

## STANDING, ON APPEAL

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*Scholarly criticism of standing doctrine is hardly new, but a core problem with standing jurisprudence remains overlooked: How do parties challenging administrative decisions factually prove that they have standing on appeal when appellate courts normally do not conduct factfinding? This Article attempts to tackle that problem. It combines a four-pronged normative procedural justice model with an empirical study of appellate cases to conclude that (1) although this issue arises in a relatively narrow set of cases, the number of such cases is growing and (2) existing judicial solutions to the problem are deficient. Thus, after exploring several options—including the possibility of abandoning the current standing test—we suggest that appellate courts should, as the D.C. Circuit currently does, require all petitioners to address standing in their opening brief. In addition, courts should require petitioners who are not directly regulated by the agency action in question to submit additional evidence to support their standing claim. Here, courts must be careful to separate facts from law. But if these preliminary submissions show there is a factual dispute on any element of standing, the court should refer the dispute to a magistrate judge, who will hold a hearing on the disputed issues and provide a report and recommendation to the appellate tribunal.*

### INTRODUCTION

Virtually no one noticed what the Court actually did.

The Supreme Court's decision in *Massachusetts v. EPA*<sup>1</sup> was immediately hailed as a “major,” “momentous,” “landmark,” “groundbreaking” case.<sup>2</sup> Environmentalists and the media were the most effusive. The

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1. 549 U.S. 497 (2007).

2. Beth Daley, *High Court Tells EPA to Rethink Policy on Emissions*, BOSTON GLOBE, Apr. 3, 2007, at A1 (quoting Massachusetts Attorney General Martha Coakley); Editorial, *High Court Turns*

*New York Times* called *Massachusetts* “one of [the Court’s] most important environmental decisions in years.”<sup>3</sup> The *Washington Post* declared it “truly substantial,” a “significant” ruling.<sup>4</sup> And environmentalists were so jubilant that *Investor’s Business Daily* characterized their reaction as “green extremists’ glee,” a presumptive “arrival of the Green Messiah.”<sup>5</sup> Scholars, too, joined the fray. As Professor Jonathan Cannon opined: “I am not suggesting this is *Brown v. Board of Education* for the environment, but it may be as close as we will come.”<sup>6</sup>

The reason the case received so much attention was obvious: climate change. Yet on the issue that the Court labored longest—standing—there was much less interest. Predictably, the popular press mentioned the issue, if at all, only briefly.<sup>7</sup> Several academics, including one of us,<sup>8</sup> spilled much ink analyzing the importance of the “special soli-

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*Green*, NEWSDAY, Apr. 3, 2007, at A38; Brian Hansen, ‘Supreme’ Ruling Comes Down, but Impacts Unclear, INSIDE ENERGY, Apr. 9, 2007, at 1, 11 (quoting Timothy Dowling of Community Rights Counsel); John J. Monahan, EPA Loses Emissions Court Fight: Environmentalists Hail Mass.-led Case, WORCESTER TELEGRAM & GAZETTE, Apr. 3, 2007, at A1 (quoting Frank Gorke of Environmental Massachusetts).

3. Linda Greenhouse, *Justices Say E.P.A. Has Power to Act on Harmful Gases*, N.Y. TIMES, Apr. 3, 2007, at A1.

4. Editorial, *Regulating Emissions: Cleaner Air, Compliments of the Supreme Court*, WASH. POST, Apr. 3, 2007, at A22.

5. Editorial, *Hot Air Court*, INVESTOR’S BUS. DAILY, Apr. 3, 2007, at A13. Others only piled on. See, e.g., Zachary Coile, *Ruling Pushes a New U.S. Approach to Global Warming*, S.F. CHRON., Apr. 3, 2007, at A6 (calling *Massachusetts* “one of the court’s most critical environmental decisions in decades”); Editorial, *Clearing the Air*, L.A. TIMES, Apr. 3, 2007, at A20 (denominating the decision “a gratifying victory” in “a case that could easily have been called Science vs. Bush”); Editorial, *Time to Act on Auto Emissions*, CHI. TRIB., Apr. 9, 2007, § 1, at 16 (finding *Massachusetts* a “withering retort from the Supreme Court”); Greenhouse, *supra* note 3 (characterizing the decision as a “strong rebuke” of the EPA’s refusal to regulate); Michael Hawthorne, *EPA Must Regulate Greenhouse Gases*, CHI. TRIB., Apr. 3, 2007, § 1, at 3 (casting the decision as a “stinging reprimand of the Bush administration’s policy on global warming”). But cf., e.g., Cathy Cash, *EPA Can Regulate CO<sub>2</sub>, Supreme Court Rules, but Issue’s Real Playing Field Is Still Congress*, ELECTRIC UTIL. WK., Apr. 9, 2007, at 2 (explaining that the critical path on global warming is comprehensive federal legislation).

6. Jonathan Z. Cannon, Essay, *The Significance of Massachusetts v. EPA*, 93 VA. L. REV. IN BRIEF 53, 62 (2007).

7. See, e.g., Editorial, *supra* note 2 (briefly mentioning standing); Juliet Eilperin, *The Court’s Green Light for Green Tech*, WASH. POST, Apr. 8, 2007, at B3 (citing actual and imminent harm language from opinion but not mentioning state standing or ability to sue); Joel Lang & Michael Regan, *Court’s Climate Ruling Hailed: May Help States Fight Greenhouse Emissions*, HARTFORD COURANT, Apr. 3, 2007, at A1 (same). Notably, veteran Supreme Court reporter Linda Greenhouse’s article was an exception to this trend, devoting several paragraphs to the Court’s discussion of standing. See Greenhouse, *supra* note 3. She later followed up on the standing question in an article on Chief Justice Roberts. See Linda Greenhouse, *For the Chief Justice, a Dissent and a Line in the Sand*, N.Y. TIMES, Apr. 8, 2007, at WK12.

8. See, e.g., Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. EPA’s New Standing Test for States*, 49 WM. & MARY L. REV. 1701 (2008); Calvin Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249 (2009); Dru Stevenson, *Special Solicitude for State Standing: Massachusetts v. EPA*, 112 PENN. ST. L. REV. 1 (2007); Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other Than Global Warming*, 102 NW. U. L. REV. 1029 (2008), 102 NW. U. L. REV. COLLOQUY 1 (2007), <http://www.law.northwestern.edu/lawreview/Colloquy/2007/17/>; Amy J. Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 J. LAND RESOURCES & ENVTL. L. 273 (2007); Sara Zdeb, Note, *From Georgia v. Tennessee Copper to Massachusetts v. EPA: Parens Patriae Standing for State Global-Warming Plaintiffs*, 96 GEO. L.J. 1059 (2008); cf. Daniel A. Farber, *A Place-Based Theory of*

citude” afforded to Massachusetts in the Court’s standing analysis.<sup>9</sup> Almost none of the reaction,<sup>10</sup> however, grappled with the glaring procedural question of how the Court arrived at its conclusion: Because many administrative cases, like *Massachusetts*, are sent directly to an appellate court for judicial review rather than a district court, and because standing requires a plaintiff to show facts to prove her ability to sue, an appellate tribunal was in the awkward position of being tasked with making factual findings regarding petitioners’ standing. At the Supreme Court, the particular challenge of factfinding by an appellate court seemed to go unnoticed, as did the reality that no factfinding on the standing issues in question had been completed. This was so even though the evidence in the record arguably was not “unchallenged” as the majority asserted,<sup>11</sup> but was disputed by the government at several points in the litigation.<sup>12</sup>

The lack of attention paid to this issue was patent enough given how prominent the standing issue was before the Court, but it was even more striking given that the D.C. Circuit’s opinion below was dominated by that court’s sharp disagreement over whether petitioners had marshaled sufficient evidence to prove standing.<sup>13</sup> Indeed, both Judge Randolph and Judge Tatel were troubled by this issue, but disagreed on the appropriate course for the court to take.<sup>14</sup>

This problem—how parties challenging administrative decisions can factually prove before an appellate court that they have standing—has been presented not just in *Massachusetts* but in a growing number of cases in the last decade.<sup>15</sup> In the heat of the climate change debate, however, this critical legal issue went overlooked, both at the Supreme Court and thereafter. The procedure got lost in the substance. Virtually no one noticed what the Court actually did.

This Article seeks to shed some light on the broader, and increasingly critical, procedural question of what the Court actually did in *Massachusetts*. It is a question with serious ramifications for both administrative and procedural law; a question that cuts across industries, interest

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*Standing*, 55 UCLA L. REV. 1505 (2008); Andrew Long, *Standing & Consensus: Globalism in Massachusetts v. EPA*, 23 J. ENVTL. L. & LITIG. 73 (2008); Jonathan Remy Nash, Essay, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494 (2008).

9. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

10. Cf. 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3531.15, at 351–52 (3d ed. 2008) (concluding that *Massachusetts v. EPA* “laid bare” the fact that “trial-finding standards of proof are not easily addressed in a court of appeals”); Wildermuth, *supra* note 8, at 281 n.71 (highlighting the fact that the petitioners in *Massachusetts* submitted uncontested affidavits, but noting that “the D.C. Circuit . . . does not normally engage in fact-finding [and therefore] is ill-equipped to handle” dueling factual declarations).

11. *Massachusetts*, 549 U.S. at 522.

12. *E.g.*, *id.* at 542 (Roberts, C.J., dissenting) (“[T]here is nothing in petitioners’ 43 standing declarations and accompanying exhibits to support an inference of actual loss of Massachusetts coastal land from 20th century global sea level increases. It is pure conjecture.”).

13. *Massachusetts v. EPA*, 415 F.3d 50, 54–56 (D.C. Cir. 2005).

14. *Id.* at 55–56; *id.* at 66–67 (Tatel, J., dissenting).

15. See *infra* Part I.C.2.

groups, and disputes; a question that runs to the core of what role our courts play in society, and the role appellate courts play in the federal judicial system. It is a question that was at the center of *Massachusetts* but that extends far beyond that case. How should appellate courts address challenges to standing, which is predominantly factual in nature, when those courts have no mechanism for conducting factfinding?

The problem of standing on direct review of administrative decisions is important from a number of perspectives.<sup>16</sup> Chief among them, it appears that agencies increasingly raise and are successful on standing challenges. The pitfalls of relying on standing to demarcate who can and cannot question the validity of governmental action are well documented.<sup>17</sup> But the fact that agencies increasingly have been able to insulate the *substance* of their decision making based on standing—basically, a *procedural* device—complicates the equation even further.

The result is a dual paradox: First, agencies widely employ very permissive intervention standards in their own proceedings, standards that are even more lax when it comes to rulemakings. The very purpose of this is to promote public involvement in agency work, thus improving the legitimacy, efficacy, and accountability of administrative decision making.<sup>18</sup> But when, on judicial review, the standing of parties whose very involvement they invited in the proceeding below is disputed, a kind of public participation bait-and-switch occurs. Parties are (purportedly) warmly welcomed by the agency when it is trying to formulate policy, but are suddenly shunned when the parties question the legality of the agency's action.<sup>19</sup>

Second, given the increase in standing challenges, numerous courts of appeals—the D.C. Circuit foremost among them—have begun developing mechanisms attempting to deal with the problem of evaluating standing on direct appellate review of administrative decisions.<sup>20</sup> None of these mechanisms, however, solve the problem. They ignore the fact that they call on appellate courts to make factual findings, when appellate courts are ill-suited, by design, for the task. Moreover, they fail to acknowledge that dressing a court's standing determinations in a shroud of appellate "facts" risks exacerbating one of the core problems standing doctrine creates in the first place: the perception that judges will use

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16. See John D. Echeverria, *Standing and Mootness Decisions in the Wake of Laidlaw*, 10 WIDENER L. REV. 183, 188 n.44 (2003).

17. See *infra* Part II.A.

18. E.g., Sean Connelly, *Congressional Authority to Expand the Class of Persons with Standing to Seek Judicial Review of Agency Rulemaking*, 39 ADMIN. L. REV. 139, 159 (1987); Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 17–31 (1998).

19. Cf. 13B WRIGHT ET AL., *supra* note 10, § 3531.13, at 275 ("Once a party has been permitted to appear in the administrative proceeding, there are strong reasons to extend this administrative standing into standing for judicial review.")

20. See, e.g., D.C. CIR. R. 28(a)(7), available at <http://www.cadc.uscourts.gov/> (follow "Rules and Operating Procedures" hyperlink; then follow "Circuit Rules" hyperlink).

standing as a subterfuge to make results-oriented decisions without admitting they have done so.<sup>21</sup> Add to all this the fact that much of lawmaking today occurs in the administrative state,<sup>22</sup> and that legal challenges to that lawmaking are a key way the “headless fourth branch”<sup>23</sup> is kept in check,<sup>24</sup> and the continuing lack of a judicial solution for effectively dealing with standing in administrative appeals is problematic indeed.

This Article grapples with the problems created by the murky procedures on which courts have been relying to address standing on appeal, and offers a new solution for negotiating them. We do so in three parts.

Part I begins with an empirical analysis of the existing case law, surveying 94 appellate court opinions in which courts have ruled on parties’ standing to seek review of administrative decisions when the facts supporting standing are in question. From this survey, we outline the various tests that courts have used to assess standing on appeal, and the problems that have arisen from them. Our empirical survey shows that the issue of standing in these cases has become more common in recent years; that standing has been raised, especially over the last ten years, in more administrative cases than it ever had before, irrespective of whether the petition for review is from a rulemaking or an administrative adjudication; and that the mechanisms currently used to deal with standing in these cases impose unnecessary costs on both parties and courts. Using a four-pronged normative procedural justice model of (1) accuracy, (2) judicial economy, (3) procedural economy, and (4) access to justice, Part I evaluates each of the approaches courts have used thus far and reaches a single conclusion: A new solution is needed.

The final two parts identify and assess possible new solutions. Specifically, Part II reviews the critiques of standing to determine whether the difficulties detailed in Part I argue for a substantive change in standing jurisprudence. In particular, we explore the rationales for current standing doctrine and, echoing a growing number of scholars, conclude that other doctrines might better achieve these purposes, at least in the administrative context.

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21. See *infra* notes 163–65 and accompanying text.

22. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“Congress simply cannot do its job absent an ability to delegate power under broad general directives.”); *INS v. Chadha*, 462 U.S. 919, 986 (1983) (White, J., dissenting) (“There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term.”).

23. THE PRESIDENT’S COMM. ON ADMIN. MGMT., *ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES* 30 (1937) (internal quotation marks omitted); see also, e.g., *FTC v. Ruberoid Co.*, 343 U.S. 470, 487–88 (1952) (Jackson, J., dissenting) (“Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial . . . . The mere retreat to the qualifying ‘quasi’ is implicit with confession that all recognized classifications have broken down, and ‘quasi’ is a smooth cover which we draw over our confusion . . . .”). The term “headless fourth branch” originally referred to so-called “independent” agencies such as the FCC, ICC, and FERC. The term is now sometimes used, as we do here, more expansively to encompass agencies generally.

24. See 5 U.S.C. § 702 (2006) (providing judicial review of agency action).

Although we view sweeping changes to substantive standing law worthy of consideration, we nevertheless believe existing standing doctrine is unlikely to undergo wholesale change. Equally unlikely is a change to the statutes permitting review of administrative cases in the first instance in the appellate courts. Accordingly, we next examine potential solutions to remedy the discrete factual problem with standing in administrative appellate cases.

Based on our assessment of the law and existing practice, we conclude in Part III that when reviewing administrative decisions in the first instance, federal appellate courts should embrace a new, clear standard for assessing standing.

First, courts should, as the D.C. Circuit currently does, require all petitioners to address standing in their opening brief. In addition, courts should require petitioners who are not directly subject to the agency action in question to submit additional evidence showing that they have standing. Here, courts must be diligent in separating facts from law. But if these preliminary submissions show that there is a factual dispute on any element of standing, we suggest that courts of appeals employ special masters well versed in both factfinding and the Federal Rules of Evidence to help resolve the standing problem. We posit that magistrate judges fit this bill quite nicely.

Although this proposal is not without drawbacks, it should offer a number of benefits, including conserving appellate courts' resources, making courts' expectations of parties clearer, and making standing doctrine more transparent. We begin, however, by describing the problems created when appellate courts evaluate standing claims in the first instance.

#### I. TRACING THE GORDIAN KNOT: THE PROBLEM OF STANDING ON APPEAL

*Massachusetts* reveals, at least in part, the problem presented when Article III standing is challenged for the first time in a case that is reviewed in the first instance in the court of appeals. That case, however, is more emblematic than extraordinary. Many other cases have brought to the fore the procedural quandary that courts face when a party's standing is questioned but there is no factual record—let alone factual findings—for the appellate court to rely upon. This Part seeks to identify and weigh this dilemma, first, by tracing its potential procedural ramifications through three recent cases, and second, by constructing a normative framework through which to assess those ramifications. It then offers an initial empirical assessment of what we will call, for ease rather than accuracy,<sup>25</sup> the “standing on appeal” cases to date. We conclude that stand-

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25. Appellate review of agency decisions in the first instance is by petitions for review, not appeal. See FED R. APP. P. 15(a)(1) (“Review of an agency order is commenced by filing, within the time

ing on appeal cases are becoming more common and, in fact, present numerous procedural problems.

*A. Identifying the Problems of Standing on Appeal—Three Cases*

Perhaps the best way to trace the difficulties presented by standing challenges in administrative appeals is to juxtapose those cases with “normal,” non-administrative civil appeals.

Because the Court has defined it in Article III terms, standing is a jurisdictional question that, by definition, cannot be waived.<sup>26</sup> Today, the elements required to show Article III standing are so routine as to be *de rigueur*.<sup>27</sup> A party has standing if it can demonstrate injury in fact, causation, and redressability. As famously summarized in *Lujan v. Defenders of Wildlife*:<sup>28</sup>

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”<sup>29</sup>

Because it is a constitutional requirement, standing can be raised at any time;<sup>30</sup> in fact, a court must determine first that a plaintiff has standing before it considers the merits of any case.<sup>31</sup>

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prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order.”). To emphasize that this problem surfaces only when appellate courts hear these cases, however, this Article occasionally refers to the problem of resolving standing disputes on direct appellate review of agency decisions using the shorthand “standing on appeal.”

26. *E.g.*, *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996) (“[S]tanding . . . is jurisdictional and not subject to waiver.”).

27. *E.g.*, *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (calling standing elements “well established”); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (calling the requisite elements of standing familiar); *United States v. Hays*, 515 U.S. 737, 742 (1995) (standing elements “now well settled”).

28. 504 U.S. 555 (1992).

29. *Id.* at 560–61 (alterations in original) (citations and footnote omitted). In addition, parties must show that they have satisfied the strictures of so-called “prudential” standing: the “judicially self-imposed” “prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–12 (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

30. *E.g.*, *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 323–24 (5th Cir. 2008); *Pa. Prison Soc’y v. Cortés*, 508 F.3d 156, 158 (3d Cir. 2007); *accord* FED. R. CIV. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).

When an appellate court entertains a standing challenge in a *non-administrative* case, or an administrative case that was heard in the first instance in the district court,<sup>32</sup> it is unlikely to be procedurally peculiar. If the district court already ruled on standing, the appellate court will simply apply traditional standards of review. It will defer to any factual findings the district court made unless they are clearly erroneous,<sup>33</sup> and it will review the legal aspects of the court's standing ruling *de novo*.<sup>34</sup>

If standing was not considered in the district court, an appellate court will resort to what it typically does when new, non-waivable issues are raised on appeal.<sup>35</sup> It will resolve the standing challenge to the extent the question is legal and, to the extent it is factual, the court will simply remand for any necessary factfinding by the district court.<sup>36</sup>

This is precisely why, in *Lujan*, the Supreme Court went to great pains to enunciate the different levels of factual proof required in standing challenges.<sup>37</sup> When the facts are not in dispute, appellate courts are

31. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998); *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002).

32. Where the statute that authorizes the agency action is silent regarding review, judicial review of administrative action must be sought in the district court under 28 U.S.C. § 1331. *Robbins v. Reagan*, 780 F.2d 37, 42 (D.C. Cir. 1985); CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE*, § 8.11[2](b) (2008).

33. *E.g.*, *Me. People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 283 (1st Cir. 2006); *Retired Chi. Police Ass'n v. City of Chi.*, 76 F.3d 856, 862 (7th Cir. 1996).

34. See *ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1318 (10th Cir. 2008); *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008); *Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1100 (9th Cir. 2007).

35. See, *e.g.*, *Sporty's Farm L.L.C. v. Sportsman's Market, Inc.*, 202 F.3d 489, 496–97 (2d Cir. 2000) (“[E]ven if a new law controls, the question remains whether in such circumstances it is more appropriate for the appellate court to apply it directly or, instead, to remand to the district court to enable that court to consider the effect of the new law.”).

36. See, *e.g.*, *Pa. Prison Soc'y v. Cortés*, 508 F.3d 156, 169 (3d Cir. 2007) (“Because the issue of standing was raised for the first time on appeal, none of the plaintiffs have had the opportunity to present evidence or to litigate this issue. We will therefore dismiss this appeal *without prejudice* for lack of jurisdiction and remand to the District Court . . . .”); *United States v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1014 (8th Cir. 2003) (“If a threshold issue of Article III standing raises material fact disputes, including credibility issues, the district court may conduct an evidentiary hearing and resolve them.”); see also *Halicki Films, L.L.C. v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1226 (9th Cir. 2008); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 263 F. App'x 348, 356 (4th Cir. 2008); *Friery v. L.A. Unified Sch. Dist.*, 448 F.3d 1146, 1147 (9th Cir. 2006); *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 185–86 (2d Cir. 2005); *Bevill Co., Inc. v. Sprint/United Mgmt. Co.*, 77 F. App'x 461, 463–64 (10th Cir. 2003); *Lopez v. Behles (In re Am. Ready Mix, Inc.)*, 14 F.3d 1497, 1500 (10th Cir. 1994); HARRY T. EDWARDS & LINDA A. ELLIOTT, *FEDERAL STANDARDS OF REVIEW* 34 (2007) (noting that when resolving a standing issue, “if the factual record compiled in the district court is inadequate to the task, the court of appeals must remand the case to the district court for appropriate factual findings.” (citation omitted)). *But see Ford v. NYLCare Health Plans of the Gulf Coast, Inc.*, 301 F.3d 329, 331–32 (5th Cir. 2002) (dismissing for lack of standing *sua sponte* even though issue was not raised below and plaintiff had no opportunity to submit evidence in support of standing); *id.* at 334 (Benavides, J., concurring) (criticizing majority's decision, noting that “if the appellate court raises the issue *sua sponte* without notice to the parties, the plaintiff is deprived of a meaningful opportunity to address the court's concerns by identifying record evidence to satisfy the standing requirements”).

37. The Court said:

At the pleading stage, general factual allegations of injury . . . may suffice, for on a motion to dismiss we “presum[e] that general allegations embrace those specific facts that are necessary to support the claim.” In response to a summary judgment motion, however, the plaintiff can no



just as well equipped as trial courts to rule on standing because the question is a legal one.<sup>38</sup> When the facts are contested, however, the appropriate place to resolve those issues is in a trial court.<sup>39</sup>

All of this is turned upside down when standing questions arise for the first time during appellate review of an agency decision. After a decision is made by an agency, many cases are reviewed not in a district court but instead in a court of appeals.<sup>40</sup> The reason for this direct path to an appellate tribunal is quite sensible. A record has been developed at the agency level, and a decision has been made on that record. A court then typically reviews the agency decision under deferential standards of review,<sup>41</sup> much like the review of a district court decision on factual matters.<sup>42</sup> As such, review of these cases in the courts of appeals is quite logical, because it is similar to what those courts usually do.

Making this more complicated, however, is that it is not enough for a complainant to assert in an agency case that she should be there. She still must show standing, despite her participation in the proceeding below. Thus, for instance, it is not enough for a party to an administrative case to allege procedural harm, such as being “denied the ability to file comments on some Forest Service actions.”<sup>43</sup> Instead, as the Supreme Court recently made clear in *Sumner v. Earth Island Institute*, a party in an administrative case must still show harm to a concrete interest: “[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.”<sup>44</sup> This means that an appellate tribunal, unaccustomed to dealing with factual disputes, is put in the situation of facing them head-on.

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longer rest on such “mere allegations,” but must “set forth” by affidavit or other evidence “specific facts,” which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be “supported adequately by the evidence adduced at trial.”

*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (alterations in original) (citations omitted).

Of course, if factual questions are raised regarding jurisdiction at an early stage in litigation, courts are permitted to hold a limited evidentiary hearing on those issues. *See Alliance for Env'tl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 83–84 (2d Cir. 2006); *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995).

38. *See Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1054 (9th Cir. 1999); *Miller v. Stuart*, 117 F.3d 1376, 1380 (11th Cir. 1997); *United States v. Kovac*, 795 F.2d 1509, 1510 (9th Cir. 1986).

39. *See Lopez*, 14 F.3d at 1500 (“If there is a dispute in the relevant facts, the issue of an appellant’s standing should be remanded to the district court.”); *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 425 (1st Cir. 1983) (“The [district] court must resolve any genuine disputed factual issue concerning standing, either through a pretrial evidentiary proceeding or a trial itself.”).

40. *See, e.g.*, 42 U.S.C. § 7607(b) (2006) (authorizing review of some administrative actions taken under the Clean Air Act in the United States Court of Appeals for the D.C. Circuit and, for other actions, review is in the “appropriate” court of appeals); 47 U.S.C. § 402(b) (2006) (providing for review of a number of FCC orders in the D.C. Circuit).

41. *See* 5 U.S.C. § 706 (2006).

42. *Cf. Dickinson v. Zurko*, 527 U.S. 150 (1999) (comparing the clearly erroneous standard used to evaluate factual findings made by the district court to the substantial evidence standard used to review the product of formal agency proceedings).

43. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009).

44. *Id.*

It is of course true that if the standing challenge is legal rather than factual, there is little difference between an appeal of that issue from a trial court and a petition for review of an administrative decision.<sup>45</sup> The difficulty instead arises in the large number of administrative cases where the facts on standing are disputed. In most of these cases, there are no facts “found” at all that go to standing—let alone by a neutral party—in the proceeding under review.

In these cases, the agency is unlikely to have engaged in any kind of standing inquiry at all. This is because, unlike federal courts, agencies are not governed by the requirement of Article III and therefore may employ extraordinarily malleable standards for intervention and other involvement in proceedings. Quite typical is the language of the Federal Communications Commission’s (FCC) requirement: An FCC hearing officer has the discretion to allow “[a]ny . . . person” to intervene so long as the party identifies its “interest” and explains how its “participation will assist the Commission” in resolving the case.<sup>46</sup> Agencies differ on whether such a general “interest” must equate to a concrete injury in fact under Article III, but generally the notion of an “interest” is seen much more broadly in the administrative context than in the judicial sphere.<sup>47</sup> The D.C. Circuit has observed:

Within their legislative mandates, agencies are free to hear actions brought by parties who might be without party standing if the same issues happened to be before a federal court. The agencies’ responsibility for implementation of statutory purposes justifies a wider discretion, in determining what actions to entertain, than is allowed to the courts by either the [C]onstitution or the common law.<sup>48</sup>

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45. See Nat’l Ass’n of State Util. Consumer Advocates v. FCC, 457 F.3d 1238, 1246 (11th Cir. 2006); Bonds v. Tandy, 457 F.3d 409, 411 (5th Cir. 2006).

46. 47 C.F.R. § 1.223(b) (2009). The intervenor must also describe any issues it seeks to add to the proceeding. *Id.*; see also *id.* § 1.225(a) (allowing for “[a]ny person,” including non-parties, “to appear and give evidence on any matter”). For examples of other agencies’ requirements, see 14 C.F.R. § 302.19 (2009) (Dep’t of Transp.) (“Any person . . . may appear at any hearing, other than in an enforcement proceeding, and present any evidence that is relevant to the issues.”); 17 C.F.R. § 10.33(a) (2009) (CFTC) (“Any person whose interests may be affected substantially by the matters to be considered in a proceeding may petition the Administrative Law Judge for leave to intervene as a party . . . .”); 21 C.F.R. § 12.45(a) (2009) (FDA) (“[A] person desiring to participate in a hearing is to file with the Division of Dockets Management . . . a notice of participation in the following form . . . .”).

47. See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 472 n.329 (2008) (“Courts already are less accessible to public participation than agencies (and Congress). Standing rules further restrict the range of voices that can be heard.” (citation omitted)); see also, e.g., *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 74 (D.C. Cir. 1999) (“Federal agencies may, and sometimes do, permit persons to intervene in administrative proceedings even though these persons would not have standing to challenge the agency’s final action in federal court.”); *Wilcox Elec., Inc. v. FAA*, 119 F.3d 724, 727 (8th Cir. 1997) (“In certain instances . . . , parties who lack Article III standing . . . will have standing to litigate that dispute in an agency adjudication.”); cf. *Ritchie v. Simpson*, 170 F.3d 1092, 1095 (Fed. Cir. 1999) (“[T]he starting point for a standing determination for a litigant before an administrative agency is not Article III, but is the statute that confers standing before that agency.”).

48. *Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976); accord, e.g., *Cal. Ass’n of the Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 826 n.8 (D.C. Cir. 1985); *Ingalls Shipbuilding Div. v. White*, 681 F.2d 275, 285 (5th Cir. 1982); *Eccc, Inc. v. FERC*, 645 F.2d 339, 349–50 (5th Cir. 1981).

The net result is often mass participation in agency proceedings. It is not unusual, for instance, for a Federal Energy Regulatory Commission (FERC) adjudication to include literally dozens of intervenors—an entire region of industry players.<sup>49</sup> Likewise with rulemakings, often hundreds if not thousands of people, companies, and interest groups comment on proposed agency rules.<sup>50</sup> Such parties clearly have *some* interest in the proceeding's outcome or they would not have intervened, or commented, in the first place. But just because they intervened does not mean that their interest rises to the level of judicial standing. Courts consistently have recognized as much: “While it is perfectly proper, and indeed appropriate and even necessary, for the political branches to respond to the abstract, ideological, philosophical or even idiosyncratic wishes and needs of citizens or, for that matter, persons at large, the courts are granted authority only for the purpose delineated” under the Constitution.<sup>51</sup>

Another problem is that even if agencies were charged with finding facts relevant to the standing inquiry, those agencies are interested parties—particularly once their decisions are challenged in an appellate tribunal. As Judge Randolph pointed out in *Massachusetts*, asking the agency to draw conclusions that could thwart judicial review “would make no sense.”<sup>52</sup>

What this means for an appellate court hearing a newly lodged standing challenge in an administrative case is that, unlike in a normal civil appeal, the court lacks numerous benefits it would otherwise have in assessing whether standing exists. The court does not have the benefit of

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49. *E.g.*, N.Y. Indep. Sys. Operator, Inc., 129 F.E.R.C. ¶ 61,164 (Nov. 20, 2009), <http://www.ferc.gov/whats-new/comm-meet/2009/111909/E-5.pdf> (allowing intervention of more than two dozen parties); Exelon Corp., Pub. Serv. Enter. Corp., Inc., 112 F.E.R.C. ¶ 61,011 (July 1, 2005), <http://www.ferc.gov/whats-new/comm-meet/063005/E-4.pdf> (allowing intervention of over sixty parties); *cf.* Barry B. Boyer, *Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience*, 70 GEO. L.J. 51, 52–57 (1981) (discussing governmental funding of public participation in administrative proceedings and the backlash thereto).

50. *E.g.*, *In re Digital Broad. Content Prot.*, 18 F.C.C.R. 23,550, 23,582 app. A (2003) (listing over 40 commenters); Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule, 72 Fed. Reg. 29,851, 29,854 (May 30, 2007) (to be codified at 8 C.F.R. pt. 103) (“USCIS provided a 60-day comment period in the proposed rule and received more than 3,900 comments.”); National Organic Program, 65 Fed. Reg. 13,512, 13,540 (proposed Mar. 13, 2000) (to be codified at 7 C.F.R. pt. 205) (“We received hundreds of thousands of comments . . . .”); Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540, 21,696 (May 10, 1996) (to be codified at 18 C.F.R. pts. 35, 385) (listing 457 commenters).

51. *Gettman v. DEA*, 290 F.3d 430, 433–34 (D.C. Cir. 2002); *see also* *Hydro Res., Inc. v. EPA*, 562 F.3d 1249, 1259 (10th Cir. 2009) (“Standing must be established even though the [statutory authority for review] provides an expansive avenue for petitions for review.”); *Inner City Press v. Bd. of Governors*, 130 F.3d 1088, 1089 (D.C. Cir. 1997) (“[P]articipation before any agency does not, without more, satisfy a petitioner’s Article III injury-in-fact requirement.” (citation omitted)); *United States v. Fed. Mar. Comm’n*, 694 F.2d 793, 800 n.25 (D.C. Cir. 1982) (“Although participation in the [administrative] proceeding below may be an inflexible prerequisite to be a ‘party aggrieved’ . . . , it does not follow that participation in and of itself provides a springboard for judicial review . . . .” (citation omitted)).

52. *Massachusetts v. EPA*, 415 F.3d 50, 55 (D.C. Cir. 2005).

a first opinion, forcing it to begin its standing analysis from scratch rather than assessing the logic, or lack thereof, of another sophisticated take on the issue.<sup>53</sup> Even more troubling, the court does not have an evidentiary record on which to base its standing analysis.<sup>54</sup> As a result, where factual questions arise, as they often do in standing challenges,<sup>55</sup> the court must find a way to have that record created, or create the record itself.

Each of these differences from a “regular” civil appeal puts the appellate court in an unusual, uncomfortable place. Appellate courts do not “redo” what was done at the trial court. Instead, they correct substantial errors made by the trial court<sup>56</sup> and develop the law.<sup>57</sup> As the D.C. Circuit has candidly acknowledged, “we are ill-equipped to judge” factual disputes “in the first instance.”<sup>58</sup> But appellate courts, when faced with standing questions on direct review of agency decisions, must either attempt to rule without a concrete factual record, or create a factual record and then render factual findings.

Because appellate courts are on foreign ground when they are faced with factual-based standing questions, the procedures they have created for the cases they normally hear are unlikely to work. They do not have

53. *E.g.*, *United States v. Ness*, 565 F.3d 73, 77 (2d Cir. 2009) (“Ordinarily, we might remand this issue to the district court to benefit from its views.”); *Transamerica Ins. Group v. Turner Constr. Co.*, 601 N.E.2d 473, 475 n.2 (Mass. App. Ct. 1992) (“In discharging their function, appellate judges benefit from rulings of law made by trial judges . . . [A] trial judge[’s decision] is generally the jumping off place for our own deliberative process.”); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1305 (2002) (“Appellate courts should use remand in lieu of supplemental briefing whenever trial court or agency input would be useful.”); *cf.* Patricia M. Wald, *Making “Informed” Decisions on the District of Columbia Circuit*, 50 GEO. WASH. L. REV. 135, 137 (1982) (“In my experience, our responsibility is made more difficult by the constraints of the judicial process on access to needed information and expertise.”).

54. *Cf.*, *e.g.*, *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, 557 F.3d 985, 1003 n.22 (9th Cir. 2009) (“This factual morass may benefit from further development before the district court on remand.”); *United States v. Mills*, 122 F.3d 346, 350 n.5 (7th Cir. 1997) (“In other circumstances, the ‘normal law-clarifying benefits that come from an appellate decision,’ will not be possible and there will be countervailing benefits from deferring to the ‘fact-intensive, close calls’ of the trial court.” (citation omitted)).

55. “The major problem in the standing cases . . . is that the central issues are factual and thus must be examined anew in each individual case.” Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 751 n.308 (1990); *see also, e.g.*, *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 & n.5 (1986); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Marchezak v. McKinley*, 607 F.2d 37, 40 (3d Cir. 1979); Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215, 289 n.384 (2000); Bruce J. Terris, *Standing on Weak Ground*, 10 WIDENER L. REV. 173, 181 (2003); James E. Brown, Case Note, 60 TEMP. L.Q. 1045, 1045 (1987).

56. PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 2 (1976) (“The traditional appeal calls for an examination of the rulings below to assure that they are correct, or at least within the range of error the law for sufficient reasons allows the primary decisionmaker.”).

57. *See* Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 317–18 (2009) (“The law declaration function [of courts] involves the articulation and refinement of legal standards through . . . case-by-case adjudication. Prior to the Legal Realist movement . . . this function was regarded as, at best, secondary. Now, however, most view it as at least the equal of, if not primary to, error correction as a responsibility of an appellate court.” (footnote omitted)).

58. *Kennecott Corp. v. EPA*, 804 F.2d 763, 768 (D.C. Cir. 1986); *see also* Connelly, *supra* note 18, at 155–56 (“It is axiomatic that appellate courts lack both the authority and competence to engage in factfinding.”).

at their disposal the suite of factfinding procedures, such as live testimony and examination of witnesses, as district courts do. As a result, it is cliché but true, as the old saying goes, that “hard cases . . . make bad law.”<sup>59</sup> This is precisely what standing on appeal cases often are—hard cases where the established procedure, the legal problem, and the judicial expertise do not match. It is for this reason that one commentator has called appellate courts “the worst forum to litigate” standing questions for the first time.<sup>60</sup> Three cases illustrate the point. *Massachusetts* is the first.

In *Massachusetts*, the procedural problem created by the Environmental Protection Agency’s (EPA) challenge to the petitioners’ standing was clear, but the route the Supreme Court chose obscured it. The majority focused on the “special solicitude” it afforded to Massachusetts’ “quasi-sovereign interest[,]” and, as a result, largely glossed over the procedural problem of standing on appeal.<sup>61</sup> In only a few brief sentences, the majority labeled the “harms associated with climate change . . . serious and well recognized,” cited petitioners’ declarations supporting both this notion and the idea that an EPA rule on greenhouse gas emissions would help ameliorate those harms as “uncontested,” and moved on to the merits of the standing inquiry.<sup>62</sup>

This treatment of the evidentiary record, however, pushed an important problem to the side: There were serious questions about what the standing evidence was—both as to the extent of petitioners’ alleged injury and as to whether the relief they sought would cure that harm. But neither the Supreme Court nor the D.C. Circuit had ready a mechanism to deal with these factual disputes.

Below, the D.C. Circuit’s three-judge panel had splintered three different ways over how to address these questions. Judge Randolph, writing for the court, spotlighted the difficulties in grappling with the standing question. He noted that the “two volumes” of petitioners’ declarations and affidavits “from scientists, engineers, state officials, homeowners,” and others sufficiently detailed the “catastrophic consequences from global warming . . . , including loss of or damage to state and private property, . . . floods, and increased health care costs” to *facially establish* standing.<sup>63</sup> But aware that, among other things, the EPA had emphasized the uncertainty of climate change’s consequences in its rulemaking, Judge Randolph viewed petitioners’ declarations as potentially insufficient to *factually prove* standing:

Petitioners’ declarations do “support each element” of standing. But supporting an allegation is one thing; *proving an allegation is*

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59. *Ex parte Long*, (1854) 3 W.R. 19 (Q.B.) (Lord Campbell, C.J.); *see also* *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) (“Great cases like hard cases make bad law.”).

60. Appel, *supra* note 55, at 289 n.384.

61. *Massachusetts v. EPA*, 549 U.S. 497, 519–20 (2007).

62. *Id.* at 521, 526.

63. *Massachusetts v. EPA*, 415 F.3d 50, 54–56 (D.C. Cir. 2005).

*quite another.* *Lujan* holds that when a plaintiff's standing is challenged in a motion for summary judgment, the plaintiff "must 'set forth' by affidavit or other evidence 'specific facts' . . ." If we were to analogize the situation here to one in which EPA filed such a summary judgment motion, we would conclude that petitioners had submitted enough evidence raising genuine issues of material fact to defeat the motion.<sup>64</sup>

Because, however, of the "wealth" of record evidence "contradict[ing] petitioners' claim[s]," Judge Randolph concluded that surviving summary judgment was not enough.<sup>65</sup> Rather, the conflicting evidence made the case more akin to the "final stage" of litigation—trial—where actual proof of standing is required.<sup>66</sup> Accordingly, factfinding would be necessary.<sup>67</sup>

But Judge Randolph was not satisfied by this possibility either, because equating an administrative appeal to a trial would put the appellate court in an unusual place—that of a factfinder. "[T]he analogy is not entirely apt. As an appellate court we do not conduct evidentiary hearings in order to make findings of fact."<sup>68</sup> He thus saw three possibilities to avoid entangling the court in factfinding: refer the case to a special master, remand to the EPA, or assume that standing exists and address the merits because the question of standing was so intertwined with the merits.<sup>69</sup> Rejecting the first option as "folly" for requiring a "duplicat[ion of] the proceedings on the rulemaking," and dismissing the second as asking the EPA to encroach on the "responsibility of the federal courts," Judge Randolph opted for the third and then rejected the petitions for review on their substance.<sup>70</sup>

Judge Sentelle disagreed with Judge Randolph's approach of invoking hypothetical jurisdiction. Instead, he argued that no petitioner's declaration showed the "particularized" injury required by Article III, and thus, suggested that the court lacked jurisdiction.<sup>71</sup> Nevertheless, he concurred in the decision as pronouncing a "judgment closest to that which I myself would issue."<sup>72</sup>

Judge Tatel, dissenting from both of these paths, put the procedural quandary of standing on appeal in even starker terms. He was willing to factually credit petitioners' declarations, both because they were "unqualified" in their assertions and because the EPA failed to challenge them.<sup>73</sup> In other words, Judge Tatel was willing to engage in the very kind of

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64. *Id.* at 55 (emphasis added) (citation omitted).

65. *Id.*

66. *Id.*

67. *Id.* at 55–56.

68. *Id.* at 55.

69. *Id.* at 55–56.

70. *Id.* at 55–56, 58–59 (citation omitted).

71. *Id.* at 59–60 (Sentelle, J., dissenting in part and concurring in judgment).

72. *Id.* at 61.

73. *Id.* at 65–67 (Tatel, J., dissenting).

weighing of facts that Judge Randolph found so troublesome. To be sure, in doing so, Judge Tatel acknowledged the “fascinating” question of what to do when an “agency submits evidence that contradicts that of petitioners.”<sup>74</sup> But he saw no reason to resolve that knotty problem. Deeming the case’s procedural status more analogous to summary judgment than trial, he found the EPA’s failure to either supply opposing affidavits or point to specific contradictory evidence in the record as dispositive.<sup>75</sup> This, he said, was what mattered most.<sup>76</sup> Thus, Judge Tatel reached exactly the opposite conclusion of Judge Randolph: The relevant evidence on standing was not conflicted, but “plain.”<sup>77</sup>

Four years before *Massachusetts*, the Tenth Circuit found itself in this same unfamiliar appellate territory in *Qwest Communications International, Inc. v. FCC*.<sup>78</sup> There, Qwest disputed FCC orders implementing the Telecommunications Act of 1996’s new phone number “portability” requirement.<sup>79</sup> Initially, the FCC attacked Qwest’s standing, but later retreated from that position.<sup>80</sup> Nevertheless, the Tenth Circuit invoked standing *sua sponte* as a grounds for dismissing the appeal,<sup>81</sup> and again, evidentiary problems became the dispute’s core.

The crux of Qwest’s petition for review was that the FCC had improperly forced telephone carriers to pay their “own costs of currently available number portability measures,” rather than sharing with others the expense of allowing customers who switch to competing telephone providers to keep their same phone number.<sup>82</sup> Though this kind of economic harm is the textbook example of an Article III injury in fact,<sup>83</sup> the Tenth Circuit found standing lacking.<sup>84</sup> The court noted that there was no evidence in the agency record showing the extent of Qwest’s harm, and, while “mindful” that Qwest had “no reason” to introduce facts into the rulemaking proceeding “sufficient to establish standing,” the court still faulted Qwest for not providing that evidence on appeal.<sup>85</sup> The Su-

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74. *Id.* at 66.

75. *Id.*

76. *Id.* at 67.

77. *Id.*

78. 240 F.3d 886 (10th Cir. 2001).

79. *Id.* at 889.

80. *Id.* at 891.

81. *Id.*

82. *Id.* at 890 (citation omitted). The statutory provision implemented by the FCC in the challenged rule requires that “[t]he cost of . . . number portability . . . be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.” *Id.* (alterations in original) (citing 47 U.S.C. § 251(e)(2) (2006)).

83. *E.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 733–34 (1972) (“[E]conomic injuries have long been recognized as sufficient to lay the basis for standing . . . .”); *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1065 (9th Cir. 2008) (“The Supreme Court ‘repeatedly has recognized that such [direct economic] injuries establish the threshold requirements’ of Article III standing.” (alteration in original) (citation omitted)).

84. *Qwest*, 240 F.3d at 890.

85. *Id.* at 892 (quoting *Nw. Env’tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527–28 (9th Cir. 1997)).

preme Court, the Tenth Circuit observed, had counseled litigants a decade earlier to “supplement the record in any manner necessary to enable [the court] to address with as much precision as possible any question of standing that may be raised,” and Qwest had “not availed itself of this opportunity.”<sup>86</sup>

Likewise in *American Library Association v. FCC*,<sup>87</sup> the lack of factual evidence proving standing took center stage on appeal. In that case—a challenge to an FCC rule that sought to dictate the design of every device manufactured after July 1, 2005 capable of reading a digital television signal—the D.C. Circuit readily acknowledged petitioners’ “obvious interest in the rule.”<sup>88</sup> The court further recognized petitioners’ contention that the rule would injure them as “plausibl[e].”<sup>89</sup> The FCC, in fact, did not challenge standing. Nevertheless, based on what the court itself called a “vague and limited” standing challenge in a single footnote in the intervenor’s brief, the panel found itself “dubitante” on standing and thus gave petitioners two weeks to submit affidavits proving their injury.<sup>90</sup> Following submittal of those affidavits and supplemental briefing by both sides, the court weighed this new factual “record” and, despite the intervenor’s continued protests to the contrary, found it “clear” that standing existed.<sup>91</sup>

In each of these cases, the problem of standing on appeal was readily apparent: There were no established facts on which the courts could rest their standing determination, putting them in a procedurally unusual place. Had any of the appeals been from a district court, this problem would not have existed because the appellate court could have simply remanded to resolve the factual deficiency. Moreover, as Judge Edwards and Professor Linda Elliott have noted, “several circuits explicitly prohibit district courts from resolving disputed factual questions or making credibility determinations essential to the question of standing on the basis of affidavits alone.”<sup>92</sup> It therefore makes little sense for the circuits to require less of themselves in cases involving standing on appeal. Yet if standing decisions are made at the appellate level on the basis of affidavits that either are disputed, or would have been in a district court, that is exactly the result. And, just as problematic, each of these published opinions here reached very different solutions. The possibilities appear to be (1) assume standing and go to the merits, (2) rely only on the evidence that is presented by the parties before the agency, and (3) receive additional evidence in some manner on standing.

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86. *Id.* at 892–93 (quoting *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988)).

87. *Am. Library Ass’n v. FCC (Am. Library I)*, 401 F.3d 489 (D.C. Cir. 2005).

88. *Id.* at 490.

89. *Id.*

90. *Id.* at 491, 495–96.

91. *Am. Library Ass’n v. FCC (Am. Library II)*, 406 F.3d 689, 697 (D.C. Cir. 2005).

92. EDWARDS & ELLIOT, *supra* note 36, at 34.



The very difference in how courts—sometimes in the same case—struggle to solve this dilemma confirms the risks these cases present. If courts of appeals cannot agree on how to deal with standing issues first raised in petitions for review, how will litigants know how to address the issue? If litigants cannot predict how courts will address the problem, what is to stop judges from manipulating the procedures to reach outcomes that satisfy judges' individual preferences under the guise of procedure? And if courts can use the procedural rules for standing to surreptitiously reach the merits, and agencies can invoke these procedures to defend their own decisions, how meaningful does judicial review remain? In short, the problem of evaluating standing in these cases is not merely a narrow procedural one, but a problem with potentially much broader implications across administrative and appellate law as a whole.

### B. *Examining the Problem—A Normative Assessment*

Although the problem of standing on appeal appears to beget a deep procedural quandary for courts, it is possible that the appearance distorts the actual. Cases like *Massachusetts*, *Qwest*, and *American Library* could be outliers, oddities that rarely occur. Likewise, even if standing in these kinds of cases is a common dilemma, it may be that the problem's *effects* are not actually that troublesome, or difficult, for courts to address. In fact, it appears that the number of cases where standing is raised for the first time on direct appellate review of agency actions—what we, for ease, are calling “standing on appeal” cases—although small when compared to the total number of cases heard in courts of appeals, is nevertheless growing.<sup>93</sup> Before addressing that question, however, we evaluate the latter inquiry, assessing why standing on appeal cases are problematic from the perspective of our appellate system's aims. We do this, first, by building a normative model of procedural justice from which to evaluate the standing on appeal problem and, second, by applying that model to the existing case law. The nub of it is that standing on appeal cases risk frustrating each of the key goals of our appellate system.

#### 1. *Constructing the Model*

Different scholars frame our adjudicative system's purpose in different terms, but at their core, all of these models recognize the fundamental tension at the system's center: the delicate balance of accuracy and efficiency.<sup>94</sup> From the very initiation of a lawsuit, these twin—and

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93. See *infra* Part I.C.2.

94. E.g., Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 307–08 (1994) (“[A] large portion of the rules of civil, criminal, and administrative procedure . . . involve an effort to strike a balance between accuracy and legal costs.”); Michael I. Swygert & Katherine Earle Yanes, *A Unified Theory of Justice: The Integration of Fairness into Effi-*

often countervailing—objectives of civil justice pervade. Rule 1 of the Federal Rules of Civil Procedure declares: “[These rules] should be construed and administered to secure the *just, speedy, and inexpensive* determination of every action and proceeding.”<sup>95</sup> This oft-cited language thus infuses our justice system with multiple meanings from the beginning. The very notion of civil justice in the United States does not turn solely on getting every case right, or reaching “just” results alone; nor is it only about rendering decisions quickly and efficiently, or the exercise of “speedy” and “inexpensive” dispute resolution.<sup>96</sup> Rather, the American conception of civil justice envisions the simultaneous pursuit of all these goals: a judicial system that always seeks to reach substantively correct results but that does not sacrifice access to the system for absolute or perfect correctness. “The government-created rules of procedure represent, in this symbolic sense, the system’s best efforts to find a correct balance between fairness and efficiency, and to provide facially equal opportunities for all litigants.”<sup>97</sup>

The end purpose is no different for appellate courts. Though they serve a narrower role, primarily error correction,<sup>98</sup> appellate courts, like trial courts, embrace accuracy and efficiency as two of their guiding lights.<sup>99</sup>

Beyond the settled understanding that American civil justice rests on the tension of accuracy and efficiency, however, there are few comprehensive models of overall civil procedural justice.<sup>100</sup> The hard ques-

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*ciency*, 73 WASH. L. REV. 249, 251 (1998) (arguing that procedural and substantive justice embody both fairness and efficiency).

95. FED. R. CIV. P. 1 (emphasis added).

96. *Id.*; see also, e.g., Robert G. Bone, *Mapping the Boundaries of Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 88 (1989) (noting the tension between “the social interest in predictability and certainty” and “an individualized approach to justice”); Allan Erbsen, *From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1003 n.11 (2005) (“Accuracy is of course not the only value that procedure should promote—others include efficiency, distributive justice, an opportunity to be heard and participate, and the avoidance of invidious bias . . .”); Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267, 1276 (1975); John Lande, *How Much Justice Can We Afford?: Defining the Courts’ Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213, 214 (“In the real world, however, courts have limited resources, and they need to manage their resources wisely to accomplish their goals.”); *Washington State Access to Justice Technology Principles*, 79 WASH. L. REV. 5, 5 (2004) (recognizing transparency, fairness, effectiveness, and efficiency all as aspects of access to justice).

97. Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 207–08.

98. See Oldfather, *supra* note 57, at 316.

99. E.g., Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 865 (2000); Elizabeth Chamblee Burch, *Nonjurisdictionality or Inequity*, 102 NW. U. L. REV. COLLOQUY 64, 68 (2007), <http://www.law.northwestern.edu/lawreview/Colloquy/2007/24/>; Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1313 (1986); Amy E. Sloan, *Appellate Fruit Salad and Other Concepts: A Short Course in Appellate Process*, 35 U. BALT. L. REV. 45, 51–52 (2005).

100. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004); see also Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 488–89 (2003). This is in contrast to the broader social science literature, of

tion is not whether there is a tension, but how the tension should be resolved. We do not pretend to take up here the daunting task of building an overall model of procedural justice that can be used to evaluate any dispute resolution system's effectiveness. Rather, drawing on prior legal and social science scholarship, we seek more narrowly to frame a normative model to assess what impact, if any, the problem of standing on appeal may have for the federal appellate system's procedural objectives.<sup>101</sup> We find that potential impact both pervasive and large.

We begin with Professor Lawrence Solum's comprehensive legal work seeking to construct a holistic model of procedural justice.<sup>102</sup> Professor Solum posits that procedure, in general, has two overarching objectives: to "guarantee correct outcomes" under the substantive law, and "to guide primary conduct after the judgment is rendered."<sup>103</sup> Procedure serves both of these functions. It sets, "ex post," the framework in which the substantive law is applied, and it signals, "ex ante," what those rules will be.<sup>104</sup> Nevertheless, because "[p]rocedural perfection is unattainable,"<sup>105</sup> it is necessary to strike the time-worn balance of accuracy-and-efficiency that pervades procedural law. To find where this balance should lie, Professor Solum weighs three different conceptions of procedural justice: the *accuracy model*, or a "utopian" notion of perfect justice and correct results; the *balancing model*, or "imperfect procedural justice," the recognition that "diminishing marginal returns" mean that perfection is "too costly at some point"; and the *participation model*, or the idea that "procedural fairness requires that those affected by a decision have the option to participate" in the decision-making process.<sup>106</sup> From this assessment, Professor Solum concludes that "[a]ccuracy, cost, and participation must all play a role" in procedural justice.<sup>107</sup> He thus constructs a cascading model that places the ability of interested parties to participate first and the goal of maximizing the "likelihood" of a "legally correct outcome" second.<sup>108</sup> In this model, the objective of arriving at correct results in a given case can be limited only by (1) the need for participation or (2) the need to protect important substantive or constitutional rights or liberties, to fairly distribute the risk of incorrect results, to promote correct results systemically in future cases, or to keep justice's costs proportional to the "interests at stake."<sup>109</sup>

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which there are literally hundreds of articles positing and testing possible procedural justice models. See *infra* note 113 and accompanying text.

101. Certainly our model may have application elsewhere; we simply do not explore those circumstances here.

102. See Solum, *supra* note 100.

103. *Id.* at 184, 188.

104. *Id.*

105. *Id.* at 185.

106. *Id.* at 244, 252, 259.

107. *Id.* at 305.

108. *Id.* at 305–06.

109. *Id.*

Apart from Professor Solum's efforts, Professor Tom Tyler has used empirical work to identify, in the context of citizen contacts with courts and police, seven criteria of procedural justice.<sup>110</sup> The criteria are (1) the degree to which the decisionmaker appears motivated to act fairly, (2) is honest, (3) is unbiased, (4) is ethical, (5) the extent to which the citizen could participate in the process or give voice to her views, (6) the quality of the decisions made, and (7) the possibility for error correction.<sup>111</sup> Coalescing these factors, Professor Tyler contends that procedural justice is best achieved when decision making is consistent, accurate, impartial, and participative.<sup>112</sup> His research rests on a broad foundation of scholarship showing that citizens see the *legal system* as more just when the system's *procedure* is more just, irrespective of the results reached.<sup>113</sup> Professor Tyler thus observes that "procedural justice is complex and multifaceted."<sup>114</sup> Citizens do not use "any simple, unidimensional approach" to assess procedural justice.<sup>115</sup> Rather, procedural justice has numerous "positively interrelated clusters" that overlap, influence each other, and take on more or less importance depending on the situation.<sup>116</sup>

Other researchers have identified their own models of procedural justice. The taxonomies these scholars use to denominate procedural justice's attributes are as diverse as the methodologies, expertise, and purposes they employ to develop them.<sup>117</sup> Ultimately, however, some

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110. Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 103 (1988).

111. *Id.*

112. *Id.* at 121.

113. See, e.g., Robert Folger, *Distributive and Procedural Justice: Combined Impact of "Voice" and Improvement on Experienced Inequity*, 35 J. PERSONALITY & SOC. PSYCHOL. 108 (1977); Robert Folger et al., *Effects of "Voice" and Peer Opinions on Responses to Inequity*, 37 J. PERSONALITY & SOC. PSYCHOL. 2253 (1979); E. Allan Lind et al., . . . *And Justice for All: Ethnicity, Gender, and Preferences for Dispute Resolution Procedures*, 18 LAW & HUM. BEHAV. 269 (1994); E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978); John Thibaut et al., *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974); Tom R. Tyler & Robert Folger, *Distributional and Procedural Aspects of Satisfaction with Citizen-Police Encounters*, 1 BASIC & APPLIED SOC. PSYCHOL. 281 (1980).

114. Tyler, *supra* note 110, at 128.

115. *Id.*

116. *Id.* at 131.

117. Compare, e.g., Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a "Fair" Process*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 747, 749 (2003) (conceptualizing a procedural justice model around "formal" and "informal" decision-making quality and treatment of individuals and groups), with E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988) (defining fairness as based on trust in decisionmakers, dignity for affected parties, and neutrality in decision-making processes), E. Allan Lind et al., *Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments*, 73 J. PERSONALITY & SOC. PSYCHOL. 767 (1997) (examining status of recognition, trust in benevolence, and neutrality in decision making as indications of procedural justice), Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 172 (2005) (fair process includes "lack of bias, thoroughness, clarity" and giving "dignified, respectful treatment" to the voice of the affected), and Chad M. Oldfather, *Remediating Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 750-52 (2006) (espousing a minimum adjudi-

common themes bridge the models' boundaries. First, procedural justice is malleable. Procedural justice means different things in different situations, so the effective model must be tailored to the specific circumstances in which it labors.<sup>118</sup> Second, procedural justice is both internal and external; it is longitudinal. Procedural justice must be measured both from the short-term perspective of specific cases and specific litigants and from the long-term perspective of providing systemic legitimacy and "norm-setting" over time.<sup>119</sup> Third, procedural justice is participatory. Essentially all of the postulated models recognize that to have legitimacy, any kind of dispute resolution system must give voice to the affected—procedural justice demands affording parties their "day in court."<sup>120</sup> Finally, procedural justice is contextually value-based. Typically the values our society ascribes to "fair" procedure include non-bias, neutrality, equality, consistency, accuracy, and rights-enforcement, but certainly from the vantage of litigation, efficiency also must be added to the list.<sup>121</sup>

Apply these conceptual criteria to the specific circumstance of standing in administrative appeals and a more particularized normative model of procedural justice emerges. The model must be tailored to the appellate system's goals, so it must account both for the tension of accuracy-and-efficiency built into the civil judicial system and for the need of public involvement in agency decision making. Indeed, because litigant challenges are a key way that agencies' arrogation of power is kept in

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cative duty based on party participation, court engagement of arguments and facts, and transparency in reasoning).

118. See, e.g., Blader & Tyler, *supra* note 117, at 749; Solum, *supra* note 100, at 307–09; Tyler, *supra* note 110, at 107, 125, 131; E. Allan Lind, *Perspective and Procedural Justice: Attorney and Litigant Evaluations of Court Procedures* 5 (Am. Bar Found. Working Paper No. 9106, 1992).

119. See, e.g., Lande, *supra* note 96, at 222; Oldfather, *supra* note 117, at 749; Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 105–06 (2008); Solum, *supra* note 100, at 247–52; Tom R. Tyler, *Restorative Justice and Procedural Justice: Dealing with Rule Breaking*, 62 J. SOC. ISSUES 307, 315–16 (2006).

120. See, e.g., LIND & TYLER, *supra* note 117; MacCoun, *supra* note 117, at 172; Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 404–05 (2004/05); Oldfather, *supra* note 117, at 755; Solum, *supra* note 100, at 305, 308–11; Tyler, *supra* note 110, at 111; E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities* 10 (Am. Bar Found. Working Paper No. 9403, 1994).

121. See, e.g., Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1162 (2006) (arguing that "procedure must always be measured in terms of the substantive values at stake" because "[a]ccuracy is valuable only insofar as it improves enforcement of the substantive law and bolsters protection for the values served" thereby); Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2534–36 (2008); Orna Rabinovich-Einy, *Beyond Efficiency: The Transformation of Courts Through Technology*, 12 UCLA J.L. & TECH. 1, 11 (2008); Solum, *supra* note 100, at 184–90, 320–21; Tom R. Tyler & Steven L. Blader, *The Group Engagement Model: Procedural Justice, Social Identity, and Cooperative Behavior*, 7 PERSONALITY & SOC. PSYCHOL. REV. 349, 354–55 (2003); Lind, *supra* note 120, at 14 (noting that individuals' views of procedural justice depend on cultural assessments of whether they are being treated fairly).

check, participation is particularly important in this context.<sup>122</sup> The model also must recognize standing's substantive purpose of ensuring that only actually injured parties appear in court, just as it must seek to ensure that standing's limits on judicial access are administered in a neutral way, both on a case-by-case basis and from the perspective of the signals that standing doctrine sends to other appellants as well.<sup>123</sup> From this application, a normative model of procedural justice in the standing on appeal context can be framed around four pillars:

- (1) *Accuracy*, or ensuring that decisions are based on a correct application of the substantive law and without any bias for or against either side or any class of litigant, including affording parties a full and fair opportunity to litigate the standing question;
- (2) *Judicial economy*, or resolving the standing question with the minimum expenditure of judicial resources;
- (3) *Procedural economy*, or what might be referred to as *private procedural economy*, meaning that the expenditure of party resources to establish standing also should be minimized; and
- (4) *Access to justice*, or ensuring that standing is not used by either the agency or the courts to render, or to avoid rendering, decisions on the merits under another name.

## 2. *Applying the Model*

After putting the existing case law into this normative frame, the potential problems that standing on appeal cases present become immediately obvious. Together, *Massachusetts*, *Qwest*, and *American Library* demonstrate the point. Although each of these courts adapted to find solutions to resolve the standing question, the very ways they adapted illustrate how each of the tenets of the appellate system's objectives can be frustrated when standing is challenged for the first time in an agency appeal.

### a. Accuracy

The first problem is accuracy. When trial courts make factual findings, there are numerous procedural safeguards in place to help ensure that the facts found are accurate. Foremost, trial courts are relative experts in factfinding because they perform the task on a regular basis.<sup>124</sup> They also employ numerous procedures to help develop and decide facts.

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122. See, e.g., *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) ("The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." (emphasis added)).

123. See *supra* note 29.

124. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985) ("The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise.").

Clear burdens of production and persuasion guide who must come forward with evidence at various stages of a civil case.<sup>125</sup> The discovery process allows parties to acquire evidence and test the other side's.<sup>126</sup> Cross-examination expands this possibility,<sup>127</sup> and the factfinder itself, whether the judge or the jury, directly observes witnesses and can thus assess their credibility.<sup>128</sup> It is for all these reasons that appellate courts heavily defer to trial courts' factual findings, rather than revisiting them *de novo* when making legal rulings.<sup>129</sup>

What appellate courts are asked to do in standing on appeal cases, however, is the very thing they traditionally do not: find facts. Thus, in both *Massachusetts* and *American Library*, the D.C. Circuit examined petitioners' affidavits attempting to show, factually, why they had standing.<sup>130</sup> The procedurally strange thing about this was that the affidavits were subject to none of the protections that normally would help ensure accuracy. There was no discovery, no cross-examination, and, obviously, the affiants' credibility could not be fully weighed because they testified on paper, not before the court.<sup>131</sup>

One might contend, of course, that this kind of affidavit submittal is very much like what happens on summary judgment.<sup>132</sup> It is, but that misses a critical point: A court enters summary judgment only where

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125. See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (explaining that the burden of persuasion determines "which party loses if the evidence is closely balanced" and the burden of production determines "which party bears the obligation to come forward with the evidence at different points in the proceeding"); cf. 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE* § 5122 (2d ed. 2005) (explaining the history and application of both burdens).

126. See FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . ."); *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) ("The various instruments of discovery now serve[, among other things,] as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues.").

127. See *California v. Green*, 399 U.S. 149, 158 (1970) (calling cross-examination the "greatest legal engine ever invented for the discovery of truth" in our adversary system (quoting 3 J. WIGMORE, *EVIDENCE* § 1367 (3d ed. 1940)); see also Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 391 (1992).

128. See *United States v. Williams*, 977 F.2d 866, 870 (4th Cir. 1992) (noting need to give "due deference to the trial court's opportunity to assess credibility"); *United States v. Risken*, 869 F.2d 1098, 1100 (8th Cir. 1989) ("The district court is in the best position to observe the demeanor of the witnesses and to assess credibility, and such factual findings shall not be set aside unless clearly erroneous."). Not all agree, however, that judges or juries are as good at assessing credibility as originally thought. See, e.g., John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 214-15 (2001); Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1245 (2001).

129. See FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."); *Anderson*, 470 U.S. at 574-75.

130. See *Massachusetts v. EPA*, 415 F.3d 50, 54-56 (D.C. Cir. 2005); *Am. Library II*, 406 F.3d 689, 696-97 (D.C. Cir. 2005).

131. See Appel, *supra* note 55, at 289 n.384 (criticizing the practice of allowing parties to demonstrate standing by submitting affidavits on appeal because there is no opportunity for discovery or cross-examination).

132. See *infra* Part I.C.1.

there is “no genuine issue as to any material fact.”<sup>133</sup> In other words, a trial court grants summary judgment only when it is clear that one side must win. It does not grant summary judgment in factually contested cases.<sup>134</sup> In those instances, the case proceeds to trial, where traditional mechanisms for factfinding, such as live testimony and cross-examination, are employed.

Unlike the clarity of facts necessary for summary judgment, administrative standing cases increasingly involve hotly contested evidence. This is made plain even by the standards courts have begun to develop to grapple with the standing on appeal problem. As the D.C. Circuit has ruled, a petitioner’s “burden . . . is to show a ‘*substantial probability*’ that it has been injured, that the defendant caused its injury, and that the court could redress that injury.”<sup>135</sup>

Applying this standard, Judge Randolph’s opinion in *Massachusetts* acknowledged that “petitioners had submitted enough evidence raising genuine issues of material fact to defeat [a summary judgment] motion.”<sup>136</sup> But that left the court, in Judge Randolph’s view, with conflicting factual evidence and no good mechanism for resolving the conflict: “As an appellate court we do not conduct evidentiary hearings in order to make findings of fact.”<sup>137</sup> Courts of appeals do not do factfinding; they simply are not built for it.<sup>138</sup>

#### b. Judicial Economy

Standing on appeal cases also threaten judicial economy. This may occur in three ways. First, precisely because appellate courts lack factfinding expertise, delays and thus additional costs can result when they must sort through facts. Appellate courts are more efficient at resolving standing disputes if they can do so using an established factual record, just as they do for other questions.<sup>139</sup>

*Massachusetts* and *American Library* both bear this out. Those cases arrived at the court of appeals with no set of established facts with respect to standing. The *Massachusetts* opinions dealt with this by merging the administrative record and newly submitted affidavits and then quib-

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133. FED. R. CIV. P. 56(c).

134. *E.g.*, *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968); *Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227, 230–31 (6th Cir. 1990).

135. *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (emphasis added) (citing *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000)).

136. *Massachusetts v. EPA*, 415 F.3d 50, 55 (D.C. Cir. 2005).

137. *Id.*

138. See Daniel Egger, Note, *Court of Appeals Review of Agency Action: The Problem of En Banc Ties*, 100 YALE L.J. 471, 481 (1990).

139. See *Retired Chi. Police Ass’n v. City of Chi.*, 76 F.3d 856, 862 (7th Cir. 1996) (“Where the district court’s resolution of a standing question involved disputed factual matters, we will accept the district court’s factual findings unless they are clearly erroneous.”); *Lopez v. Behles (In re Am. Ready Mix, Inc.)*, 14 F.3d 1497, 1500 (10th Cir. 1994) (“If there is a dispute in the relevant facts, the issue of an appellant’s standing should be remanded to the district court.”).



bling over what that composite record established.<sup>140</sup> The *American Library* court, in contrast, solved the problem by ordering petitioners to supplement the administrative record.<sup>141</sup> Had standing instead been presented to these courts with an established record, there would have been no need to take these steps, and, particularly in *American Library*, scarce appellate resources could have been conserved.

Second, standing on appeal cases risk hampering efficiency by delaying decisions on the merits. Normally in civil cases, most case-dispositive issues arise relatively early in a proceeding, such as by a Rule 12 or summary judgment motion. One core reason for this is to limit unnecessary resource expenditure.<sup>142</sup> Standing, however, can be raised at any point in a case.<sup>143</sup> Moreover, because the standing inquiry mimics the requirements of private common law actions, standing is more rarely in doubt in those cases.<sup>144</sup> In contrast, standing is more difficult to establish in public lawsuits that seek review of government action—precisely the situation in administrative cases. Take, for instance, *American Library*. There, standing was not really in dispute until oral argument. But once it became the focus before the appellate court, it spawned an entire side proceeding complete with its own evidentiary record, briefing schedule, and supplemental submissions.<sup>145</sup>

Third and perhaps most minor, standing on appeal cases may make appellate courts more inefficient by distracting them from their core task: issuing decisions on the merits.<sup>146</sup> There is no doubt that this cost is ancillary, not direct. The Federal Rules of Appellate Procedure contemplate motions,<sup>147</sup> and motions practices at the appellate level are not uncommon. Possibly, a standing-based motion to dismiss early on in a proceeding could actually *add* efficiency because it might result in prompt resolution before resources are expended on the merits. But to the extent motions are not filed early on, or are used by parties to make an end-run around the length limitations for merits briefs,<sup>148</sup> appellate courts may find themselves expending more time addressing motions and less time

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140. See *Massachusetts*, 415 F.3d at 55–56.

141. See *Am. Library II*, 406 F.3d 689, 696–97 (D.C. Cir. 2005); *Am. Library I*, 401 F.3d 489, 496 (D.C. Cir. 2005).

142. See Robert H. Abrams & Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75, 105–06 n.150 (1984); Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 714 n.426 (2000).

143. See *supra* note 30.

144. See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 301 (2008).

145. See *Am. Library I*, 401 F.3d at 495–96; see also Terris, *supra* note 55, at 181–82 (“Extensive briefing, oral argument and sometimes a factual hearing are needed to resolve the standing issue. The resulting litigation may consume almost as much of the parties and the courts’ resources as litigation of the liability and relief issues. The fact is that standing is nearly always a side show . . .”).

146. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 9–10 (2004) (“The Court of Appeals . . . issued three separate decisions discussing the merits and [petitioner’s] standing.”).

147. See FED. R. APP. P. 4, 12, 27.

148. See *id.* R. 32(a)(7) (limiting merit briefs to 30 pages, 14,000 words, or 1300 lines).

deciding cases. In fact, in *Qwest* the Tenth Circuit invited this possibility. It ruled that *Qwest* lacked standing because it did not move to supplement the administrative record.<sup>149</sup> If *Qwest* had made that motion, the almost certain result would have been more resource expenditure on non-merits questions. As any litigator will attest, the most likely immediate outcome of any motion is not quick resolution, but more motions practice.

### c. Procedural Economy

The judicial inefficiencies these cases can create have corollaries for private parties as well. If parties do not clearly understand what level of factual proof they must offer to establish standing, they may incur additional costs by presenting one form of evidence (e.g., allegations or administrative record citations) only to find later that the court demands more (e.g., affidavits). Had the parties understood the court's expectation from the beginning, they could have avoided the middle step of providing less evidence than required.

Likewise, the lack of a clear mechanism for how courts of appeals deal with the standing issue means that parties may expend, cumulatively, more resources than they otherwise would. For instance, a party who participated heavily in an agency proceeding but knew it might have difficulty establishing standing on appeal might decide to forego seeking review altogether, or choose to allocate its resources to assisting another party instead.<sup>150</sup> Correspondingly, there is a risk that if some courts impose one type of evidentiary requirement on standing but other courts employ a less stringent standard, parties may, to the extent possible, forum shop.<sup>151</sup>

By the same token, ambiguity in evidentiary requirements may effectively encourage parties to stretch their standing assertions, thereby imposing unnecessary costs on the agencies and intervenors defending the agency action.<sup>152</sup> This risk, in fact, runs both ways. Without clear

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149. See *Qwest Commc'ns Int'l, Inc. v. FCC*, 240 F.3d 886, 892–93 (10th Cir. 2001) (citing *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988)).

150. See, e.g., *Rosen-Zvi & Fisher*, *supra* note 119, at 105–06 (“[Procedural] rules affect not only court proceedings but also the bargaining process that occurs outside the courtroom. Bargaining does not transpire in a vacuum; it takes place ‘in the shadow of the law.’ Legal rules and procedures structure the bargain, governing what each party can expect to gain in litigation and giving each party certain bargaining chips—an endowment of sorts.” (footnote omitted)).

151. Although some statutes limit venue for appeals of an agency's decision, see, e.g., 7 U.S.C. § 2461 (2006); 42 U.S.C. § 3612(i)(2) (2006), others allow the parties to choose, see, e.g., 15 U.S.C. § 717r(b) (2006); 28 U.S.C. § 2343 (2006); 42 U.S.C. § 10139(a)(2), sometimes resulting in appellate venue “races” or “competitions” through the filing of petitions for review. See also Steven Ferrey, *The Eagles of Deregulation: The Role of the Courts in a Restructured Environment*, 32 ENVTL. L. 297, 314 (2002); George P. Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 FORDHAM J. CORP. & FIN. L. 1, 117–19 (2007).

152. Cf. Alberto B. Lopez, *Laidlaw and the Clean Water Act: Standing in the Bermuda Triangle of Injury in Fact, Environmental Harm, and “Mere” Permit Exceedances*, 69 U. CIN. L. REV. 159, 191 (2000) (“Although well-intentioned, the affidavits of environmental plaintiffs [on standing] frequently

evidentiary requirements, both sides might attempt to sandbag the other: Agencies may lull a party into heavy participation below and then suddenly challenge that party's ability to continue participating on appeal, and appealing parties may assert one interest in the agency proceeding, only to state a new theory on appeal.

Almost all of these possibilities are evident in the *Massachusetts-Qwest-American Library* trilogy. In *American Library*, the petitioners initially responded to the intervenor's cursory standing challenge via a correspondingly cursory footnote in their brief, but the back-and-forth then escalated dramatically.<sup>153</sup> After standing was raised in oral argument, the petitioners made post-argument letter submittals on standing, and, finally, the D.C. Circuit ordered supplemental briefing and affidavits, with which petitioners complied.<sup>154</sup> Had the parties known from the beginning that standing would take on such central importance, they could have skipped to the proof-by-affidavit step.

The opposite problem was present in *Massachusetts*. There, petitioners arrived at the D.C. Circuit armed with scores of affidavits.<sup>155</sup> Had they known, however, that the Supreme Court would afford state-based interests elevated importance,<sup>156</sup> they could have focused exclusively on proof from the state parties.

And what of the agencies and intervenors in these cases? If they doubted the factual assertions petitioners made to show standing, they were remarkably constrained in their response. The *American Library* court gave the parties a chance to oppose the new affidavits by brief,<sup>157</sup> but in neither that case nor *Massachusetts* did parties file opposing affidavits, or seek discovery or cross-examination. The paper evidentiary record built on appeal was one-sided, crafted by those who had the burden to demonstrate standing.

Finally, in *Qwest*, although the Tenth Circuit acknowledged that "there were reasonable grounds for Qwest's failure to adduce evidence of injury before the Commission,"<sup>158</sup> it nevertheless faulted Qwest for failing to "obtain[] leave to adduce evidence regarding standing."<sup>159</sup> In short, Qwest believed the law to run one way, only to find out it went the other.

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boil down to an 'academic exercise in the conceivable.'" (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973)); Terris, *supra* note 55, at 181 ("The determination whether to bring cases [under the Clean Water Act] is usually made jointly by environmental organizations and their attorneys. . . . The organizations then canvas their members to find ones who use, or would use if there were less pollution, [the water or land]. . . . The plaintiffs' members generally play no role in the litigation except to sign affidavits and to testify as to standing.").

153. *Am. Library I*, 401 F.3d 489, 490–91 (D.C. Cir. 2005).

154. *Id.* at 491, 495–96; *see also Am. Library II*, 406 F.3d 689, 696–97 (D.C. Cir. 2005).

155. *Massachusetts v. EPA*, 415 F.3d 50, 54 (D.C. Cir. 2005).

156. *Massachusetts v. EPA*, 549 U.S. 497, 518–20 (2007).

157. *See Am. Library I*, 401 F.3d at 496.

158. *Qwest Commc'ns Int'l, Inc. v. FCC*, 240 F.3d 886, 893 (10th Cir. 2001).

159. *Id.*

The agency's position, too, demonstrated the problems of standing on appeal. The FCC welcomed Qwest as a participant in proceedings below,<sup>160</sup> but when Qwest petitioned for review, the FCC initially challenged Qwest's standing but then withdrew its challenge after briefing.<sup>161</sup> After this rollercoaster ride of sorting out where it stood with the agency, one can only imagine that Qwest was stunned when the court, acting *sua sponte*, concluded that it fell short of the standing hurdle.<sup>162</sup> In short, the lack of clarity as to how any given court will approach the standing question, particularly after cases like *Massachusetts*, *American Library*, and *Qwest*, may cause parties to overspend, in resources or time, on an issue that is by definition ancillary to the merits of their case.

d. Access to Justice

Finally, standing on appeal cases may frustrate parties' access to justice. The most troubling possible manifestation of this is if courts use standing to reach a silently desired substantive result without actually ruling on the merits. It is, indeed, a longstanding criticism of standing generally that courts invoke the doctrine as a subterfuge to keep out litigants, or types of cases, for which they lack sympathy. As Professor Richard Pierce has observed, there is a "strong tendency" for "judges to engage in ideologically driven doctrinal manipulation in standing cases."<sup>163</sup> "The net effect" is a collective closing of courts' doors, a *de facto* limitation on "citizens' claims against their government."<sup>164</sup> The standing on appeal problem, however, goes beyond this broad critique. It is the risk not only that courts will use standing *doctrine* as a cryptic filter on substance,<sup>165</sup> but that they will use the onus of *evidentiary standing re-*

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160. *See id.* at 891.

161. *Id.*

162. *Id.* at 893.

163. Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1760 (1999); *see also, e.g.*, Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 426 (1974) (arguing that standing is better understood from the perspective that courts blend its components with cases' merits); Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 635 (1985) (arguing that standing "has been employed without consistent rationale to fence out disfavored federal claims"); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663-64 (1977); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1373 n.14 (1988) ("Although it is probably impossible to document, I suspect that most academics and practicing lawyers at least share the suspicion that standing law is nothing more than a manipulation by the Court to decide cases while not appearing to decide their merits."); Michael A. Wolff, *Standing to Sue: Capricious Application of Direct Injury Standard*, 20 ST. LOUIS U. L.J. 663, 674-75 (1976); Kevin A. Coyle, Comment, *Standing of Third Parties to Challenge Administrative Agency Actions*, 76 CAL. L. REV. 1061, 1081 (1988) (noting criticism that "judges abuse standing in order to vindicate their view of the merits"); Bruce B. Varney & George J. Ward, Jr., Note, *Who Can Stand Up for the Environment?: Standing to Challenge Administrative Agency Actions*, 7 ST. JOHN'S J. LEGAL COMMENT. 443, 459 (1991) ("[W]hen it is not clear whether a plaintiff has standing, federal courts blur the distinction between an examination prior to the merits and an examination on the merits in order to 'tip the scales' towards one determination.").

164. Winter, *supra* note 163, at 1373.

165. *Cf. Flast v. Cohen*, 392 U.S. 83, 128-29 (1968) (Harlan, J., dissenting).

*quirements* to further disguise the way in which they manipulate the doctrine. That is, courts need not even render a decision on standing; they can simply chalk it up to an evidentiary failing.

Moreover, even if courts do not use standing in this way, there is a risk of a second, residual impact on access to justice: a chilling effect. If parties see appellate courts' factual treatment of standing as inconsistent—or if courts appear willing to decide fact-based standing questions without the record to do so—the result may be a perception, irrespective of the reality, that courts are using standing improperly. This, in turn, undermines courts' legitimacy. It disincentivizes parties who believe courts will use standing improperly in their case from seeking review. To the extent that happens, a critical check on agencies' tendency to push the boundaries of their statutory authority is weakened. This is most pronounced in the public law context—that is, the precise context in which agency decisions are being challenged for the first time before appellate courts.

Again, the trilogy of *Massachusetts*, *Qwest*, and *American Library* illustrates. In all three cases, whether the party challenging the agency action prevailed aligned neatly with the court's determination on standing. In *American Library* and the Supreme Court's *Massachusetts* decision, the courts found standing present and also found the agencies' actions unlawful.<sup>166</sup> Conversely, in *Qwest*, the court found standing lacking and thus dismissed the petition for review.<sup>167</sup>

To be clear, our argument here is not that whenever a court's decision on standing corresponds to the end result, the standing analysis has been manipulated. Nor, certainly, is it that there was any manipulation of the standing analyses in any of these cases. Indeed, the question about what is “really” inside judges' heads is exactly the sort of inquiry that is impossible to measure.<sup>168</sup> But when a key restraint on agency power is citizen and interest group challenges, and when standing is already viewed suspiciously, a tendency for the case result to match the standing decision, especially when the standing “facts” are in play, may exacerbate concerns over the doctrine's manipulability.

### C. *Weighing the Problem—An Initial Empirical Look*

Despite the multitude of ways that standing on appeal might frustrate procedural justice, it may be that, in actual practice, the problems are ameliorated by judicial innovation. It may be that courts have solved the problems. This Section considers that possibility from two angles. It evaluates the judicial approaches adopted thus far, and it takes an initial

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166. *Massachusetts v. EPA*, 549 U.S. 497, 521–26, 533–35 (2007); *Am. Library II*, 406 F.3d 689, 696 (D.C. Cir. 2005).

167. *Qwest*, 240 F.3d at 892–93. This ruling applied to portions of *Qwest's* petition; the court dismissed other portions based on ripeness. *See id.* at 895.

168. *See Winter*, *supra* note 163, at 1373 n.14.

empirical look at the extent to which standing on appeal cases actually present the possible procedural problems identified. Together, these assessments confirm that courts need to break new ground in how they approach standing on appeal.

### 1. *The Judicial Response*

Courts that have expressly addressed the standing on appeal problem have taken three basic approaches. These approaches differ primarily in the specificity of procedure they prescribe. As such, they might be categorized, respectively, as specific, moderately specific, and ad hoc.

The D.C. Circuit's approach is by far the most specific. This is important because, and perhaps due to the fact that, the D.C. Circuit is regarded as having particular expertise in administrative law.<sup>169</sup> The D.C. Circuit first adopted its approach in 2002 in *Sierra Club v. EPA*,<sup>170</sup> but it has since codified the requirement in D.C. Circuit Rule 28(a)(7).<sup>171</sup> That rule states that in all "direct" appellate challenges to agency decisions, the petitioning party must include "the basis" for its "claim of standing" in its opening brief.<sup>172</sup> What such a "claim of standing" entails is not entirely clear on the rule's face, but the next sentences add some detail: "When the appellant's or petitioner's standing is not apparent from the administrative record, the brief must include *arguments and evidence* establishing the claim of standing. If the evidence is lengthy, and not contained in the administrative record, it may be presented in a separate addendum to the brief."<sup>173</sup>

*Sierra Club* injects even more substance into the requirement. In *Sierra Club*, public interest groups challenged an EPA rule promulgated under the Resource Conservation and Recovery Act (RCRA).<sup>174</sup> Both the EPA and intervenors disputed standing, to which the *Sierra Club* responded that the new rule harmed its members who had contacts with areas where chemical plants governed by the rule operated.<sup>175</sup> In making this argument, the *Sierra Club* did not offer any evidence placing its members in those locations; it merely alleged the harm in its reply brief.

The D.C. Circuit found this entirely deficient. Analogizing direct administrative review to summary judgment because "the petitioner [asks] the court of appeals for a final judgment on the merits, based upon the application of its legal theory to facts established [below],"<sup>176</sup> the

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169. WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE 66-67 (3d ed. 2006).

170. 292 F.3d 895 (D.C. Cir. 2002).

171. D.C. CIR. R. 28(a)(7), available at <http://www.cadc.uscourts.gov/> (follow "Rules and Operating Procedures" hyperlink; then follow "Circuit Rules" hyperlink).

172. *Id.*

173. *Id.* (emphasis added) (citation omitted).

174. *Sierra Club*, 292 F.3d at 896.

175. *Id.* at 898.

176. *Id.* at 899.

court found the Sierra Club obliged to provide more than “[b]are allegations” on standing.<sup>177</sup> Accordingly, it was the Sierra Club’s responsibility either to “identify in [the administrative] record evidence sufficient to support its standing . . . or, if there is none because standing was not an issue before the agency, submit additional evidence to the court of appeals” at the earliest possible point, not in its reply brief:<sup>178</sup>

[A] petitioner whose standing is not self-evident should establish its standing by submissions of its arguments and any affidavits or other evidence appurtenant thereto *at the first appropriate point in the review proceeding*. In some cases that will be in response to a motion to dismiss for want of standing; in cases in which no such motion has been made, it will be *with the petitioner’s opening brief*—and not, as in this case, in reply to the brief of the respondent agency.<sup>179</sup>

With this ruling, the D.C. Circuit thus set the new rules for standing on appeal. It specified, “[h]enceforth,” the burden, evidentiary requirements, and time for parties to show standing.<sup>180</sup>

Courts from three other circuits have followed aspects of *Sierra Club*,<sup>181</sup> but no circuit has yet amended its local rules to mandate either the specificity in timing or type of factual proof the D.C. Circuit now demands. Rather, most circuits appear either not to have squarely addressed the question yet or to have done so with much less specificity. The Fifth and Tenth Circuits are indicative of what might be referred to as the moderately specific approach. Both jurisdictions have begun emphasizing that petitioners must carry their standing burden through affidavits or similar evidence, but they have yet to announce a mandatory timeline for doing so. *Qwest*, of course, is a prime example of this rule.<sup>182</sup> Another is *Central & South West Services, Inc. v. EPA*.<sup>183</sup> Petitioners there challenged an EPA rule governing disposal of polychlorinated biphenyls (PCBs).<sup>184</sup> Although the Sierra Club offered affidavits attempting to show how the rule would harm its members, the Fifth Circuit dismissed the appeal on standing grounds because those affidavits failed to include the necessary “facts.”<sup>185</sup> The court wrote, “Sierra Club has failed

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177. *Id.* at 898.

178. *Id.* at 899.

179. *Id.* at 900 (emphasis added).

180. *Id.*

181. *Manufactured Hous. Inst. v. EPA*, 467 F.3d 391, 398 (4th Cir. 2006); *Heide v. FAA*, 110 F. App’x 724, 726 (8th Cir. 2004); *Piedmont Envtl. Council v. U.S. Dep’t of Transp.*, 58 F. App’x 20, 23–24 (4th Cir. 2003); *cf. Tex. Indep. Producers & Royalty Owners Ass’n v. EPA*, 410 F.3d 964, 970–71 n.7 (7th Cir. 2005) (rejecting argument that petitioners were not required to address standing until challenged).

182. *See supra* notes 78–86 and accompanying text.

183. 220 F.3d 683 (5th Cir. 2000).

184. *Id.* at 687.

185. *Id.* at 700.

to present any affidavits or other evidence explaining how PCBs . . . could migrate into aquifers and waterways.”<sup>186</sup>

Indicative of the final category—the ad hoc approach—are the Ninth and Eleventh Circuits. Their approach can be denominated ad hoc because, while they emphasize the rule that petitioners bear the burden of proving standing, these courts have not provided specific directives either on what type of evidence must be produced to do so, or the circumstances in which it must be produced. In *Northwest Environmental Defense Center v. Bonneville Power Administration*, for instance, the Ninth Circuit allowed petitioners’ affidavits over a motion to strike.<sup>187</sup> But it did not mandate, as *Sierra Club* did, that subsequent parties in other cases offer the same type of evidence.<sup>188</sup> Likewise, in *Tennessee Valley Authority v. EPA*, the Eleventh Circuit used evidence provided by petitioners to reject a standing challenge, even though it did not expressly require them to tender that evidence.<sup>189</sup> In fact, in accepting this evidence, the court seemed to assume its veracity.<sup>190</sup>

These courts’ burgeoning emphasis on petitioners’ burden to establish standing is understandable. It is what the Supreme Court has demanded.<sup>191</sup> Consistent with this requirement, it is also not surprising that courts have begun requiring parties to submit evidence to show standing, for that is the very nature of the standing on appeal problem: Administrative challenges end up in the appellate courts without a sufficient, or certain, factual record.

What is troubling, however, is that courts do not appear to recognize the special nature of this problem. Certainly some courts, such as the D.C. Circuit in *Sierra Club*, have acknowledged that these cases are different from normal civil appeals.<sup>192</sup> Courts’ default approach, however, is nevertheless to seek solutions by analogizing to the civil proceedings that are by definition different.

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186. *Id.* at 701; *cf.* *Am. Mining Cong. v. Thomas*, 772 F.2d 640, 650–51 (10th Cir. 1985) (finding standing lacking, despite “generous[]” reading of petition and affidavit, for failure to provide allegation or proof of actual harm).

187. 117 F.3d 1520, 1527–28 (9th Cir. 1997).

188. *Id.* (“Because standing was not at issue in earlier proceedings, we hold that petitioners in this case were entitled to establish standing anytime during the briefing phase.”).

189. 278 F.3d 1184, 1206–07 (11th Cir. 2002).

190. *Id.* (“APC and Duke have submitted expert declarations . . . ; moreover, we note that “[a]t the pleading stage, . . . we presum[e] that general allegations embrace those specific facts that are necessary to support the claim.” (second alteration added) (citation omitted)); *see also, e.g.*, *Nuclear Info. & Res. Serv. v. NRC*, 457 F.3d 941, 951–54 & n.4 (9th Cir. 2006) (considering affidavits submitted to court of appeals in assessing standing challenge); *Idaho Rivers United v. FERC*, 189 F. App’x 629, 632 (9th Cir. 2006) (same); *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005) (same); *Tex. Indep. Producers & Royalty Owners Ass’n v. EPA*, 410 F.3d 964, 971–74 (7th Cir. 2005) (considering affidavits on standing after ordering petitioners to supplementally brief issue); *Goos v. ICC*, 911 F.2d 1283, 1289–90 (8th Cir. 1990) (weighing cross-affidavits on standing).

191. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

192. *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002).



The bankruptcy of this approach is immediately apparent from even a brief juxtaposition of *Sierra Club*, where the D.C. Circuit was convinced that administrative appeals are like summary judgment, and *Massachusetts*, where the very same court splintered on whether they are more like summary judgment or trial.<sup>193</sup> It is true, as *Sierra Club* acknowledged, that administrative *appeals themselves* are generally much like summary judgment in that they require application of the law to, typically, facts found by the agency.<sup>194</sup> Yet it is also true, as Judge Randolph observed in *Massachusetts*, that the factual questions *about standing* on appeal often are in such dispute that something more like a trial is needed.<sup>195</sup> The fact is, depending on where the case is procedurally, appellate review of administrative decisions reflects different facets of different parts of district court civil proceedings at different times. But they are not one in the same.

Thus, even the most sophisticated approach adopted so far to deal with the standing on appeal question appears to perpetuate, if not exacerbate, the procedural problems these cases create. *Sierra Club* demonstrates virtually no concern for accuracy. It does not contemplate any testing of the evidence submitted; it says nothing about discovery, cross-examination, or opposing affidavits. Nor does *Sierra Club* promote judicial efficiency, because it both calls for the creation of a new factual record on appeal and encourages parties to instigate satellite litigation dedicated to standing, not the merits.

Indeed, the inherent malleability of *Sierra Club*'s trigger—that a party must provide evidence only when standing is not “self-evident”<sup>196</sup>—practically begs for litigation over what “self-evident” means. Agencies are bound to claim that standing is never self-evident, naturally leading to standing challenges cropping up only after merits briefing has begun. Parties seeking review, conversely, have an incentive either always to assert that standing is self-evident or, perhaps more likely, to place standing evidence in the administrative record every time they participate in an agency proceeding.<sup>197</sup> The problem with the former approach is that it leads to the *American Library* quandary; it is impossible for courts to assess whether parties have claimed self-evidence in good faith, and even if they have, the court may still want factual proof.<sup>198</sup> The difficulty with the latter possibility is again accuracy; because the agency rarely has reason to launch an Article III standing inquiry in an agency proceeding,

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193. *See id.* at 899; *supra* notes 63–77 (discussing the splinter in the D.C. Circuit panel in *Massachusetts*).

194. *Sierra Club*, 292 F.3d at 899.

195. *Massachusetts v. EPA*, 415 F.3d 50, 55–56 (D.C. Cir. 2005).

196. *Sierra Club*, 292 F.3d at 900.

197. Likewise, petitioners might paper the court itself with affidavits, as occurred in the D.C. Circuit's *Massachusetts* proceeding.

198. *Am. Library II*, 406 F.3d 689, 696–97 (D.C. Cir. 2005); *Am. Library I*, 401 F.3d 489, 491, 495–96 (D.C. Cir. 2005).

whatever evidence the party places in the agency record is likely to go unchallenged.

In this way, *Sierra Club*'s "solution" also impinges both private procedural economy and access to justice, because the lack of a mechanism for the D.C. Circuit to make factual findings on appeal only breeds uncertainty. Likewise, the very idea that a court would decide whether standing exists based on untested (and untestable) factual evidence only raises the specter of standing as a subterfuge.

Moreover, even though the test falls short, it is notable that only the D.C. Circuit has adopted a specific test. This highlights the uncertainty that parties face when assessing how standing may affect their appeals, especially if the petition for review may be filed in more than one circuit.

The conclusion, then, appears clear. A different approach is needed. And the data confirm it.

## 2. *The Empirical Landscape*

To begin understanding the extent to which standing on appeal cases may actually frustrate procedural justice, we constructed a dataset of every federal court of appeals opinion we could locate that met three conditions:<sup>199</sup> (1) the case was on direct review of an agency ruling rather than an appeal of a district court challenge to an agency action, (2) the court rendered a decision on standing, and (3) the court described the standing challenge as involving a factual dispute, or it was plainly evident from the court's opinion that the standing challenge was factual.<sup>200</sup> This yielded a dataset of 94 cases,<sup>201</sup> which we then parsed using nine different procedural traits for how standing arose and was resolved.<sup>202</sup> That analysis—beyond showing that the D.C. Circuit is the only court thus far to engage the standing on appeal problem with any meaningful procedural specificity—produced four substantive conclusions. Each provides initial empirical evidence that standing on appeal cases in fact hamper procedural justice.

First, standing on appeal cases, although modest in total numbers, are increasing. Although we did not choose a cutoff for when to begin

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199. We compiled these cases through searches in the CTA database in Westlaw. Thus, our dataset includes both published and unpublished decisions, so long as they are available on Westlaw. The collection is current through December 31, 2009.

200. Cases where we considered the factual nature of the standing challenge "plainly evident" were those where, in the court's opinion, either the parties or the court cited to record or appellate evidence to address standing.

201. Our complete dataset can be found on the *University of Illinois Law Review* Web site at [http://www.law.illinois.edu/lrev/publications/200s/2010/2010\\_3/Wildermuth\\_appendix.pdf](http://www.law.illinois.edu/lrev/publications/200s/2010/2010_3/Wildermuth_appendix.pdf).

202. The traits are (1) whether the agency proceeding was a rulemaking or adjudication; (2) who challenged standing; (3) how standing was raised; (4) whether non-administrative record evidence was submitted to the court; (5) the type of such evidence, if any; (6) whether the court relied on evidence from the administrative record in assessing standing; (7) how the court resolved the standing question; (8) whether the court's finding on standing was factual or legal; and (9) the proceeding's substantive resolution.

including cases, the first case that qualified for inclusion in our dataset was decided in 1975.<sup>203</sup> Only 26 cases prior to 2000 qualified for inclusion. By contrast, 68 cases decided in 2000 or later satisfied the dataset conditions. Some of this trend clearly is attributable to the D.C. Circuit's *Sierra Club* ruling. Prior to *Sierra Club*'s issuance, 37 cases qualified for inclusion in the dataset. Post-*Sierra Club*, however, 56 cases qualified. However, *Sierra Club* does not appear to be the sole reason for the increasing frequency of these disputes. Roughly a quarter of cases that qualified for inclusion were decided in circuits other than the D.C. Circuit: The dataset includes 9 non-D.C. Circuit cases pre-2000 but 15 cases decided in the decade from 2000 to 2009. In short, it appears that courts and litigants should expect to see the problem of standing on appeal to continue arising more often.

To be clear about what this data does and does not explain, we note that we are not suggesting that standing cases have increased comparatively over time. Given the variability in the filing of administrative cases in the courts of appeals since 2000, this kind of comparison is particularly difficult. Between 2001 and 2004, there was a sharp increase in administrative cases heard in courts of appeals on direct review, leaping from 3300 to a whopping 12,255.<sup>204</sup> This increase, however, is largely explained by a dramatic jump in immigration appeals, which went from 1760 to 10,812 during that same period.<sup>205</sup> Setting these immigration cases aside, the number of administrative cases on direct review in the appellate courts has remained relatively stable since 2004, with the exception of a decline in 2007 that was followed by a slight upward tick in 2008.<sup>206</sup>

For our purposes, because the D.C. Circuit hears more non-immigration administrative cases than other circuits,<sup>207</sup> their docket would seem to be most instructive on the question of the overall trend of direct appellate review of administrative decisions. We also note, in this same vein, that it is unlikely that standing would be an issue in the immigration cases, which typically involve an immigrant who is challenging a decision that has a direct impact on his or her immigration status.

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203. See *ACLU v. FCC*, 523 F.2d 1344 (9th Cir. 1975).

204. LEONIDAS RALPH MECHAM, 2004 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 88 (2004) (Table B-3 Sources of Appeals and Original Proceedings Commenced, by Circuit, During the 12-Month Periods Ending September 30, 2000 Through 2004), <http://www.uscourts.gov/judbus2004/appendices/b3.pdf>.

205. *Id.* at 88, 93 n.1.

206. JAMES C. DUFF, 2008 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 96 (2008) (Table B-3 Sources of Appeals and Original Proceedings Commenced, by Circuit, During the 12-Month Periods Ending September 30, 2004 Through 2008), <http://www.uscourts.gov/judbus2008/appendices/B03Sep08.pdf>.

207. See *id.* at 96–101 (showing that the vast majority of administrative cases in other circuits are immigration cases).

The D.C. Circuit began the decade with 567 direct review cases.<sup>208</sup> In 2002, the number dipped to 400; it then increased to 474 by 2004.<sup>209</sup> In 2006, there was another decline, to 420, but the number returned to 483 by 2007, and was 456 in 2008.<sup>210</sup>

Based on these data, the overall picture seems to reflect pendulum-like behavior, with increases and decreases every few years—not a clear increasing or decreasing trend. In contrast, standing on appeal cases—which are still few in number at less than 1% of the non-immigration direct review cases in any given year—have increased substantially in the past decade, compared to previous years.

We also acknowledge that many might find it notable that standing on appeal cases began increasing around 2000 after the election of a new, more conservative president, which might suggest a conscious change in government policy of raising standing challenges more frequently. Although there are bound to be variations in policy from one administration to the next, and even variation between offices within the Department of Justice during any particular administration, we have found no document that evinces a policy change for how the government deals with standing. Indeed, the only evidence of a possible shift in policy is modest at best: When comparing the arguments and briefs of the Solicitor General under President Bush to those of prior administrations, some have noted that Bush administration Solicitors General took more extreme positions on standing issues in cases before the Supreme Court.<sup>211</sup> Because the Solicitor General sets the tone for litigation in a particular administration,<sup>212</sup> it is possible that the Office's position in Supreme Court cases influenced the government's position taken in standing on appeal cases overall. Even if this were true, though, it would not fully explain the increased number of standing on appeal cases because, as shown in *American Library*, the government is not necessarily the party to raise the issue of standing.

Moreover, there are other potential explanations for the shift. For one, there could simply be an increase in overall filings of petitions for review by public interest groups in cases that involve public rights, the

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208. See MECHAM, *supra* note 204, at 88. Because the totals were tallied differently from report to report, we have added the 500 “Administrative Agencies” cases to the 9 “U.S. Tax Court” cases and the 58 “NLRB” cases.

209. See *id.*

210. See DUFF, *supra* note 206, at 96.

211. See, e.g., Jennifer Koons, *Environmental Policy a Specialty of Obama's Solicitor General*, GREENWIRE (Mar. 26, 2009), <http://www.eenews.net/public/Greenwire/2009/03/26/1>. The Solicitor General is charged with, among other things, conducting all litigation on behalf of the United States in the Supreme Court. 28 C.F.R. § 0.20(a) (2009).

212. See United States Department of Justice, Office of the Solicitor General, About the Office of the Solicitor General, [http://www.justice.gov/osg/about\\_us.htm](http://www.justice.gov/osg/about_us.htm) (last visited Mar. 8, 2010) (noting that in addition to arguing cases for the government before the Supreme Court, the Solicitor General “review[s] all cases decided adversely to the government in the lower courts to determine whether they should be appealed and, if so, what position should be taken.”).

sort of cases that pose the greatest standing problems, leading to a concomitant uptick in standing on appeal cases.

More plausible in our view is that, because *Lujan* was decided in 1992, it took a few years for courts and litigators to determine the contours of its requirements, a process that is still ongoing.<sup>213</sup> But as standing has had time to develop into more certain law, judges (and, as a result, litigants) have focused more attention on standing. The number of cases taking up the issue then naturally increased.

In addition to our documentation of an increase in standing on appeal cases, our dataset reveals that these cases in fact present accuracy problems. Of the 94 cases in our dataset, well over half—55 cases—involved declarations, affidavits, or other evidence submitted to establish standing on appeal. Yet in none of these decisions did the courts discuss the possibility of allowing discovery or cross-examination to test the affiants' testimony. Likewise, even evidence from the administrative record seemed to go untested. Courts relied on administrative record evidence to resolve standing in 36 of our cases. But 20 of those cases involved rulemakings, not administrative adjudications. Thus, presumably, the vast bulk of these cases involved no opportunity for discovery or cross-examination.

Third, standing on appeal cases clearly create efficiency problems for both courts and appealing parties, but these inefficiencies are more complex than might be anticipated. The fact that 55 of the 94 cases involved newly created factual records on appeal is the most basic evidence of this: Standing on appeal cases are indeed putting appellate courts in a position with which they are unfamiliar.

The data do not show, however, that factual standing questions consistently arise late in appellate proceedings. Only 12 of the 94 cases involved post-oral argument briefing or evidentiary submissions on standing, as in *American Library*. Similarly, courts raised standing sua sponte in 50% of those 12 cases, implying that often there is a legitimate reason, beyond party sandbagging, why the question arises so late.

The most problematic aspect of these cases from an efficiency perspective, however, is how often courts actually evaluate the evidence presented. One would expect that, if there really is such a need for factual standing evidence that courts are requiring affidavits on appeal, a substantial portion of their standing decisions would be rendered on the facts. But that is not the case. Rather, in the vast majority of cases—85 of the 94 cases, or 90% of the time—courts decide standing as a matter of law, despite the factual nature of the standing challenge. This is true even when new evidentiary records have been created on appeal through affidavits or other evidence: 49 of 55, or 89%, of those cases were decided as a matter of law. The efficiency impacts of this tendency are ob-

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213. See, e.g., *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009).

vious. If the court could have decided the standing question as a legal matter, before a new evidentiary record was created, the effort expended by both the court and the parties was wasted. This is, to us, puzzling.

The final conclusion is that standing on appeal cases appear to create access to justice problems, but it is unclear whether they do so in a way that corroborates the historical concern that standing is a subterfuge. It is plain that agencies increasingly use standing as a way to avoid review of the merits of their decision: 70% of the standing challenges made in our dataset were lodged, or joined in, by the agency, as opposed to being raised solely by the court or an intervenor. Nor does it matter, it turns out, whether the cases are rulemakings—in which there is no reason at all for parties to provide evidence on standing—or adjudications—in which parties typically have to show at least some kind of interest to participate in the agency proceeding: 44% of cases where agencies challenged standing were rulemaking proceedings; 56% were adjudications.

What the data do not provide, however, is clear evidence that standing is consistently used as a smokescreen in these cases. If that were true, two phenomena should be present: courts should seek to insulate their standing determinations by making factual findings as often as possible, and cases' ultimate results should closely correlate with the courts' standing determinations. Yet our dataset manifests neither trend. As noted above, courts virtually never make their standing findings as a matter of fact; 90% of the time, their findings are legal. More critical, these cases' ultimate outcomes do not align well with their standing determinations. Cumulatively, courts used standing to dismiss the petitions for review (or a portion thereof) in our dataset in 46 cases, or only 49% of the time. Moreover, in cases where the courts found standing present and thus reached the merits, they ruled in the petitioner's favor only 33% of the time. This is telling indeed. Under the subterfuge theory, the presumption is that courts should tend to find standing present when they want to rule substantively in the appellant's favor. As an empirical matter, however, exactly the opposite appears true.

## II. UNTANGLING THE KNOT: POTENTIAL SOLUTIONS FOR THE STANDING ON APPEAL PROBLEM

In summary, our review of the standing on appeal cases to date reveals two principal points: Appellate courts' current approach for evaluating standing in these cases (1) imposes considerable costs and inefficiencies and (2) presents accuracy problems because of appellate courts' limitations in factfinding. In other words, standing doctrine demands courts of appeals to do something that they are not equipped to do, at a high cost to all involved. This begs the questions at the heart of this Part: Is standing worth the trouble? And, if standing doctrine will not change, what are the alternatives for standing on appeal cases?

### A. *Is Standing Worth It?*

The doctrine of standing, particularly after its articulation in *Lujan*, has spawned hundreds of law journal articles<sup>214</sup> and remains, as evidenced by the Court's recent 5-4 decision in *Summers v. Earth Island Institute*,<sup>215</sup> a contentious area of the law.<sup>216</sup> There is a long line of standing detractors,<sup>217</sup> as well as a few notable defenders.<sup>218</sup> The critiques of standing are wide-ranging, but the most common are (1) that there is no constitutional basis for standing,<sup>219</sup> and (2) that because "standing law suffers from inconsistency, unreliability, and inordinate complexity,"<sup>220</sup> courts manipulate standing for unstated purposes.<sup>221</sup> Typically, standing detractors argue for the elimination of standing doctrine altogether, or at least an easing of the standing requirements to allow more parties into federal court.<sup>222</sup>

The defenses of and justifications for standing also vary,<sup>223</sup> but Justice Scalia, *Lujan*'s author and leading defender of its requirements, has suggested that separation of powers drives the issue. Specifically, Justice Scalia appears to worry that without standing, the legislature and the judiciary will step on the toes of the executive by deciding what laws are enforced, when the Constitution expressly gives that power to the executive. As he wrote in *Lujan*:

The question presented here is whether the public interest in proper administration of the laws . . . can be converted into an individual

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214. An admittedly imprecise measure—a search of the JLR database on Westlaw for articles with the word "standing" in the title—yields over 1400 results.

215. *Summers*, 129 S. Ct. 1142.

216. Justice Harlan famously referred to standing as "a word game played by secret rules." *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

217. See, e.g., Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 384–88 (1993); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222–24 (1988); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1142–43 (1993); Pierce, *supra* note 163, at 1786–87; Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1170–71 (1993); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 165–66 (1992); Winter, *supra* note 163, at 1418–25.

218. See John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 890–93 (1983).

219. See Nichol, *supra* note 217, at 1142–43; Sunstein, *supra* note 217, at 166; Winter, *supra* note 163, at 1377.

220. 3 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.1, at 1401 (5th ed. 2010).

221. See Pierce, *supra* note 163, at 1742–43; Winter, *supra* note 163, at 1373; see also Wildermuth, *supra* note 8, at 289–94 (summarizing standing critiques).

222. See Wildermuth, *supra* note 8, at 292.

223. See, e.g., Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1310 (1995) ("[S]tanding ground rules . . . presumptively prevent[] ideological litigants from opportunistically manipulating the critically important path of case decisions in the Supreme Court and in lower federal courts."); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004) ("[H]istory does not defeat standing doctrine; the notion of standing is not an innovation, and its constitutionalization does not contradict a settled historical consensus about the Constitution's meaning.").

right by a statute that denominates it as such, and that permits all citizens . . . to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," and to become "virtually continuing monitors of the wisdom and soundness of Executive action." We have always rejected that vision of our role . . . .<sup>224</sup>

At bottom, then, Justice Scalia's central concern is Article II, even though the Court long has moored standing in the "case and controversy" requirement of Article III. Nevertheless, for lack of a better vehicle,<sup>225</sup> standing remains grounded in Article III. The Article II concern, however, has important implications for standing on appeal cases because these are the very cases that Justice Scalia has argued present more problems than ordinary cases.

The end result of *Lujan* is that a plaintiff in any private law action, whether based on common law or a statute, should easily satisfy standing's requirements.<sup>226</sup> Indeed, injury, causation, and redressibility map very nicely on the usual requirements for a negligence action—duty, breach, causation, and damages—and this is no accident. In fact, there is a strong argument that the standing test is by definition "superfluous" in private law actions.<sup>227</sup>

For those lodging public actions, however, the standing hurdle is much higher. Such actions seek to ensure the proper administration of laws, which is the goal of basically every administrative law case. It is in this arena that standing doctrine traditionally has been criticized,<sup>228</sup> because there is a concern that standing unnecessarily shuts the courthouse doors when the judiciary is needed to keep the Executive Branch in check.<sup>229</sup>

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224. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576–77 (1991) (citations omitted); see also Scalia, *supra* note 218, at 881; cf. Robin Kundis Craig, *Will Separation of Powers Challenges "Take Care" of Environmental Citizen Suits? Article II, Injury-In-Fact, Private "Enforcers," and Lessons from Qui Tam Litigation*, 72 U. COLO. L. REV. 93, 95–99 (2001) (describing the separation of powers concerns of Justice Scalia and Justice Kennedy in their opinions in *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000)).

225. See Scalia, *supra* note 218, at 881.

226. *But cf.* Hessick, *supra* note 144, at 310–17 (discussing private law cases where standing has been denied).

227. *Id.* at 301.

228. *Id.* at 277.

229. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 111 (1968) (Douglas, J., concurring) ("The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of gov-



Picking up these themes, Professor Heather Elliott recently argued that standing fails to accomplish one primary objective the Supreme Court has ascribed to it: separation of powers.<sup>230</sup> Professor Elliott identifies three separation-of-powers functions that standing potentially could serve: ensuring that courts hear cases in an adversary context, allowing courts to refuse to hear cases that are better suited to the political process, and acting as a bulwark against legislative overreaching.<sup>231</sup> Professor Elliott shows that standing in fact does not serve any of these purposes well.<sup>232</sup> She then makes two critical points, exemplary of how deeply standing critiques cut.

First, echoing the discussion above, Professor Elliott notes that Justice Scalia objects to citizen suits in which private parties are given the power to enforce federal law by suing in federal court. She observes that the concerns “motiv[at] Justice Scalia are Article II concerns. His true problem is with the transfer of executive power to private citizens.”<sup>233</sup> To remedy this, she recommends: “Rather than using standing doctrine to address this question, the Court needs to confront the Article II issue directly.”<sup>234</sup>

Though Professor Elliott makes this observation in a different context, it also has import for standing on appeal cases. It suggests that if there is a problem with some, or even all, administrative cases under Article II, the Supreme Court should squarely face and address that issue. It should not use an indirect device that only roughly remedies what some view as interfering with the Executive’s prerogative.

Second, Professor Elliott suggests replacing the current standing doctrine entirely with a prudential abstention doctrine along the lines of what Professor Louis Jaffe proposed years ago.<sup>235</sup> As one example, she notes that in *Massachusetts*, the Supreme Court fundamentally disagreed about whether it should enter into the climate change debate given that debate’s highly political context.<sup>236</sup> Instead of addressing the political abstention question head-on, though, the Court “argued in terms of the plaintiffs’ standing—a fruitless exercise under current doctrine.”<sup>237</sup> In or-

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ernment it is often the one and only place where effective relief can be obtained. If the judiciary were to become a super-legislative group sitting in judgment on the affairs of the people, the situation would be intolerable. But where wrongs to individuals are done by violation of specific guarantees, it is abdication for courts to close their doors.”); AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 177–89 (2006); David C. Vladeck & Alan B. Morrison, *The Roles, Rights, and Responsibilities of the Executive Branch*, in *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* 169, 171–73 (Herman Schwartz ed., 2002).

230. Heather Elliot, *The Functions of Standing*, 61 *STAN. L. REV.* 459, 463–64 (2008).

231. *Id.* at 461–63.

232. *Id.* at 463–64.

233. *Id.* at 514 (footnote omitted).

234. *Id.*

235. *Id.* at 510 (citing Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 *HARV. L. REV.* 1265 (1961)).

236. *Id.* at 512.

237. *Id.*

der to avoid “criticism that standing doctrine is at bottom dishonest and offer[] clearer rules to the lower courts,”<sup>238</sup> Professor Elliott recommends that the Court “dramatically reduce its use of standing as a tool for separation-of-powers functions so that it may explicitly confront the separation-of-powers issues it now addresses implicitly (and confusingly) through standing analysis.”<sup>239</sup>

Professor Elliott’s proposal to adopt an abstention doctrine in lieu of standing appears to solve many of the problems we have identified with respect to standing on appeal cases. Most importantly, an abstention doctrine would allow courts to focus on whether the parties are in fact adverse, as well as whether the case involves a question that is better left to the political branches of the government. These inquiries should require less factfinding, and therefore are better suited for appellate courts than the necessarily fact-intensive standing analysis.

On the other hand, Professor Elliott’s proposal could raise other issues. Like forum non conveniens or the political question doctrine, malleable tests in which some scholars see judicial maneuvering,<sup>240</sup> a prudential abstention doctrine may be subject to manipulation by courts and lead to result-oriented decision making. Such a result would be worse overall than what we have identified as standing on appeal problems.

More time could be devoted to debating Professor Elliott’s proposal, or even returning to the less-demanding standing requirements prior to *Lujan*, but we will leave that to others. The reality is that, although Professor Elliott’s proposal and other similar suggestions<sup>241</sup> have much to offer in rethinking standing doctrine, the Court remains unmoved on standing, making only modest adjustments in *Lujan*’s application over time,<sup>242</sup> not throwing it out entirely. Because the Court simply “is unlikely to change its standing test in the near future,”<sup>243</sup> it appears *Lujan* will continue to govern entry into federal court.

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238. *Id.* at 517.

239. *Id.*

240. See, e.g., Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 602–03 (2007) (“Federal forum non conveniens decisions appear to depend more on the individual biases of district court judges than any identifiable legal standard.”); Wayne McCormack, *The Political Question Doctrine—Jurisprudentially*, 70 U. DET. MERCY L. REV. 793, 822 (1993) (“[T]he political question doctrine is nothing other than a subterfuge for masking explicit review on the merits of particular claims that come before a court.”).

241. See, e.g., Jaffe, *supra* note 235; Richard Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943 (2008); Pierce, *supra* note 163, at 1775–86; Tushnet, *supra* note 163.

242. The Court, with Justice Kennedy as the swing vote, and as evidenced in its standing cases over the last decade, seems to alternate “between more restrictive applications of standing requirements and less restrictive ones.” Wildermuth, *supra* note 8, at 292; see also, e.g., William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL’Y F. 247 (2001).

243. Bradford C. Mank, *Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?*, 34 COLUM. J. ENVTL. L. 1, 8 (2009).

*B. If We Are Stuck with Standing, What Is an Appellate Court to Do?*

Because standing is tethered to Article III and is therefore jurisdictional, courts cannot avoid the standing question in standing on appeal cases. In fact, not only is standing non-waivable, the Supreme Court has instructed that lower courts must address standing first.<sup>244</sup>

Given this, and understanding that appellate courts are not equipped—and are unlikely to become equipped—with the factfinding tools comparable to those of a district court, there are, we think, five possible responses to the problems that standing on appeal cases create. The final two possibilities are quite closely related, however, so we address them here as a single option. That combined response would substantially reduce—or even eliminate—the accuracy and efficiency issues we have identified, and potentially could avoid the access to justice problems as well. The other responses, however, appear far less promising. The possibilities are (1) continuing the practice of having appellate courts make factual findings on standing, as under *Sierra Club*; (2) remanding to the agency for factfinding; (3) changing venue statutes to send all administrative review cases to district courts; and (4) employing special masters to make factual findings, including appointing magistrate judges for this task.<sup>245</sup> We take each in turn.

*1. Perpetuating Sierra Club*

The first possible solution is perpetuating the *Sierra Club*<sup>246</sup> test adopted by the D.C. Circuit and then codified, in part, in D.C. Circuit Rule 28(a)(7). This option leaves factfinding to the appellate court, and thus, perpetuates the very problems created by standing on appeal cases. Nevertheless, as explained more fully in Part III, a modified *Sierra Club* test has much potential in forging a new solution that could cut through the Gordian knot of standing on appeal cases.

Before assessing why *Sierra Club*, as currently formulated, is problematic, a brief review is in order. *Sierra Club* dictates two critical aspects for how to conduct the standing analysis.

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244. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) (“The requirement that jurisdiction be established as a threshold matter ‘spring[s] from the nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’” (alteration in original) (quoting *Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884))).

245. We do not explore the possibility of sending these cases—already on direct review in the appellate court—to the district court. There is one option to do this under 28 U.S.C. § 2347(b)(3) (2006). But that section applies only to a small number of agency actions, see 28 U.S.C. § 2342, and requires that the challenged agency action be an “order,” that “a hearing . . . not [be] required by law,” and that “a genuine issue of material fact [be] presented.” 28 U.S.C. § 2347(b)(3). Because this option is so limited, it does not provide the kind of comprehensive solution that standing on appeal cases demand. Moreover, as we discuss below, if Congress is truly interested in having administrative cases heard in district courts, it could require just that, which would avoid the standing-on-appeals problem altogether.

246. *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002).

First, *Sierra Club* controls *when* parties must demonstrate standing. It teaches that in standing on appeal cases, petitioners whose standing is not “self-evident” must demonstrate their standing by submitting *new* “arguments and any affidavits or other evidence” on standing “at the first appropriate point in the review proceeding.”<sup>247</sup> The subsequent D.C. Circuit Rule articulates the test using a term other than “self-evident,” but the thrust appears to be the same: “When the appellant’s or petitioner’s standing is not *apparent* from the administrative record, the [opening] brief must include arguments and evidence establishing the claim of standing.”<sup>248</sup> In both instances, the court requires a petitioner to determine whether, in essence, the standing question is “easy,” in which case additional materials are unnecessary, or whether the standing inquiry is “hard,” in which case the heightened evidentiary requirement applies.

In adopting this “self-evident” standard, the D.C. Circuit undoubtedly hoped to maximize efficiency: Neither petitioners nor the court should waste resources by collecting and examining affidavits and arguments to demonstrate standing when standing is obvious. The difficulty, however, is that what is “self-evident” is not always clear. Litigants in public rights administrative cases understand that their cases are exactly the sort that *Lujan* was concerned with. Accordingly, prudent petitioners, as a rule, should err on the safe side. They should always include standing materials in their submissions. Yet that risks the very inefficiencies and wasted resources that standing on appeal cases can beget.<sup>249</sup> It also may have the ancillary effect of discouraging suits,<sup>250</sup> particularly when nonprofit groups with limited resources must include the expense of compiling a significant standing record in the calculation of seeking appellate review, even though the standing question may well come out in their favor.

Second, *Sierra Club* dictates not just *when* a petitioner must show standing but also *how*. It requires that petitioners “must support each element” of their standing claims “by affidavit or other evidence.”<sup>251</sup> More specifically, this evidence must meet a “burden of proof” that *Sierra Club* refers to as “a ‘substantial probability’” of standing—a substantial probability that the petitioner “has been injured, that the defendant caused its injury, and that the court could redress that injury.”<sup>252</sup> Where a petitioner’s evidence is uncontested and appears on its face to be sound, this inquiry is relatively simple. Standing is present or it is not. But where standing is murkier—when, for instance, the veracity of an affida-

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247. *Id.* at 900.

248. D.C. Cir. R. 28(a)(7) (emphasis added), available at <http://www.cadc.uscourts.gov/> (follow “Rules and Operating Procedures” hyperlink; then follow “Circuit Rules” hyperlink).

249. See *supra* Part I.B.2.b–c.

250. See *supra* Part I.B.2.d.

251. *Sierra Club*, 292 F.3d at 899 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

252. *Id.* (citing *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 63 (D.C. Cir. 2000)).

vit is challenged, or if a party contests particular facts submitted to the appellate court—the procedural justice problems of standing on appeal cases reemerge.<sup>253</sup> The court is put in a place where it lacks expertise; the parties cannot be certain the right outcome will be reached; and some parties may be excluded from the process when they should not be.

As a result, we do not view continued use of *Sierra Club* and D.C. Circuit Rule 28(a)(7) as an optimal path. Rather, the deficiencies in this approach call for an examination of other possibilities that will better promote procedural justice. The remainder of this Part assesses the possibilities for dealing with standing on appeal cases. We return to modifying *Sierra Club* in Part III.

## 2. Remand to the Agency

Another possibility, suggested by the D.C. Circuit in *Massachusetts*, is to remand standing on appeal cases to the agency from which they came.<sup>254</sup> The agency would then compile a factual record on standing that could be reviewed by the appellate court.<sup>255</sup> This approach, however, has several flaws.

The major—and perhaps determinative—problem with this option is that the agency is an interested party. A remand to the agency to determine the standing of its to-be-adversary in court makes little sense.<sup>256</sup>

In addition, there are at least two other problems with this option. First, as Judge Randolph pointed out in *Massachusetts*, “judgments about standing are the responsibility of the federal courts.”<sup>257</sup> Because standing is about the jurisdiction of a federal court to hear a case, standing questions not only are outside of agencies’ expertise but delegating them to the executive could raise significant constitutional questions.<sup>258</sup> It therefore makes little sense to give agencies this job. Second, requiring agen-

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

254. See *Massachusetts v. EPA*, 415 F.3d 50, 55–56 (D.C. Cir. 2005); *id.* at 66 (Tatel, J., dissenting).

255. We note that, if this option were selected, it is likely that agencies would begin to compile standing records before a case was reviewed at the appellate court, eliminating the need to remand the case. Cf. Wald, *supra* note 53, at 153 (suggesting a “supplemental dialogue” that continues between the court and parties “beyond the oral argument, when needed by the judge”); Kathryn A. Watts, *Adapting to Administrative Law’s Erie Doctrine*, 101 Nw. U. L. REV. 997, 1002 (2007) (suggesting that courts interact with agencies, that is, ask them for help, rather than interpret a statute that an agency may later reinterpret).

256. See *Massachusetts*, 415 F.3d at 55.

257. *Id.*

258. See, e.g., *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986) (“[I]n reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary. Among the factors upon which we have focused are the extent to which the ‘essential attributes of judicial power’ are reserved to Article III courts, and, conversely, the extent to which the non–Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.” (citations omitted)).

cies to take up this task in addition to their many other substantive obligations would likely serve only to further delay agency actions, particularly when resources are limited, as they so often are.<sup>259</sup> For all these reasons, it should be clear that remanding contested standing cases to an agency for factfinding is not a viable solution to this problem—which explains why no court has embraced it to date.

### 3. *Amending Venue Statutes*

Another possible solution is to amend statutes so that agency actions must be challenged in a district court first, rather than by petitions for review directly to a court of appeals in the first instance. This, of course, should solve all of the inefficiency, resource, accuracy, and access problems identified above, because district courts are well equipped to handle factual disputes.<sup>260</sup> In other words, this solution should serve procedural justice well.

There are, however, at least two problems with this solution. First, the mechanics of convincing Congress to amend the many organic statutes that provide for direct review of administrative decisions in appellate courts<sup>261</sup> would seem, at a minimum, difficult, even if it was done in a single housekeeping bill.<sup>262</sup> Passing legislation in Congress, even when it has popular backing and lobbyists, can be tricky enough.<sup>263</sup> One can only imagine that procedural statutes focused on administrative law would be less likely to capture the imagination, and political will, of legislators.

Second and more critical, this solution may amount to throwing the baby out with the bathwater. Many of the venue provisions provide for direct appellate review of administrative actions for a reason: The substance of that review can be performed, and has been performed, efficiently by the appellate courts.<sup>264</sup> Standing issues may be coming up more often, but they still remain relatively modest in number. In the vast majority of direct review cases, the courts of appeals are well suited for the substantive review these venue provisions envision. We therefore

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259. Cf., e.g., *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) (acknowledging that agencies have “broad discretion to choose how best to marshal [their] limited resources and personnel to carry out [their] delegated responsibilities”).

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

261. See *supra* note 151.

262. See, e.g., Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, 123 Stat. 1607 (housekeeping bill that changed deadlines in a number of civil procedure statutes).

263. Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 526 (2009) (“[O]ur constitutional system purposefully makes it relatively difficult to enact legislation, and the growing size of the congressional ‘docket’ of proposed legislation further reduces the likelihood that any given bill will be enacted. In each session of Congress, there are more than 10,000 bills introduced and fewer than 10 percent of these become law.”).

264. See FUNK ET AL., *supra* note 169, at 66–67 (noting the relative expertise of the D.C. Circuit in administrative cases).

see no need to remove all of these cases from the courts of appeals. Doing so would be too blunt of a tool.

We are left, then, with only two additional possibilities, which we consider together given their similarity. We turn to those solutions now.

#### 4. *Appointing a Special Master or a Magistrate Judge*

Federal Rule of Appellate Procedure 48 allows appellate courts to “appoint a special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court.”<sup>265</sup> Special masters are, generally, lawyers “appointed to address a court’s need for special expertise in a particular case.”<sup>266</sup> The Advisory Notes make clear that use of special masters fits neatly with the situation that occurs in standing on appeal cases—when factual issues arise for the first time in the appellate tribunal:

Ordinarily when a factual issue is unresolved, a court of appeals remands the case to the district court or agency that originally heard the case. It is not the Committee’s intent to alter that practice. However, when factual issues arise in the first instance in the court of appeals, such as fees for representation on appeal, it would be useful to have authority to refer such determinations to a master for a recommendation.<sup>267</sup>

Consistent with the Advisory Notes, courts of appeals do not employ Rule 48 frequently. When they do, however, there are three general categories of tasks that masters are appointed to do. First, and by far the most frequent, is to use special masters in civil contempt proceedings in National Labor Relations Board (NLRB) cases.<sup>268</sup> These are typically cases in which a court has enforced an NLRB order against a party and the party then violates the order.<sup>269</sup> The special master is usually employed to oversee the dispute and prepare a report and recommendation.<sup>270</sup> Second, the Ninth Circuit uses its Appellate Commissioner as its

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265. FED. R. APP. P. 48.

266. See THOMAS E. WILLGING ET AL., SPECIAL MASTERS’ INCIDENCE AND ACTIVITY: REPORT TO THE JUDICIAL CONFERENCE’S ADVISORY COMMITTEE ON CIVIL RULES AND ITS SUBCOMMITTEE ON SPECIAL MASTERS I (2000), [http://www.fjc.gov/public/pdf.nsf/lookup/SpecMast.pdf/\\$file/SpecMast.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/SpecMast.pdf/$file/SpecMast.pdf) [hereinafter SPECIAL MASTERS REPORT].

267. FED. R. APP. P. 48 advisory committee’s note.

268. See *NLRB v. Rosedale Fabricators, L.L.C.*, No. 04-60480, 2004 WL 1666136 (5th Cir. June 2, 2004); *NLRB v. Ketrionic, Inc.*, No. 95-6389, 1997 WL 720384 (6th Cir. Nov. 10, 1997); *NLRB v. Fox Painting Co.*, Nos. 89-6317, 89-6509, 1996 WL 290259 (6th Cir. May 31, 1996); *NLRB v. Monfort, Inc.*, 29 F.3d 525, 527 (10th Cir. 1994); *NLRB v. Day*, No. 92-3248, 1993 WL 312887 (7th Cir. Aug. 18, 1993); *NLRB v. Hospital S.F., Inc.*, No. 90-2047, 1993 WL 93129 (1st Cir. Mar. 30, 1993); *NLRB v. Interstate Material Corp.*, 930 F.2d 4, 5 (7th Cir. 1991); *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1182 (D.C. Cir. 1981); *NLRB v. Die Supply Corp.*, No. 6961, 1971 WL 2963 (1st Cir. Apr. 13, 1971).

269. See, e.g., *Monfort*, 29 F.3d at 526; *Hospital S.F.*, 1993 WL 93129, at \*1; *Blevins Popcorn*, 659 F.2d at 1175.

270. See Hon. J. Clifford Wallace, *Improving the Appellate Process Worldwide Through Maximizing Judicial Resources*, 38 VAND. J. TRANSNAT’L L. 187, 210 & n.97 (2005) (explaining that the Ninth Circuit rules on NLRB contempt orders).

special master.<sup>271</sup> Among other things, the Commissioner conducts evidentiary hearings when determining whether to discipline attorneys.<sup>272</sup> Third and finally, as the Notes contemplate, special masters have been appointed to determine attorney's fees.<sup>273</sup>

Despite these traditional categories, many other uses of special masters at the appellate level have been suggested. For example, in *Gulf Power Co. v. United States*, the appellate court had the authority to review and determine whether an FCC rate order provided a utility just compensation for the taking of the utility's property.<sup>274</sup> Concluding that it was an adequate forum for the job, the court noted that, among other possibilities, it could refer the issue to a special master "to hold hearings and gather any additional information the court needs to decide the just compensation issue."<sup>275</sup>

Likewise, on the academic front, when contemplating the fast pace at which changes take place in cyberspace, Professor Stuart Benjamin has proposed using special masters to perform factfinding in cases where facts change rapidly post-trial.<sup>276</sup>

Using special masters to conduct factfinding for the purposes of determining standing fits comfortably within the language of Rule 48, as well the ways that appellate courts have used special masters to date. Standing, like attorney's fees or contempt proceedings, is an issue that is largely ancillary or secondary to the merits of the action: by definition, an inquiry into the party's right to be there, not whether the party's substantive challenge to the administrative action has merit. Moreover, a court of appeals would appoint a special master in a standing on appeal case for precisely the same reason courts appoint them in other appellate cases: to resolve factual disputes.

In addition, special masters are empowered to use all of the mechanisms that we have suggested are necessary to achieve procedural justice. Unless a court orders otherwise in appointing the master, the master's "powers include . . . the following: (1) regulating all aspects of a hearing; (2) taking all appropriate action for the efficient performance of the master's duties under the order; (3) requiring the production of evidence on all matters embraced in the reference; and (4) administering oaths and examining witnesses and parties."<sup>277</sup> In other words, if it so chooses, the special master could use all the tools necessary to ensure the accuracy of its factual findings.

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271. *Id.* at 210.

272. *Id.*; see also *In re Bagdade*, 334 F.3d 568, 570–71 (7th Cir. 2003).

273. See *AANP v. Am. Ass'n of Naturopathic Physicians*, 37 F. App'x 894 (9th Cir. 2002).

274. 187 F.3d 1324, 1327 (11th Cir. 1999).

275. *Id.* at 1335.

276. Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 365 (1999).

277. FED. R. APP. P. 48.



It is important, however, to use someone that is expert at the fact-finding task at hand. As such, one possibility would be to appoint magistrate judges to conduct standing factfinding. Magistrates are empowered to employ the usual mechanisms of factfinding in civil cases at the district court level and routinely do so.<sup>278</sup> As such, if available to appellate courts as well, they are a perfect fit for the task of factfinding on standing.

The problem, however, is that magistrate judges are judicial officers of the district court. Accordingly, it is the district court—not the appellate court—that, under the statute authorizing the use of magistrate judges, “determines the volume and type of duties to be assigned to a magistrate judge.”<sup>279</sup> Although there have been proposals to create appellate magistrate judges, none have been adopted yet.<sup>280</sup> We imagine, just as we think it would be difficult to convince Congress to change the venue statutes,<sup>281</sup> that gaining blanket congressional authorization for appellate magistrate judges also would be problematic.

Another possibility is to amend the current district court magistrate statute, 28 U.S.C. § 636, more narrowly.<sup>282</sup> That statute could, for instance, be amended to allow appellate courts to, with the district court’s permission, designate a magistrate judge to hear, perhaps among other things, standing on appeal factual disputes. This more modest amendment would seem to avoid the problem of appellate courts “borrowing” magistrate judges too frequently from district courts, because the district court’s permission would be a prerequisite. In other words, this narrower approach could help avoid a turf war over magistrates because the district court would retain the final say over a magistrate’s duties.

One advantage of this path is that magistrate judges generally have more experience with factfinding proceedings than special masters. Indeed, the job of a magistrate judge is largely one of factfinding.<sup>283</sup> Special masters, by contrast, are typically lawyers who are appointed for a particular case based on expertise and experience with a complex, technical issue that is the subject of the task at hand.<sup>284</sup> They rarely have as much experience as magistrate judges with overseeing factfinding procedures—unless they are, in fact, magistrate judges.<sup>285</sup> In addition, there is the pos-

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278. See 28 U.S.C. § 636(a) (2006).

279. See Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503, 1510 (1995).

280. See Thomas E. Baker, *Proposed Intramural Reforms: What the U.S. Courts of Appeals Might Do to Help Themselves*, 25 ST. MARY’S L.J. 1321, 1349 (1994).

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

282. 28 U.S.C. § 636.

283. See Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 271 (1996) (“Magistrate judges typically do any intensive factfinding that is necessary to resolve pretrial issues.”).

284. See SPECIAL MASTERS REPORT, *supra* note 266, at 6. Although this report details the use of special masters at the federal district court level, many of its points about special masters are common to all special masters regardless of the court that appoints them.

285. *Id.* at 10.

sibility that magistrate judges, because of their judicial appointment and title, might lend more authority to proceedings and orders than a practicing attorney deputized by the court.<sup>286</sup>

Because they appear to be best suited for the job, we prefer a mechanism that would allow magistrate judges to oversee the factfinding process in standing on appeal cases that raise significant factual disputes. The problem, as noted, however, is that the statute governing magistrate duties affords no role to the appellate court in managing the magistrate's duties, and thus, an amendment to the statute would be required.

But what if it were possible to appoint a magistrate judge as a special master in these cases?

Although the Rules do not directly permit this, they do not disallow it either. More importantly, they seem to contemplate the possibility. Rule 48 does not provide a list of who might be eligible to serve as a special master. It does, however, provide that “[i]f the master *is not a judge* or court employee, the court must determine the master's compensation and whether the cost is to be charged to any party.”<sup>287</sup> This strongly suggests that the rule drafters contemplated the possibility that any judge, including a magistrate judge, could serve as a special master. Likewise, nothing in 28 U.S.C. § 636 prevents magistrates from being appointed as special masters.<sup>288</sup> In fact, Rule 53(h) of the Federal Rules of Civil Procedure expressly permits magistrate judges to be appointed special masters in district court proceedings.<sup>289</sup> Finally, the Supreme Court has held that courts have broad powers to appoint those whose aid is needed:

Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause.<sup>290</sup>

Moreover, there is precedent for an appellate court to appoint a magistrate judge as a special master.<sup>291</sup> For example, in *Public Utility District*

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286. *Id.* at 70.

287. FED. R. APP. P. 48(b) (emphasis added).

288. In fact, § 636(b)(3) provides that “[a] magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.” 28 U.S.C. § 636(b)(3) (2006).

289. FED. R. CIV. P. 53(h); *see* 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE § 2607, at 596–97 (3d ed. 2008); SPECIAL MASTERS REPORT, *supra* note 266, at 69 (exploring situations in which magistrate judges were appointed as special masters in the district court).

290. *Ex parte Peterson*, 253 U.S. 300, 312 (1920) (citation omitted).

291. *See, e.g., In re Bagdade*, 334 F.3d 568, 575 (7th Cir. 2003); *Reich v. Sea Sprite Boat Co., Inc.*, 50 F.3d 413, 414 (7th Cir. 1995); *NLRB v. A-Plus Roofing, Inc.*, 39 F.3d 1410, 1413 (9th Cir. 1994); *Kennecott Corp. v. EPA*, 804 F.2d 763, 768 (D.C. Cir. 1986); *United States v. Daly*, 720 F.2d 819, 821 (5th Cir. 1983); *Pub. Power Council v. Johnson*, 674 F.2d 791, 796 (9th Cir. 1982); *cf. Rafaelano v. Wilson*, 471 F.3d 1091, 1099 (9th Cir. 2006) (Rawlinson, J., dissenting) (“I read Rule 48 as authorizing us

*No. 1 of Clark County v. Johnson*,<sup>292</sup> the court appointed a magistrate as a special master to supervise discovery with respect to several claims leveled by petitioners because “neither the nature of the . . . actions being challenged, nor the nature of the claims being asserted were clear.”<sup>293</sup>

In sum, we think it would be appropriate for an appellate court to appoint a magistrate judge as a special master. In fact, in many standing on appeal cases, like *Massachusetts*, the expertise that a magistrate offers is exactly what is needed to resolve significant factual disputes.

This approach, however, is not without potential pitfalls. Because appointing a magistrate judge for this task is a significant investment of resources and could cause major delays in litigation, it must be limited to those cases in which the factual dispute truly requires a magistrate judge’s expertise. We now turn to what we believe courts of appeals could do to ensure that this occurs.

### III. CUTTING THE KNOT: TOWARD A NEW SOLUTION

Although finding a better way for appellate courts to conduct fact-finding on standing questions would improve the procedural justice problems that standing on appeal cases present, it would not eliminate them altogether. To move closer to that aim, a more comprehensive approach is necessary. Below, we attempt to outline that approach.

Our proposal comes in four parts. It seeks to maximize procedural justice by eliminating, or at least ameliorating, the concerns that standing on appeal cases inherently create. Although abolishing standing requirements in favor of some other mechanism might do the job just as well, if not better, than the approach we craft here, because we see the likelihood of eliminating standing doctrine altogether as remote, we propose a different approach. The approach combines modified aspects of the D.C. Circuit’s current *Sierra Club* test with the proposal above to enlist magistrate judges as special masters on factual disputes over standing.

*First*, parties appearing in appellate courts must continue to bear the burden of proving that they have satisfied the elements of standing. Accordingly, all federal courts of appeals should mandate that petitioners seeking direct appellate review of agency decisions show at the first possible opportunity that they have standing to appear, as *Sierra Club* and D.C. Circuit Rule 28(a)(7) now require in that court. That is, all petitioners should address standing in their opening briefs.

*Second*, courts should, as the D.C. Circuit does, require petitioners to submit additional evidence to support their standing claim when ne-

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to appoint a special master, including a magistrate judge, to ‘recommend factual findings and disposition’ in this matter.” (citation omitted)).

292. 855 F.2d 647 (9th Cir. 1988).

293. *Id.* at 647. Although this case was decided before the adoption of Rule 48, there is no reason to suspect that Rule 48 was intended to change the use of a magistrate judge as a special master, particularly when the rule itself contemplates that judges may serve as special masters.

cessary. The problem, of course, is determining when such evidence is necessary. It is this problem, in fact, that causes procedural justice problems even under the current *Sierra Club* regime, and it is for that reason that *Sierra Club* should not be imported wholesale. Rather, it must be modified in both of the ways in which we urge its expanded application.

The first way in which *Sierra Club* should be modified is to adopt a clearer test for determining when petitioners must provide additional evidence. One solution would be to require standing evidence in all standing on appeal cases. This option would have the advantage of treating all parties the same, and it would provide greater certainty in terms of what is required; but it would also exacerbate the gross inefficiencies already embedded in the standing on appeal process. For that reason, we do not recommend it.

Another option, and our preferred approach, is to institute a bright-line test for when additional evidence must be submitted. Presently, *Sierra Club* and D.C. Circuit Rule 28(a)(7) together require additional evidence when standing is not “self-evident.” That is the nub, however, of the *Sierra Club* problem. What is “self-evident” is always open to debate.

Accordingly, we propose that courts put in place a less ambiguous test, one that draws on different language in *Sierra Club* as its guide. This test requires that a petitioner not directly regulated by the agency action in question submit additional evidence in order to determine whether it has standing. As the D.C. Circuit noted in *Sierra Club*:

[I]f the complainant is “an object of the action (or forgone action) at issue” — as is the case usually in review of a rulemaking and nearly always in review of an adjudication — there should be “little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.”<sup>294</sup>

In other words, instead of insisting that petitioners contemplate whether standing is self-evident, courts should instead embrace a test that presumes that parties who are directly regulated by the agency action being challenged need not submit additional evidence on standing unless and until ordered to do so by the court.<sup>295</sup> All other petitioners, however, who fail to submit additional evidence on standing do so at their own peril. If a party in this category fails to provide supplemental evidence of standing, the court may rule against it simply based on insufficient information.

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294. *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992)).

295. *American Chemistry Council v. Department of Transportation*, 468 F.3d 810 (D.C. Cir. 2006), in which the court concluded that regulated entities had no standing to challenge the narrowness of a rule, is a good example of a case where a court would order a regulated entity to brief the issue of standing.

This rule, just as the “everyone-must-submit-standing-materials” option, provides more certainty than *Sierra Club* currently does. But it also avoids the trap that the self-evident test has fallen into: a debate, whether played out in the court or in law firm conference rooms, about whether a petitioner reasonably believes its standing is self-evident.<sup>296</sup> This bright-line test also offers an advantage on the efficiency front when compared to the first option.

Nevertheless, even if courts adopt this bright-line, modified-*Sierra Club* test, there are still accuracy problems that must be dealt with. In order to satisfy the “substantial probability standard” when standing is contested, *Sierra Club* allows submission of written and other documentary evidence, primarily in the form of affidavits. Importantly, it does not consider live testimony or cross-examination. Yet as made clear above,<sup>297</sup> without the ability to use these and other factfinding mechanisms, it is difficult for appellate courts to render an accurate decision on contested facts. This leads to the next aspect of our proposed new solution for standing on appeal cases.

*Third*, courts should address head-on this likelihood of contested facts in standing on appeal cases. To date, the bulk of standing on appeal cases skirt this issue. That is, although courts have been diligent in ferreting out when the evidence on standing is inadequate, they have not squarely addressed what to do when that evidence is in conflict. That was, in fact, exactly the problem identified by Judge Randolph in *Massachusetts*.<sup>298</sup> Granted, giving parties who oppose petitioners’ right to appear the ability to contest standing evidence may only lead to further procedure and evidentiary debate and, concomitantly, litigation expense. But the cost of weighing such facts is easily justified by the accuracy it should add.

Accordingly, we urge courts to begin addressing conflicting standing evidence in two ways. The first is for courts to carefully and directly assess which standing issues are legal questions, and which are factual. As noted, our data indicate that 90% of standing on appeal decisions have been made on legal, rather than factual grounds. This seems, to us, quite high given that there appears to be genuine factual disputes in many of these cases.<sup>299</sup> Making the analytic distinction between facts and law

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296. *Compare* Int’l Bhd. of Teamsters v. TSA, 429 F.3d 1130, 1135–36 (D.C. Cir. 2005) (disallowing later standing submissions and dismissing petition for review where petitioner “could not have reasonably believed . . . standing was self-evident”), with *Am. Library I*, 401 F.3d 489, 492, 493 (D.C. Cir. 2005) (allowing parties to submit affidavits where they “reasonably, but incorrectly, assume[d]” standing to be self-evident).

297. See *supra* Parts I.B.2.a, I.C.

298. *Massachusetts v. EPA*, 415 F.3d 50, 55–56 (D.C. Cir. 2005).

299. In our dataset provided on the *University of Illinois Law Review* Web site at [http://www.law.illinois.edu/lrev/publications/200s/2010/2010\\_3/Wildermuth\\_appendix.pdf](http://www.law.illinois.edu/lrev/publications/200s/2010/2010_3/Wildermuth_appendix.pdf), we identify in two different columns those cases in which affidavits were submitted and/or additional briefing was required at the appellate level on the question of standing. Our general sense is that standing issues that are legal, and

clearer would have significant—and positive—procedural justice implications. First, it would go a long way toward easing the access to justice concerns that standing on appeal cases naturally raise. It would also clearly delineate which issues the appellate court is not particularly well-equipped to handle, that is, those that require factfinding. That benefit, in turn, leads to the second aspect of how courts should approach disputed facts in standing on appeal cases. It is the final element of our proposed solution.

*Finally*, after identifying which factual standing issues are disputed, appellate courts should delegate the task of reconciling those evidentiary disputes to an expert factfinder. In line with our analysis above, we believe the best approach here is for courts to delegate factfinding problems in standing on appeal cases to magistrate judges, appointed as special masters. Determining when courts should pass standing issues on in this way should be relatively straightforward. If, after a petitioner's submission of additional evidence, its standing is either contested by other parties or questioned by the court because there is a *factual* dispute as to whether there is a "substantial probability" that [the petitioner] has been injured, that the defendant caused its injury, [or] that the court could redress that injury,"<sup>300</sup> the dispute should be referred to a magistrate judge. If there is no dispute on the facts related to standing, the court should handle the question in usual course: It should either expressly state that it is assuming all evidence on standing to be true as asserted (akin to a 12(b)(6) motion) and determine standing based on those facts, or, if the court has reason to doubt the evidence's veracity, explain as much and refer the matter to a magistrate. The key to this part of the solution is, when a factual dispute arises, to put the factfinding chore firmly in the hands of a judicial officer familiar with that process, thereby maximizing procedural justice.

Although a magistrate judge satisfies most of our concerns, there remains one issue that appointing a magistrate judge does not resolve: What amount of deference should a court of appeals give to the magistrate judge's factual findings?

Rule 48 does not provide a standard of review for the court of appeals to employ. Courts of appeals, however, have typically deferred to a master's findings of fact, employing a clearly erroneous standard.<sup>301</sup> That same standard should work well for standing on appeal cases. When the

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not factual, could be resolved in the usual course of briefing without affidavits. Accordingly, we consider these cases to at least arguably raise factual disputes.

300. *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (citation omitted).

301. See *Fla. Steel Corp. v. NLRB*, 648 F.2d 233, 236 (5th Cir. 1981); Benjamin, *supra* note 276, at 363 n.347. Although Federal Rule of Civil Procedure 53 was amended several years ago to allow for de novo or clearly erroneous review, depending on the court's preference and parties' preferences, less efficiency would be gained by employing a de novo standard. As such, we recommend that courts of appeals employ a clearly erroneous standard of review of a master's findings in standing on appeal cases.

facts on standing are disputed, the magistrate judge will be closest to the evidence, including potentially having seen live testimony first-hand and thus observing the demeanor and tenor of witnesses as well, precisely the reasons appellate courts traditionally have cited for deferring to lower courts' factual findings.<sup>302</sup>

As an entire package, we think this new approach to standing on appeal cases will better provide procedural justice. We also note that this approach should end the odd result we observed in several of the standing on appeal cases in which the court claimed to be resolving standing as a matter of law.<sup>303</sup> That is, merely having a magistrate judge as an option for factual disputes should help appellate courts separate out issues of fact from issues of law more clearly.

#### CONCLUSION

The real costs of the standing analysis are not limited to cases where parties are prevented by an adverse standing ruling from seeking "judicial review of an otherwise reviewable government action."<sup>304</sup> The inefficiency, uncertainty, and inaccuracy generated by standing doctrine also impose large costs on both parties and courts in cases where standing is ultimately found. This is made most clear by those cases at issue here, appellate petitions for review directly from administrative agency decisions, what we have called standing on appeal cases.

Indeed, the lack of procedural justice that standing on appeal cases create is yet another reason to urge abandonment of the current standing inquiry altogether, or in favor of some other more procedurally just mechanism. Failing that, however, we have endeavored to frame a solution that can be immediately implemented by appellate courts.

Our proposal, to be sure, is not perfect. But requiring parties to identify their interests up front, ensuring that courts expressly sort the law and facts of standing, and appointing magistrates to referee the factual disputes when they arise can only improve the accuracy, efficiency, and overall justness in these cases. For that alone, this new approach is worth pursuing.

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302. See *supra* note 128–29 and accompanying text.

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

304. 3 PIERCE, *supra* note 220, § 16.1, at 1401.

