s purposes.<sup>313</sup> Yet, as I have demonstrated above, the evolution of doctrine under *Hunt* means that many organizations can essentially do the former in the guise of the

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306. See *supra* notes 135-36 and accompanying text.

307. Grove, *supra* note 5, at 808-11.

308. *Id.* at 812.

309. *Sierra Club v. Morton*, 405 U.S. 727, 736 (1972).

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

311. See *supra* Part I.A.2.

312. See *supra* Part I.B.2.

313. See *supra* Part I.C.2.

latter—and thus serve as pure private attorneys general.<sup>314</sup> The doctrine both forbids and permits pure private attorneys general, giving even more reason to consider it “incoherent”<sup>315</sup> and “confus[ed].”<sup>316</sup>

### III. CLEARING UP THE CONFUSION

Once it becomes clear that *Hunt*'s associational standing can permit certain organizations to act essentially as pure private attorneys general, which is supposedly forbidden by *Sierra Club*, then the question comes: What, if anything, should be done?

One answer would be for the Court to recognize that standing doctrine—including *Sierra Club*'s ban on pure private attorneys general—has taken a wrong turn. The tension between *Hunt* and *Sierra Club* could be seen as the straw that breaks the back of standing doctrine. Yet, as discussed below, standing doctrine has been increasingly entrenched decade by decade, and such a revolution in doctrine seems unlikely.

A second answer would be for Congress to take steps to regulate the jurisdiction of the federal courts over associations. Congress is well-placed to make the factual assessments and to draw the lines required, and I lay out some of those possibilities below.<sup>317</sup> Congress is, however, unlikely to take the time to remedy *Hunt*.

The least-worst response, then, may be for the Court to take modest steps to adjust standing doctrine to respond to the concerns I raise here. The remainder of this Part discusses the doctrinal modifications the Court could make to address the conflict between *Hunt* and *Sierra Club*.

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314. See *supra* Part II.A.

315. Fletcher, *supra* note 17, at 221.

316. Sunstein, *Privatization*, *supra* note 17, at 1458.

317. Cf. *Flast v. Cohen*, 392 U.S. 83, 131 (1968) (Harlan, J., dissenting) (“[T]he limitations adopted by the Court [using the standing doctrine] are ... wholly untenable. This is the more unfortunate because there is available a resolution of this problem that entirely satisfies the demands of the principle of separation of powers. This Court has previously held that individual litigants have standing to represent the public interest, despite their lack of economic or other personal interests, if Congress has appropriately authorized such suits.”).



A. *The Court Could Abandon Standing Doctrine*

As noted above, modern standing doctrine has been heavily criticized since it emerged in the early 1970s, with critics focused on how disjointed, unpredictable, disingenuous, and ultra vires the doctrine is.<sup>318</sup> The previously unnoticed tension between the ban on pure private attorneys general and the doctrine of associational standing is of a piece with these criticisms. The Court could therefore abandon standing doctrine and, as many have urged before, condition access to the federal courts using prudential and statutory considerations.

For example, Professor William Fletcher argued more than thirty years ago that the question of standing was hopelessly mixed up with the merits question of whether a plaintiff stated a cause of action.<sup>319</sup> Why not simply abandon standing doctrine and return to the question of whether a plaintiff states a cause of action?<sup>320</sup> This move is not uncontroversial, as Professor Ernest Young has argued: relying *solely* on causes of action to determine who may proceed in federal court, especially if that inquiry involves *implying* causes of action, raises questions of judicial lawmaking now perceived as illegitimate.<sup>321</sup> He further asserts that it does not permit consideration of certain structural aspects viewed as essential to standing doctrine, including “separation of powers, federalism, and the need to protect the quality of judicial decision-making.”<sup>322</sup> The complexities of modern standing doctrine are not necessary for addressing those concerns, however, as I think Professor Young would acknowledge, even if more general questions into who may invoke the power of the federal courts are required.<sup>323</sup>

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318. *See supra* Part 1.A.2.

319. Fletcher, *supra* note 17, at 223-24; *see also* Chemerinsky, *supra* note 17, at 697 (listing the question of whether a cause of action is asserted as one of four that can replace entire structure of justiciability doctrine).

320. *See, e.g.*, F. Andrew Hessick, *Standing in Diversity*, 65 ALA. L. REV. 417, 418 (2013) (arguing that the Supreme Court’s application of Article III standing doctrine in diversity cases interfere with state authority to define substantive state law).

321. Ernest A. Young, *In Praise of Judge Fletcher—and of General Standing Principles*, 65 ALA. L. REV. 473, 477-80 (2013).

322. *Id.* at 476.

323. *Id.* at 488-89 (arguing for continued use of “general standing principles” and noting that “[s]tanding doctrine arouses criticism because the questions it necessarily confronts—who has the right to invoke the jurisdiction of the federal courts, and under what

Many critics have argued that standing doctrine would be better as a prudential doctrine.<sup>324</sup> Professor Jaffe, for example, argued for a prudential rather than a constitutional approach to threshold questions like standing;<sup>325</sup> Professors Jonathan Siegel and Mark Tushnet have made similar arguments.<sup>326</sup> I have argued that a prudential approach to the issues raised by standing doctrine—for example, whether a case presents a question that can be judicially resolved or whether separation-of-powers issues counsel against taking a case—allows for the transparent resolution of complicated questions, is “preferable to a world where courts are forced to apply a misconceived doctrine in an attempt to solve problems that the doctrine simply cannot solve,”<sup>327</sup> and “cut[s] short accusations that ... standing is merely a devious method to hidden ends.”<sup>328</sup>

But it is next to impossible to imagine the Court doing anything like this. Standing doctrine in its current form has existed for more than forty years, and the current Justices all treat it as entrenched.<sup>329</sup>

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circumstances?— are simply hard questions.”).

324. See, e.g., Elliott, *Functions*, *supra* note 17, at 465, 471-72; Elliott, *Inability*, *supra* note 17, at 168, 177.

325. See Jaffe, *supra* note 83, at 1034-43 (suggesting an abstention doctrine to limit the justiciability of suits brought to vindicate the public interest); see also Richard Murphy, *Abandoning Standing: Trading Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943, 989-90 (2008).

326. See Siegel, *supra* note 66, at 129-38 (recommending a variety of discretionary rules of justiciability); Tushnet, *supra* note 17, at 700 (suggesting “a candid assessment of the plaintiff’s ability to present the case adequately and a pragmatic evaluation of the factual concreteness that could be expected ... with a reluctance to find standing where plaintiffs more directly affected by the claimed illegality might realistically be expected to come forward ... [and] a revitalized political question doctrine, which would allow the court to confront directly the separation-of-powers concerns” that arise under the guise of standing decisions).

327. Elliott, *Functions*, *supra* note 17, at 514.

328. *Id.* at 464.

329. See, e.g., *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2098 (2019) (Gorsuch, J., concurring in the judgment); *Gill v. Whitford*, 138 S. Ct. 1916, 1941 (2018) (Thomas, J., concurring); *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (Alito, J.); *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016) (Breyer, J.); *Camreta v. Greene*, 563 U.S. 692, 701 (2011) (Kagan, J.); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341-42 (2006) (Roberts, C.J.); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (Ginsburg, J.); see also *In re Navy Chaplaincy*, 534 F.3d 756, 759-60 (D.C. Cir. 2008) (Kavanaugh, J.); *Lamar Advert. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 373 (2d Cir. 2004) (Sotomayor, J.).

*B. Congress Would Do It Better but Will Not*

Congress is far better placed than the courts to make complicated factual distinctions among organizations, which might be based on the size of organizations and the nature of the organization's purpose<sup>330</sup> (though the First Amendment constrains the latter).<sup>331</sup> But Congress seems unlikely to do so.

*1. Congress's Authority to Act*

As noted above, Congress cannot alter by statute the fundamental standing requirements the Court has imposed through Article III.<sup>332</sup> Congress may create legal causes of action for those who have suffered injury in fact as defined by the Court<sup>333</sup> but cannot expand standing beyond Article III boundaries.<sup>334</sup> Thus, when Congress enacts a statute that permits "any citizen" (or, conceivably, any membership organization) to sue—statutory language that certainly looks like a congressional effort to authorize pure private attorneys general—the Court has said that the "any citizen" language merely reflects Congress's intent to authorize suits as broadly as Article III permits.<sup>335</sup>

The Court has emphasized that Congress may not change the constitutional rules that the Court itself has established.<sup>336</sup> In *City of Boerne v. Flores*, the Court rejected a congressional effort to overrule First Amendment precedent because to permit Congress's action would "contradict[] vital principles necessary to maintain separation of powers."<sup>337</sup> I have therefore argued that the Court is likely to reject any congressional effort to rewrite the rules of

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330. KOMESAR, *supra* note 25, at 141.

331. *See infra* notes 341-44 and accompanying text.

332. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997); *supra* notes 79-81 and accompanying text; *see also* Elliott, *Inability*, *supra* note 17, at 190-91 (arguing that *Boerne* would stand in the way of congressional efforts to find standing by statute). *But see* Seidenfeld & Akre, *supra* note 17, at 751-52 (arguing that Congress's power to find facts gives it more authority to define injury in fact and causation than has been recognized).

333. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992).

334. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)).

335. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 165-66 (1997).

336. *Boerne*, 521 U.S. at 519.

337. *Id.* at 536.

standing.<sup>338</sup> Because it would essentially overturn fifty years of standing doctrine if Congress were to abolish the ban on pure private attorneys general or lift all restrictions on organizational standing, Congress can take neither step.

But, as Professor Mark Seidenfeld has argued, Congress can find legislative facts that convince courts to recognize injury in fact, causation, and redress.<sup>339</sup> Congress could therefore find facts that relate to the suitability of membership associations to proceed in federal court under the existing *Hunt* standards, and courts could take note of those facts in deciding on associational standing. What is more, Congress has wide authority to regulate the federal courts.<sup>340</sup> Thus, it is within Congress's constitutional authority to resolve incongruities in access to the federal courts.

At the same time, Congress is limited in how it can regulate in this area by the First Amendment rights of free speech, assembly, and petition.<sup>341</sup> For example, Congress could not bar associational standing. As a matter of politics, legislators would not act to deprive the thousands of American associations of their access to the courts. What's more, Congress is likely forbidden from doing so by the First Amendment.<sup>342</sup>

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338. Elliott, *Inability*, *supra* note 17, at 165, 167, 225.

339. Seidenfeld & Akre, *supra* note 17, at 748.

340. See U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (emphasis added)); *id.* art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." (emphasis added)).

341. See, e.g., Carol Rice Andrews, *After BE & K: The "Difficult Constitutional Question" of Defining the First Amendment Right to Petition Courts*, 39 HOUS. L. REV. 1299, 1300-02, 1307-08 (2003); Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 560, 688-89 (1999); cf. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 216-19 (1985); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 508 (1974); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

342. See, e.g., Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 934 (1963) ("The concept of freedom of expression presently extends to a right of association, that is, a right to form and join organizations for the advancement of particular views and to carry on all the normal activities of such associations.").

More limited restraints on associational standing may also run afoul of the First Amendment. To the extent that such restraints look like content-based restrictions on speech, they would be subject to strict scrutiny.<sup>343</sup> But if akin to time, place, and manner restrictions in the free speech context, rather than content-based restrictions,<sup>344</sup> Congress's modifications of associational standing rules would be acceptable.

Congress might also itself recognize the constitutional problem such regulations would raise and frame any statute on associational standing accordingly. Therefore, Congress could create presumptive standing for organizations that meet certain standards, while leaving open the possibility that courts could override the limitations where they find a constitutional infirmity. In this way, Congress would incorporate a constitutional avoidance principle into the statute itself.<sup>345</sup>

## 2. *Congress Has Many Options*

So long as Congress stays within the boundaries of existing standing doctrine and the First Amendment, it has a number of options for regulating court access in a way that helps resolve the tension between *Sierra Club* and *Hunt*. Congress is well-placed to consider systemic issues in access to and burdens on the courts, confer causes of action on appropriate plaintiffs, adjust associational

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343. Regulations of speech that laws have the effect of discriminating among differing viewpoints are generally unconstitutional. *See, e.g.,* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 536-37, 548-49 (2001) (holding that Legal Services Corporation funding cannot be contingent on attorneys agreeing not to make certain argument on behalf of their clients); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 812, 815 (2000) (holding that the Federal Telecommunications Act, in limiting the circumstances under which cable-television channels could broadcast sexually explicit material, was a content-based restriction on speech and was therefore subject to strict scrutiny; further holding that the federal government had not shown that the statute employed the least restrictive means to prevent children from seeing sexually explicit material).

344. Under the "time, place, and manner" doctrine, the Court permits narrowly tailored regulations that, without viewpoint discrimination, regulate the circumstances of the speech. *See* *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989) (finding the regulation of noise levels at public performances constitutional).

345. *See, e.g.,* *NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979) ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.").

standing to reflect concerns about federalism and separation of powers, and the like.

First, Congress might conclude that municipalities pose an especially problematic instance of the *Sierra Club-Hunt* conflict, and it thus could make clear that municipalities are not proper associations under *Hunt*. In doing so, Congress would be doing little more than what it already does when it writes statutes and defines who can be proper parties to lawsuits.<sup>346</sup> Moreover, because municipalities have no inherent sovereignty, they would appear to have little ability to object to such exclusion. However, as already noted, preventing municipal use of *Hunt* does not resolve the problem posed under *Sierra Club* by organizations that are very large and/or have very broad purposes.

Congress might instead decide that cities (and states)<sup>347</sup> are the *most* trustworthy entities to serve as private attorneys general. While *Hunt* requires organizations to be membership organizations,<sup>348</sup> many membership organizations have little actual control from their members.<sup>349</sup> Those who act for cities, by contrast, are subject to regular elections.<sup>350</sup> In addition, associations can have members anywhere and can readily obtain new members. Cities, on the other hand, have geographical limits and gain new members with some difficulty. One cannot simply sign up online to be a

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346. See, e.g., *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 694-95 (1978).

347. States can sue in *parens patriae*, see *supra* note 246 and accompanying text, and are also given “special solicitude” under Article III, see *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007), so I have not spent time discussing states as litigants using *Hunt*. However, it has been suggested that states should have the same ease of suit as organizations. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 611 (1982) (Brennan, J., concurring) (“At the *very* least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations.”); see also Crocker, *supra* note 16, at 2066-67.

348. See *supra* notes 130-34 and accompanying text.

349. THE OXFORD HANDBOOK OF SOCIOLOGY AND ORGANIZATION STUDIES: CLASSICAL FOUNDATIONS 177 (Paul S. Adler ed., 2009) (compiling sociological research on how organizations are controlled by a small subset of members).

350. Cf. Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 897 (2016) (noting that “state attorneys general have strong political incentives to respond to the preferences of state constituents,” which may result in “a better job of representing the State in court”); Lemos & Young, *supra* note 264, at 113-14 (“[A] state [attorney general] should be more accountable to a state’s citizens than the leaders of an organization like the Sierra Club.”).

citizen of New York City; one must move to New York City, prove residency, and so forth.

Cities also face considerable resource constraints.<sup>351</sup> City officials must choose where to spend their resources and may often choose not to spend them on litigation.<sup>352</sup> While associations also face resource constraints, many of them have devoted significant resources to litigation.<sup>353</sup> The threshold for a city-filed lawsuit may therefore be higher than the threshold for an association-filed lawsuit.

To the extent we are worried about a roving commission to enforce the law, cities may have more inherent limits than membership associations and therefore be less troubling attorneys general. As a result, Congress could encourage standing for municipalities by finding facts and making causal connections that show how municipalities satisfy Article III—factfinding to which the Court should then give some deference.

Congress could also set guidelines that address the size of organizations, either directly or indirectly and can consider a wide variety of factors in doing so. Direct caps on size are possible though unlikely: it is difficult to imagine the evidence upon which Congress might limit associational standing simply because an organization had  $x$  members, rather than  $x-1$  members. One can envision a sliding scale where the bigger the organization, the more it would be required show along other axes, such as its demonstrated expertise in a particular area. There are also sensible policies Congress could adopt that go indirectly to size, such as giving preference to associations that could show meaningful membership involvement in the genesis of the lawsuit.<sup>354</sup> Similarly, Congress

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351. *E.g.*, Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1120-22 (2014).

352. *See id.*

353. *E.g.*, Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2029 (2008).

354. *See* William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1673-74 (1997) (suggesting that organizations should be required to prove notice to members regarding litigation or that attorney ethics rules be amended to encourage lawyers representing associations to engage in more democratic practices with respect to association members); *cf.*, *e.g.*, Steen & Hopkins, *supra* note 112, at 252-53 (arguing that associations should have standing under *Hunt* only if the membership exercises control over the association's board of directors). *But see* Karl S. Coplan, *Is Voting Necessary? Organization Standing and Non-*

could establish factors that help make the germaneness prong more useful as a limit on pure private attorneys general, rather than the vague rule it serves as today.<sup>355</sup>

One amendment Congress could probably *not* make to *Hunt* is to insist that membership in associations be voluntary. Congress might wish to do this to bring associational standing more in line with our intuitions about associational standing. But *Hunt* itself involved involuntary membership so such a move by Congress is arguably an attempt to overturn precedent, something that *City of Boerne* forbids.<sup>356</sup> It would mean no standing for many unions, bar associations, and other organizations whose membership is not strictly voluntary yet whose standing has been recognized by the Supreme Court.<sup>357</sup>

Congress also would tread on dangerous ground if it tried to limit the *purposes* of organizations who were entitled to sue. Assume, for example, that Congress tried to limit associational standing to those groups that had relatively focused purposes. The very choice between a broad and a narrow agenda would seem to be part of the *agenda* of the organization rather than a simple time, place, or manner restriction. And the agenda of the organization is presumably protected by the First Amendment's Free Exercise, Freedom of Association, or Petition Clauses.<sup>358</sup>

For example, it would likely be impermissible for Congress to limit court access for the Organization of Americans for the Rule of Law by saying that its members have chosen too broad a purpose in banding together.<sup>359</sup> Such a limit could be seen as a content restriction under the Free Exercise Clause: Congress is stating a preference for narrow messages over broad messages. It could also be seen as an impermissible limit on citizens' freedom to associate: you are not allowed to band together in this way. Finally, it could be seen as an impermissible infringement on the freedom to petition,

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*Voting Members of Environmental Advocacy Organizations*, 14 SOUTHEASTERN ENVTL. L.J. 47, 82 (2005) (noting that mandating full voting rights for the membership may put an organization at risk of a hostile takeover).

355. See *supra* Part 1.C.2.c.ii.

356. See *supra* notes 336-38 and accompanying text.

357. See, e.g., *Int'l Union v. Brock*, 477 U.S. 274, 290 (1986).

358. See U.S. CONST. amend. I; see also Karl S. Coplan, *Ideological Plaintiffs, Administrative Lawmaking, Standing, and the Petition Clause*, 61 ME. L. REV. 377, 380-81 (2009).

359. See *supra* notes 229-32 and accompanying text.



by telling groups with broad purposes that they cannot access the courts.

### 3. *Congress Is Unlikely to Act*

Whatever the options that Congress has for resolving the *Hunt-Sierra Club* conflict, and however more appropriate an institution such as Congress may be for resolving it, it seems highly unlikely that Congress would actually take any steps to do so. Not only has Congress been notably dysfunctional for years,<sup>360</sup> but it also faces innumerable problems more important than the one I describe here.<sup>361</sup> It is virtually impossible to imagine Congress paying attention to the conflict between *Hunt* and *Sierra Club*.

### C. *Judicial Fixes for Hunt*

Standing doctrine is not going anywhere.<sup>362</sup> And Congress, while institutionally suited to solving the problem, is extremely unlikely to do so.<sup>363</sup> One option, then, is to ignore the conflict I have described. After all, as I have admitted, no organization or municipality is a *pure* private attorney general, because even AARP<sup>364</sup> and New York City<sup>365</sup> cannot bring literally *any* lawsuit. Instead, *Hunt* permits *nearly pure* private attorneys general,<sup>366</sup> and that may be short enough of a true conflict to say that the doctrine need not be fixed.

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360. See generally, e.g., CONGRESS RECONSIDERED (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 11th ed. 2017); DAVIS ET AL., *supra* note 24; ROBERT G. KAISER, ACT OF CONGRESS: HOW AMERICA'S ESSENTIAL INSTITUTION WORKS, AND HOW IT DOESN'T (2013).

361. For example, the evisceration of voting rights caused by the Court's decision in *Shelby County v. Holder* is certainly more important, yet Congress has not yet amended the Voting Rights Act. 570 U.S. 529, 556-57 (2013); see Mary C. Curtis, *Voting Rights, a Partisan Issue? Yes, Republicans Have Fallen that Far*, ROLL CALL (Dec. 16, 2019, 6:00 PM), <https://www.rollcall.com/news/opinion/voting-rights-partisan-issue-yes-one-party-fallen-far> [<https://perma.cc/RNB3-CTCT>] (describing bill introduced in the House of Representatives in late 2019 to "shore up sections of the Voting Rights Act of 1965 tossed out by the Supreme Court in ... *Shelby County*").

362. See *supra* Part III.A.

363. See *supra* Part III.B.

364. See *supra* notes 182-96 and accompanying text.

365. See *supra* notes 286-93 and accompanying text.

366. See *supra* Part II.B.3.

But given the Court's separation-of-powers rhetoric<sup>367</sup> and the emphasis it has placed on a strict doctrine of standing,<sup>368</sup> it would be odd to take that approach. And doctrinal conflicts should not be ignored: it violates our ideas of the rule of law that courts would simultaneously prohibit and allow an action.<sup>369</sup>

If the Court were to act, what options does it have? First, the Court could abandon associational standing altogether. But organizations across the political spectrum and in every facet of life bring lawsuit to vindicate important interests,<sup>370</sup> and even Justice Scalia recognized the benefits of associations as litigators.<sup>371</sup> Indeed, a recent article urging strict adherence to the standing doctrine and accusing the Court of ultra vires actions did not advocate abolishing associational standing.<sup>372</sup> Given the valuable role that organizations play in upholding the public interest, it seems unlikely—and is certainly undesirable—that the Court would overrule *Hunt*.

Moreover, abolishing *Hunt* would likely be a mere formality. As a practical matter, many lawsuits brought by individuals in the

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367. See *supra* notes 100-02 and accompanying text.

368. See *supra* Part I.A.1.

369. Cf., e.g., Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1337 (2001) (“[I]t seems difficult to conceive of the rule of law in a setting in which citizens may be unable to discovery ex ante the consequences of their acts.”).

370. See, e.g., Nat'l Rifle Ass'n of Am. v. City of Chicago, 561 U.S. 1041, 1041 (2010); Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress, 890 F.3d 828, 830-31 (9th Cir. 2018).

371. Scalia, *supra* note 103, at 891 (“Often the very best adversaries are national organizations such as the NAACP or the American Civil Liberties Union that have a keen interest in the abstract question at issue in the case, but no concrete injury in fact whatever.” (internal quotation marks omitted)).

372. See Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481, 484, 538 (2018) (arguing for the abolition of the current rule—of-so called “supplemental plaintiff standing”—where one plaintiff has standing, then there need be no inquiry into the standing of other plaintiffs who make the same claim and seek the same remedy but noting that “[t]here is at least one aspect of current standing law that does fit comfortably with the one-plaintiff rule, and that is the doctrine of associational standing.... Associational standing has a superficial resemblance to supplemental-plaintiff standing in that one entity's standing is sufficient to confer standing on another, but the theory behind the two doctrines is quite different. Associational standing is a form of representational standing in which the association stands in the shoes of its affected members. In the usual multiple-plaintiff case in which the one-plaintiff rule is applied, the parties who obtain the benefit of the rule do not stand in any such representational relationship; they merely have the same legal claim as the other plaintiffs. The doctrine of associational standing therefore stands even if the one-plaintiff rule fails.” (footnotes omitted)).

wake of a *Hunt* abolition would in reality be pursued by the associations.<sup>373</sup> Associations, instead of tendering affidavits from their members in support of a *Hunt* analysis, would instead recruit members to serve as plaintiffs, much as class action attorneys do now.<sup>374</sup>

Second, the Supreme Court could fix *Hunt* to avoid its conflict with *Sierra Club*. Having courts answer questions such as “how big is too big” and “how broad a purpose is too broad?” raises some concerns regarding the courts’ institutional capability.<sup>375</sup> But courts are involved in evaluating organizational purposes in other contexts,<sup>376</sup> and it might be possible for the Court to give the germaneness prong more teeth.

More formalistic distinctions are fairly easy for courts to make: the Court could state, as some courts already have, that cities are simply not associations.<sup>377</sup> While this does not address the problem posed by large, nonmunicipal organizations and smaller organizations with broad purposes,<sup>378</sup> it does ameliorate the tension between *Hunt* and *Sierra Club*.

Third, the Court could *add* factors to *Hunt* that limit its reach. One might be to require more demonstrated expertise from associations. In dissent in *Sierra Club*, Justice Blackmun suggested focusing on the Sierra Club’s “pertinent, bona fide, and well-recognized attributes and purposes in the area of environment.”<sup>379</sup> While the Court long ago rejected the idea of permitting associational standing based on expertise, nothing prevents the Court from adding such a

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373. Nonmembership organizations already take this approach. *See, e.g., ‘Regular’ Guy Takes Aim at the Law*, WASH. TIMES (July 27, 2008), <https://www.washingtontimes.com/news/2008/jul/27/regular-guy-takes-aim-at-the-law/> [<https://perma.cc/H9SJ-FUQT>] (describing how the Cato Institute identified and represented Richard Anthony Heller in litigation under Second Amendment).

374. *See, e.g.,* Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 59-60 (2002).

375. *See* KOMESAR, *supra* note 25, at 141.

376. *E.g.,* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655-56 (2000) (evaluating whether Boy Scouts could, within its First Amendment expressive rights, prohibit gay scoutmasters).

377. *See, e.g.,* *City of Olmsted Falls v. FAA*, 292 F.3d 261, 267-68 (D.C. Cir. 2002) (“The City does not have ‘members’ who have voluntarily associated, nor are the interests it seeks to assert here germane to its purpose.”).

378. *See supra* Part II.A.

379. *Sierra Club v. Morton*, 405 U.S. 727, 757 (1972) (Blackmun, J., dissenting).

requirement as courts are already involved in evaluating expertise.<sup>380</sup>

The Court could also add pleading requirements that require more of organizations before they can invoke *Hunt*, such as a vote from the membership to authorize the lawsuit.<sup>381</sup> As noted earlier, courts define “membership organizations” in part by the control that the membership exerts over the organization’s leadership,<sup>382</sup> so it is not a huge step to require that control to be asserted over the lawsuits an organization hopes to pursue.

### CONCLUSION

Article III doctrine has long been troubled, and at least part of the problem is its imposition on the courts of many questions that courts are institutionally unsuited to answer. A previously unnoticed conflict in the doctrine—between *Sierra Club*’s ban on pure private attorneys general, and *Hunt*’s generous authorization of associational standing—highlights both the lamentable state of Article III doctrine and the difficulty courts have in fixing it.

Although the conflict between *Sierra Club* and *Hunt* may seem somewhat abstract, the recent arguments for applying *Hunt* associational standing to municipalities shows that, given the increasing involvement of cities in impact litigation, the problem is far from merely theoretical. And there are reasons to celebrate the involvement of cities and states in public-interest litigation: they are generally more democratically accountable than membership organizations, and they are perhaps more likely to be selective about the lawsuits they bring, giving gravitas to the claims that they make.

Congress is institutionally well-suited to making the kind of complex decisions that are necessary to resolve this doctrinal tension. But Congress is, at least at the moment, unlikely to devote its institutional time to solving this problem. The least-worst option

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380. See, e.g., *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993).

381. Steen & Hopkins, *supra* note 112, at 257 (nonprofit corporation, to invoke *Hunt*, should have “to plead and prove the controlling franchise of the members it seeks to represent”). But see Rubenstein, *supra* note 354, at 1657 (noting difficulties in requiring such voting).

382. See *supra* note 131.

seems to be for courts to tinker at the margins of *Hunt* and *Sierra Club* to lessen the consequences of this doctrinal conflict.