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ARTICLE

Adjudication Hiding in Plain Sight: Rethinking Standing in Rulemaking Petition Cases

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Abstract. Traditional standing doctrine places well-known and strict limits on the ability of third parties to challenge agency rules. However, courts are misapplying this test when faced with a challenge to the denial of a petition for rulemaking, a fundamentally different type of agency determination. Rules, which are generally broadly applicable, can be challenged by many different individuals, and the challenge goes to the validity of the rule itself. In contrast, a petition for rulemaking is itself a type of adjudication, one to which the only parties are the government and the individual filing the petition, who is exercising a right that is explicitly granted in the Administrative Procedure Act ("APA"). While these actions are related, they are often confused by courts that treat the denial of a petition for rulemaking as they would treat a direct challenge to a rule.

It is axiomatic that rights can be guaranteed only when the judiciary is able to ensure they are protected, yet courts routinely refuse to find standing to challenge these denials. This misunderstands both the nature of the right and what the individual challenging the denial is seeking. Challenging the denial of a petition for rulemaking does not dispute the validity of the underlying rule; instead, the court is analyzing only the adjudicatory decision made by the agency on whether to initiate rulemaking in response to the petition. Winning such a challenge only begins the true rulemaking process, the result of which would be treated the same as any other rule, with the same attendant high bar for standing to challenge it.

This Article will explain why this mistake is so problematic. Not only does it deprive interested parties of the protection of a right granted by the APA, but also closes off the one and only route an individual can take if an agency rule becomes outdated because the underlying facts have changed. Standing in such cases should be nearly automatic—the way it traditionally is in adjudications— because that is fundamentally what the rulemaking petition itself is.

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Introduction

Standing, a cornerstone of judicial restraint, dictates who has the right to bring a lawsuit and under what circumstances.[1] Traditional standing requirements impose strict limits on the ability of third parties to challenge agency rules.[2] However, these rules are also inappropriately used when a petitioner seeks to challenge the denial of a petition for rulemaking that the petitioner submitted to an agency.

This is because of a fundamental misunderstanding of the nature of such petitions. This Article explains the critical distinction between a rule and a petition for rulemaking, demonstrating that the latter is, in fact, an adjudicative act rather than merely a preliminary step in the rulemaking process (and thereby rulemaking itself). Rules are generally broadly applicable and broadly binding and, therefore, have many potential challengers. These challengers attack the validity of the rule itself, either through the procedures used to reach it or whether the rule is allowed under the governing statute.

Conversely, a petition for rulemaking is an adjudicatory interaction between the government and the individual submitting the petition—it is not binding on anyone other than the petitioner. A challenge to such a petition, therefore, can be brought only by the petitioner. And, in such a challenge, it is not the rule itself that is under review, but rather the denial of the petition for rulemaking. Even then, the question is only whether the agency abused its discretion in denying the petition. Were the petitioner to win, it would merely initiate a new rulemaking proceeding, which would be (1) within the complete control of the agency and (2) subject to the usual stringent standing requirements for anyone challenging a rule.

Misapplying standing in these cases is more than a mere procedural misstep; it is a significant barrier to the enforcement of a right explicitly granted under the APA. This Article argues that denying standing in these cases not only deprives the affected individuals of their ability to check agency action, but also cuts off the only route an individual could have to address agency rules that have become obsolete or inappropriate due to changing facts since the rule was first enacted. In advocating for a reevaluation of how to categorize a rulemaking petition, this Article contends that standing should be nearly automatic, as it would be in other typical adjudications. This is because these petitions are, at their core, adjudications.

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[1] 15 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 101.20 (Daniel R. Coquillette et al. eds., 3d ed. 2022) (describing standing and the "careful judicial examination" courts undertake to permit adjudication of a plaintiff's claim).

[2] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2386 (2023) (citing Warth v. Seldin, 422 U.S. 490, 499 (1975)).

The Article begins in Part I by explaining the different components of modern standing doctrine in the administrative context. Part II then clarifies the distinction between rulemaking and adjudication. Part III reveals one area where this distinction makes a big difference—in a standing analysis. Next, Part IV explains what a petition for rulemaking is. Part V lays out why these petitions are, in fact, adjudications before concluding, in Part VI, with what is at stake in these challenges.

I. Standing in Administrative Law: Its Importance and Variations

Standing is one of the basic requirements that plaintiffs must demonstrate to bring suit. The doctrine serves various functions:

> Standing promotes the separation of powers by preventing "over-judicialization of the process of self-governance." It serves judicial efficiency by "prevent[ing] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." It improves judicial decision making by assuring that the questions presented to the court are resolved in a concrete factual context. And it ensures that "people cannot be intermeddlers trying to protect others who do not want the protection offered."[3]

Standing is often spoken of as comprising both constitutional and prudential requirements.[4] This Part, therefore, discusses both in turn. It then discusses the ways in which the traditional requirements are relaxed when the challenged action involves administrative procedures.

A. *Traditional Constitutional Standing*

The Constitution limits courts to deciding cases and controversies.[5] The Supreme Court interprets this language to mean that a plaintiff must establish three requirements to bring suit. "[A] litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and

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[3] Nicklaw v. CitiMortgage, Inc., 839 F.3d 998, 1001–02 (11th Cir. 2016) (alteration in original) (citations omitted) (first quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983); then quoting United States v. Students Challenging Regul. Agency Procs. (SCRAP), 412 U.S. 669, 687 (1973); and then quoting ERWIN CHEMERINSKY, FEDERAL JURISDICTION 59 (5th ed. 2007)); *see* SCOTT R. ANDERSON, BROOKINGS INST. GOVERNANCE STUD., REVISITING STANDING DOCTRINE: RECENT DEVELOPMENTS, POLICY CONCERNS, AND POSSIBLE SOLUTIONS 9 (2022), https://perma.cc/J4Y3-FKNY ("[S]tanding requirements help to promote an efficient and effective judicial branch by limiting the federal courts' case load to those cases where the parties are genuinely adverse and have the most incentive to explore relevant legal issues as part of our adversarial legal system."). Anderson's report also summarizes some of the general critiques of the standing doctrine that fall outside of this Article's focus on standing in challenges to denials of a rulemaking petition. *Id.* at 10–13.

[4] *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

[5] U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . [and] Controversies . . . .").

that it is likely that a favorable decision will redress that injury."[6] These three requirements—injury, causation, and redressability—are the core constitutional requirements for standing.[7]

The injury in question must be specific enough to a plaintiff to distinguish the plaintiff from other individuals who may simply disagree with the government's actions.[8] It must be concrete.[9] An injury qualifies as concrete if it is "'de facto'; that is, it must actually exist."[10] The particularity requirement, in contrast, mandates that the challenged action "affect the plaintiff in a personal and individual way."[11] It also must have already occurred, or be likely to happen in the near future.[12] This analysis regarding timing can also bleed into the ripeness analysis, which looks at whether this is the appropriate time for the court to decide this particular case.[13]

To meet the causation/traceability requirement, the plaintiff must demonstrate that the defendant is the cause of the harm.[14] This most often becomes a problem when the true harm is being caused by an intermediary, as in *Hawkins v. Haaland*,[15] where a group of ranchers sued the government to attempt to challenge tribal water claims.[16] The group did not include either the tribes or the Oregon Water Resources Department, the organization that made the final determinations on

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6 Massachusetts v. EPA, 549 U.S. 497, 517 (2007) (citing *Lujan*, 504 U.S. at 560–61).

7 *See Lujan*, 504 U.S. at 560–61.

8 *See id.* at 563 (holding that plaintiffs must show they are "'directly' affected apart from their "'special interest" in th[e] subject.'" (quoting Sierra Club v. Morton, 405 U.S. 727, 735, 739 (1972) (alteration in original))).

9 *Id.* at 560.

10 Spokeo, Inc. v. Robins, 578 U.S. 330, 340 (2016) (citing BLACK'S LAW DICTIONARY 506 (10th ed. 2014)) ("When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'" (citing dictionaries)).

11 *Id.* at 339 (quoting *Lujan*, 504 U.S. at 560 n.1).

12 Rivera-Marrero v. Banco Popular de P.R., No. 22-1217, 2023 WL 2744683, at *7 (D.P.R. Mar. 31, 2023) ("An injury is 'actual' when it has been already suffered and 'imminent' when it has yet to be suffered." Also, "[w]hen a plaintiff premises his or her standing on the risk of suffering a future injury (*i.e.*, an 'imminent' injury), such an allegation may support standing 'if the threatened injury is "certainly impending," or [if] there is a "substantial risk that harm will occur."'" (alteration in original) (first quoting Katz v. Pershing, LLC, 672 F.3d 64, 71 (1st Cir. 2012); and then quoting Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014))).

13 The overlap is so significant that ripeness has been called a specific application of this version of the standing analysis. *E.g.*, Nat'l Org. for Marriage, Inc. v. Walsh, 714 F.3d 682, 688 (2d Cir. 2013) ("Often, the best way to think of constitutional ripeness is as a specific application of the actual injury aspect of Article III standing.").

14 *See Lujan*, 504 U.S. at 560.

15 991 F.3d 216 (D.C. Cir. 2021).

16 *Id.* at 223–24.

water allocation.[17] The ranchers argued that the federal government had improperly delegated its decision-making authority to the tribes, and could, therefore, prevent water requests from being made.[18] However, since the Court of Appeals for the D.C. Circuit determined that Oregon law did not require a federal agreement for the tribes to exercise their rights under the relevant treaties, the government was not responsible for water requests which the tribes were free to make on their own.[19] There was, therefore, no causation.[20]

Nor was there redressability, the final standing requirement.[21] Just as the plaintiff must show that the party being sued caused the injury, the plaintiff must also show that a favorable court decision will remedy the injury.[22] Since the federal government had no say in the water rights the tribes sought to enforce, enjoining the federal government would continue to have no impact on those rights. The ranchers, therefore, also failed to demonstrate redressability.[23] While the causation requirement and the redressability requirement nearly always reach the same conclusion because the connection usually goes both ways, it is not always the case.[24]

These requirements ensure that the individual bringing the case is the one most affected by the actions and that the court is addressing an existing problem rather than merely issuing an advisory opinion. But the standing analysis often includes more than these constitutional requirements, as discussed in Section I.B.

B. *Prudential Standing Requirements*

The standing analysis has traditionally encompassed both constitutional and prudential considerations. And there are still cases

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17 *Id.* at 222, 225.

18 *Id.* at 224.

19 *Id.* at 231 ("[I]nvalidating the Protocol, and requiring the federal government to independently assess whether it would concur in the Tribes' calls, would not remedy the ranchers' injuries. The Tribes would continue to make calls in the exercise of their Treaty rights, and OWRD would enforce the calls.").

20 *See id.*

21 *See Hawkins*, 991 F.3d at 231.

22 *Id.* at 224.

23 *Id.* at 231.

24 Causation and redressability generally rely on the same analysis, but not always. For example, in one of the rare cases where only redressability was lacking, the Court of Appeals for the Ninth Circuit found that a plaintiff failed to show redressability since the suit dealt with an injunction to prevent a disclosure that had already occurred. Sullivan v. Univ. of Wash., No. 23-35313, 2023 WL 8621992, at *1 (9th Cir. Dec. 13, 2023).

being decided based on this.[25] Under this way of thinking, questions about whether someone can bring a case on behalf of another party, or whether the plaintiff falls within the zone of interests of the statute, are considered prudential considerations.[26] These prudential considerations are thought of as exercising judicial restraint, looking at the judiciary's proper role in our constitutional system, and increasing the courts' efficiency.[27]

However, the Court has also stated that the prudential considerations are more properly thought of as simply whether the plaintiff has the statutory authority to bring the claim at issue rather than explicitly as part of the standing analysis.[28] Whether considered part of the standing analysis or not, a plaintiff must demonstrate both (1) that the plaintiff has the statutory authority to sue and (2) that the suit is permitted under the Constitution.

These considerations are often present in administrative challenges and have formed the core of multiple seminal standing cases.[29] They can

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[25] *E.g.*, Antero Res. Corp. v. FERC, No. 22-1278, 2023 WL 194189, at *2 (D.C. Cir. Jan. 18, 2024) ("Parties are aggrieved [by an agency order issued under the controlling statute] if they satisfy the constitutional and prudential requirements for standing."); Potter v. Cozen & O'Connor, 46 F.4th 148, 154–55 (3d Cir. 2022) (describing the role of the prudential standing doctrine and its interplay with Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) motions to dismiss).

[26] *See* S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95, 95 & n.5 (2014).

[27] The Supreme Court concisely stated the traditional explanation in *Elk Grove Unified School District v. Newdow*:

> [P]rudential standing . . . embodies "judicially self-imposed limits on the exercise of federal jurisdiction." . . . [It] encompasses "the general 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." "Without such limitations—closely related to [Article] III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights."

542 U.S. 1, 11–12 (2004) (citation omitted) (first quoting Allen v. Wright, 468 U.S. 737, 751 (1984); then quoting *Allen* 468 U.S. at 751; and then quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).

[28] *See, e.g.*, Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 (2014) (explaining how the use of statutory interpretation to determine a plaintiff's right to sue under a substantive statute replaced the traditional "zone-of-interests" test once used to measure prudential standing); Bank of Am. Corp. v. City of Miami, 581 U.S. 189, 196–97 (2017) (citing *Lexmark*, 572 U.S. at 125–128, 128 n.4) ("In *Lexmark*, we said that the label 'prudential standing' was misleading, for the requirement at issue is in reality . . . . whether the statute grants the plaintiff the cause of action that he asserts." (citing *Lexmark*, 572 U.S. at 125–128, 128 n.4)).

[29] *See, e.g.*, United States v. Students Challenging Regul. Agency Procs. (SCRAP), 412 U.S. 669, 675–66, 687–90 (1973) (granting standing to environmental groups and law students who argued that the government's failure to suspend a rail freight surcharge would discourage recyclable materials and increase natural resource extraction, ultimately injuring the groups through economic, recreational,

at times make it difficult to bring such challenges.[30] There are, however, some concessions the Court has made to administrative challenges as well, relaxing the requirements for procedural challenges, as described in Section I.C.

C. *Procedural Standing*

The normal standing rules are relaxed when the challenged violation involves a procedural right.[31] This is because "'procedural rights' are special,"[32] not only because they are "prophylactic in nature," but also because there is generally no way to meet the requirements traditionally considered to be constitutionally mandated.[33] Therefore, the constitutional requirements have been reinterpreted to account for the unique circumstances facing plaintiffs alleging violations of procedural rights.

Procedural standing is particularly important in administrative law cases. While, as described below, it still requires an injury in fact, the primary focus is on the deprivation of a procedural right the individual was entitled to under the relevant law (often the APA), rather than the end harm itself.[34] Further, there must in fact be harm that is at least theoretically tied to the procedure.

The procedural standing test retains the injury-in-fact requirement.[35] But the injury is the failure of the government to follow the proper procedures, which the plaintiff must show could have an impact on some type of concrete harm.[36] Corresponding to this, there are reduced requirements for "the normal standards for redressability and

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and aesthetic harm to the environment); FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1552–53, 1565 (2024) (denying standing, for failure to demonstrate injury in fact, to pro-life medical associations and doctors seeking to rescind the FDA's approval of a hormone blocker used to end pregnancies).

30 *See, e.g.*, Thole v. U.S. Bank N.A., 140 S. Ct. 1615, 1622 (2020) ("Courts sometimes make standing law more complicated than it needs to be.").

31 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 571–72 (1992).

32 *Id.* at 572 n.7 (explaining further, in the context of a concerned neighbor blocking an adjacent federally licensed dam for failure to prepare an environmental impact statement, that "[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy").

33 *See* Ctr. for L. & Educ. v. Dep't of Educ., 396 F.3d 1152, 1166 (D.C. Cir. 2005) (Edwards, J., concurring in the judgment in part).

34 *See, e.g.*, 5 U.S.C. § 556(d) (giving the subject of an agency adjudication the opportunity to present evidence and cross-examine witnesses); *see also* Christopher T. Burt, Comment, *Procedural Standing After* Lujan v. Defenders of Wildlife, 62 U. Chi. L. Rev. 275, 276 (1994) (describing how the harm of an agency's failure to follow required procedure may be ambiguous in the present case while potentially affecting additional parties in the future).

35 *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016).

36 *Id.*

immediacy."[37] The plaintiff need not show that following the procedure would have fixed the harm, just that it is part of the process that could potentially affect the result.[38] For instance, in a case where the plaintiff has alleged the government failed to follow notice and comment rulemaking, the plaintiff need not show that unsubmitted comments would have caused the government to change the final rule—a virtually impossible showing—only that there was no opportunity for someone to provide a comment that might have affected it.[39]

Administrative law is primarily concerned with the procedures the government is required to follow.[40] This concession to the realities of such challenges is critical for the ability to oppose a great deal of government action, and thus ensure the government remains accountable. However, how easily action can be challenged also depends on whether what is being challenged is rulemaking or an adjudication. This is a critical distinction addressed in Part II.

II. Defining Rulemaking Versus Adjudication

Administrative action is generally divided broadly into rulemaking and adjudication.[41] The distinction between these two activities forms the core of much administrative law analysis, so an understanding of each is critical. This Part first defines and describes rulemaking before moving to adjudication.

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37 *Lujan*, 504 U.S. at 572 n.7.

38 *See* Iyengar v. Barnhart, 233 F. Supp. 2d 5, 10 (D.D.C. 2002) (clarifying that the redressability element of standing must only "*likely* alleviate the particularized injury alleged by the plaintiff" (quoting Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 663–64 (D.C. Cir. 1996))).

39 *See, e.g.*, *id.* at 13 ("The procedural right at stake here—the ability to comment on [the Social Security Administration's] proposal to no longer issue SSNs to aliens who need them for driver's licenses—is quite obviously linked to their concrete interest, obtaining SSNs. It requires no imaginative leap to conclude that by cutting plaintiffs out of the loop by changing its policy without notice and comment, the agency appreciably increased the risk that plaintiffs' interest would be compromised. They need not demonstrate that their comments would necessarily have made a difference. Rather, all that is necessary is that they show 'that the procedural step was connected to the substantive result.'" (quoting Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 94–95 (D.C. Cir. 2002))).

40 *See* Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 438 (2003) ("[Administrative] law defines the structural position of administrative agencies within the governmental system, specifies the decisional procedures those agencies must follow, and determines the availability and scope of review of their actions by the independent judiciary.").

41 Sierra Club v. Atlanta Reg'l Comm'n, 255 F. Supp. 2d 1319, 1344 (N.D. Ga. 2002).

A. *What Is Rulemaking?*

Rulemaking is one of the core actions administrative agencies can take. Rulemaking is the method agencies use to create regulations that can legally bind the public.[42] These regulations implement the legislative mandates in the statutes that agencies administer. In general, rulemaking is guided by the restrictions in the APA.[43] The APA defines rulemaking (or "rule making") as the "agency process for formulating, amending, or repealing a rule."[44]

A "rule," in turn, is defined as

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.[45]

The key phrase in the definition is the term "future effect"—rules are prospective looking, setting forth the standards and requirements that will bind the public in the future rather than evaluating actions that have occurred in the past.[46]

Rulemaking is most quintessentially done through the notice-and-comment process, which starts when an agency publishes a notice of proposed rulemaking in the Federal Register.[47] This opens a comment period during which any member of the public may comment.[48] When the comment period closes, the agency reviews the comments to determine whether any changes to the proposed regulation are necessary (based on issues raised in the comments, not based on the number of comments received advocating a particular change).[49] After this review, the final version of the regulation is then published in the Federal Register, with a delayed effective date to allow affected individuals and businesses time to

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42 *See id.*

43 *See id.*

44 5 U.S.C. § 551(5).

45 *Id.* § 551(4).

46 Abraham Lincoln Mem'l Hosp. v. Sebelius, 698 F.3d 536, 559 (7th Cir. 2012) (quoting Yesler Terrace Cmty. Council v. Cisneros, 37 F.3d 442, 448 (9th Cir. 1994)) (contrasting rulemaking's "prospective . . . effect on individuals *only after* the rule [is] subsequently applied" with adjudication's "*immediate* effect" (emphasis added) (quoting Yesler Terrace Cmty. Council v. Cisneros, 37 F.3d 442, 448 (9th Cir. 1994))).

47 TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 2 (2017) (citing 5 U.S.C. § 553(b)), https://perma.cc/4EEM-JT3H.

48 *See id.* (citing 5 U.S.C. § 553(c)).

49 *Id.* at 3; *see* Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1363–64 (2011) (explaining that agencies generally "seem unmoved even when the volume of comments is very large").

comply.[50] Once finalized, the regulation is formally codified in the Code of Federal Regulations.[51]

Agencies can also engage in other activities that would be categorized as rulemaking that do not result in legally binding regulations. One particularly significant example of these alternative types of rules are guidance documents, which set forth an agency's current thinking on a particular issue but explicitly do not create binding requirements.[52] These qualify as rules as they are intended to broadly inform the public of an issue and do not involve a confined dispute between the agency and an individual. Such confined disputes are adjudicative, as explained in Section II.B.

B. *What Is Adjudication?*

Adjudication is the other primary type of action federal agencies can take. It is the method through which agencies resolve disputes, make determinations regarding individual situations, and otherwise enforce compliance with laws and regulations.[53] Formal adjudications follow the same requirements as formal rulemakings.[54] While formal adjudications are slightly less rare than their regulatory counterpart, they are also generally used by an agency only when the statute mandates that the

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[50] *See* GARVEY, *supra* note 47, at 3.

[51] *Code of Federal Regulations (CFR), 1996 to Present*, GOVINFO (Sept. 9, 2022), https://perma.cc/7N9E-E47X.

[52] KATE R. BOWERS, CONG. RSCH. SERV., LSB10591, AGENCY USE OF GUIDANCE DOCUMENTS 1 (2021), https://perma.cc/JF86-CLXF.

[53] 2 AM. JUR. 2D *Administrative Law* § 258 (2024) ("An adjudication is a process by which an administrative agency applies either law or policy, or both, to the facts of a particular case to determine past and present rights and liabilities. An adjudication resolves disputes among specific individuals in specific cases and deals with what the law was." (footnotes omitted)).

[54] Both are subject to the requirements of 5 U.S.C. §§ 556 and 557. Formal adjudications are additionally subject to 5 U.S.C. § 554. *See* BEN HARRINGTON & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R46930, INFORMAL ADMINISTRATIVE ADJUDICATION: AN OVERVIEW, at Summary (2021), https://perma.cc/4LYW-TVH9 ("The formal hearing provisions establish detailed specifications for oral, trial-type proceedings. Parties may present evidence and cross-examine witnesses, and the adjudicator must issue a decision with findings and conclusions. In addition, formal adjudications must be presided over by 'administrative law judges' (ALJs), a special class of adjudicators who enjoy a unique level of independence from their employing agencies.").

hearing be "on the record."[55] All other adjudications are considered informal.[56]

This means that informal adjudications cover both an in-person immigration court hearing and a paper determination about whether to grant disability benefits.[57] In these circumstances—when a hearing threatens a liberty or (more generally) property interest—the minimum required standards are a combination of whatever statutory requirements are in place and the Constitution's Due Process Clause.[58]

Just as rulemaking is really defined by what a rule is, adjudication is similarly defined by its end product—an order.[59] An order is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing."[60] In these instances, the agency is making a determination about the specific rights, duties, or privileges of, or sanctions imposed on, particular individuals based on the relevant legal standards and the specific facts presented in each situation.[61] Because there are specific parties to an adjudication, the dispute is inherently confined to that between the parties.[62] With the distinction clear, Part III addresses how these two processes are treated differently in the standing analysis.

III. The Distinction Between Adjudication and Rulemaking Is Particularly Important in Standing

The distinction between rulemaking and adjudication is most significant when seeking judicial review of agency action. In adjudications, standing is functionally automatic.[63] In rulemakings,

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55 Crestview Parke Care Ctr. v. Thompson, 373 F.3d 743, 748 (6th Cir. 2004) (highlighting the Supreme Court's instruction "that formal adjudication procedures are only necessary when a statute uses the magic words 'on the record'" (citing United States v. Fla. E. Coast Ry., 410 U.S. 224, 237–38 (1973))).

56 HARRINGTON & SHEFFNER, *supra* note 54, at Summary (stating informal adjudication "is a residual term for all other adjudicative proceedings" not governed by the APA's formal hearing provisions).

57 *See, e.g.*, Colmenar v. Immigr. & Naturalization Serv., 210 F.3d 967, 971 (9th Cir. 2000) (immigration); Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (disability benefits).

58 *See* HARRINGTON & SHEFFNER, *supra* note 54, at 9; Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (exemplifying that liberty and property interests—even those represented by welfare payments—cannot be properly adjudicated without due process).

59 5 U.S.C. § 551(7) (defining adjudication as "agency process for the formulation of an order").

60 *Id.* § 551(6).

61 2 AM. JUR. 2D, *supra* note 53, § 258.

62 However, other parties may seek to join an adjudication as an additional party, granting them input in the dispute.

63 So long as the challenger was a party to the challenged action at the agency level.

however, the plaintiff is frequently required to affirmatively demonstrate meeting the standing requirements. This is a well-established pattern. As the Court stated in *Lujan v. Defenders of Wildlife*:

> When the suit is one challenging the legality of government action or inaction, . . . standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish.[64]

This Part describes standing in both rulemakings and adjudications before elaborating on the differences between them, to help explain the vastly different treatment.

A. *Functionally Automatic Standing in Adjudication*

In most adjudication cases, standing is never addressed, likely because it would be undisputed that the constitutional requirements were met.[65] A typical such case is *Raper v. Commissioner of Social Security*[66] heard before the Court of Appeals for the Eleventh Circuit. Raper, the claimant, was appealing a social security disability denial based on both substantive and procedural grounds.[67] Notably, he claimed that the appointment of the presiding administrative law judge ("ALJ") violated the Appointments Clause.[68] The word "standing" appears in the opinion only when discussing limitations on Raper's physical ability to stand.[69] The legal concept of standing, however, is never discussed in the opinion.

This is because such a discussion would be pointless. Constitutionally, Raper suffered an injury because he believed he was

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64 Lujan v. Defs. of Wildlife, 504 U.S. 555, 561–62 (1992) (emphasis omitted) (citations omitted) (first quoting ASARCO Inc. v. Kadish, 490 U.S. 605, 615 (1989); and then quoting Allen v. Wright, 468 U.S. 737, 758 (1984)).

65 Adjudicating the individual rights and interests of a party essentially imparts de facto standing on that party. *See supra* Section I.A.

66 89 F.4th 1261 (11th Cir. 2024).

67 *Id.* at 1265.

68 *Id.* (citing U.S. CONST. art. II, § 2, cl. 2).

69 *Id.* at 1278.

denied benefits that he was statutorily entitled to.[70] He alone was denied the benefits in his hearing before the ALJ.[71] Since it was a government official who personally denied the benefits, there is little question that this can be directly traced to actions of the government and could be rectified by a court ordering the government to reconsider the previous action.

Generally, standing is denied for an adjudication challenge only when the initial determination was already fully in favor of the challenger,[72] or when the person challenging the adjudication was not a party to the adjudication (or their successor in interest).[73] This is not the case for rulemaking, as explained in Section III.B.

B. *High Bar in Rulemaking*

In contrast to the lack of analysis in adjudication cases, standing is at issue in many rulemaking cases. A lack of standing is the most effective defense against such a case because it prevents any examination of the merits.[74] A lack of standing is also a frequently successful defense.[75]

Rulemaking generally encompasses wide-reaching issues that can directly affect many people and have indirect effects on numerous additional individuals.[76] Due to the wide-ranging and often indirect impact, individuals can struggle to demonstrate the requisite personal, direct injury.[77] Challenges to rules have led to much of the current

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[70] *Id.* at 1265. There is generally little argument about whether the denial of a statutory right can constitute the constitutionally required injury. Issues can arise, however, if some intervening force has prevented injury despite a denial of a statutory right. *See, e.g.*, Goldman v. Azar, No. 4:20-cv-463, 2021 WL 3729032, at *2–3 (S.D. Tex. June 25, 2021) (holding that a plaintiff lacked standing to challenge the denial of a Medicare reimbursement when the cost had been born by the equipment supplier instead). Nonetheless, in such cases, the intervenor may potentially have standing to challenge the denial.

[71] *See Raper*, 89 F.4th at 1265.

[72] If an adjudication exclusively benefitted the challenger, there is no case to be made that the challenger suffered an injury—much less a redressable injury—as required by standing doctrine. *See* discussion on elements of constitutional standing, *supra* Section I.A.

[73] *See, e.g.*, Conf. Grp., LLC v. FCC, 720 F.3d 957, 963 (D.C. Cir. 2013) (collecting cases and reiterating that a "bystander" to an agency adjudication, and even a third party facing "unfavorable precedent" as a result of the decision, lacks standing to challenge the adjudication).

[74] *Cf.* Bos. All. of Gay, Lesbian, Bisexual & Transgender Youth (BAGLY) v. U.S. Dep't of Health & Hum. Servs., 557 F. Supp. 3d 224, 234 (D. Mass. 2021).

[75] *See* Glenn G. Lammi, *Federal Court Reminds Defendants that Dismissal for Lack of Standing Can Be a Pyrrhic Victory*, FORBES, https://perma.cc/4BEH-NE9A (Nov. 25, 2019, 10:59 AM) ("A plaintiff's lack of standing to sue is about as close to a silver-bullet defense as civil-litigation defendants have at their disposal . . . .").

[76] *See* MAEVE P. CAREY, CONG. RSCH. SERV., RL32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 1 (2013), https://perma.cc/5KXF-53G3.

[77] *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 562–64 (1992).

standing doctrine.[78] Both *Bennett v. Spear*[79] and *Lujan v. Defenders of Wildlife*[80] were rulemaking challenges, although with different outcomes. In *Bennett*, the rulemaking at issue was "a biological opinion issued by the Fish and Wildlife Service in accordance with the Endangered Species Act of 1973 . . . concerning the operation of the Klamath Irrigation Project by the Bureau of Reclamation, and the project's impact on two varieties of endangered fish."[81] The challengers—two water districts and two farmers getting water from the districts—were found to have standing, despite being opposed to the protection of the fish, because they had a direct and competing economic incentive in the water at issue.[82]

In *Lujan*, the rule at issue was an agency reinterpretation of when the Secretary of the Interior was required to consult with other federal agencies on action that would impact endangered animals, making it so the Secretary was no longer required to consult on action taken in other countries.[83] This decision was challenged by environmental groups, including two Defenders of Wildlife members who alleged (1) that they had traveled to foreign locations in order to view endangered animals, (2) that these locations were going to be developed (without the consultation the individuals thought should happen thanks to the new rule), and (3) that the development would impede their ability to see the animals in the future.[84] However, while both members expressed a desire to return to the foreign locations and view the animals, neither had confirmed travel plans.[85] This meant that neither was suffering a concrete and imminent injury, which then caused the members and the associations relying on them to lack standing.[86] One of the members was unable to give concrete

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78 *See id.* at 557–58 (challenging a rule promulgated by the Secretary of the Interior in accordance with the Endangered Species Act); *see also* Bennett v. Spear, 520 U.S. 154, 157 (1997) (challenging a biological opinion issued by the Fish and Wildlife Service under the authority of the Endangered Species Act).

79 520 U.S. 154 (1997).

80 504 U.S. 555 (1992).

81 *Bennett*, 520 U.S. at 157 (citation omitted).

82 *Id.* at 159, 168, 171 ("Given petitioners' allegation that the amount of available water will be reduced and that they will be adversely affected thereby, it is easy to presume specific facts under which petitioners will be injured—for example, the Bureau's distribution of the reduction pro rata among its customers. The complaint alleges the requisite injury in fact."). The Court also noted that the factual allegations needed to demonstrate this could vary depending on the stage of litigation. *Id.* at 167–68 (citing *Lujan*, 504 U.S. at 561).

83 *Lujan*, 504 U.S. at 557–59.

84 *Id.* at 563 (explaining that one member's hope to observe the endangered Nile crocodile would be jeopardized by habitat changes caused by the U.S. role in rehabilitating Egypt's Aswan High Dam, while another member would lose her future opportunity to observe endangered Sri Lankan elephants and leopards due to a USAID project).

85 *Id.* at 564.

86 *Id.* at 564, 578.

plans on when she would return to observe the animals because the country in question, Sri Lanka, was in the middle of a civil war.[87] Thus, an absence of current travel plans was not necessarily indicative of her true intent to return.[88]

This higher requirement for rulemaking challenges is further explained in Section III.C. below.

C. *Explaining the Distinction*

There are two primary explanations for the distinction in how rulemaking and adjudication are evaluated at the standing stage: (1) the different way that the injury is conceptualized in rulemaking versus an adjudication and (2) the field of potential challengers for the action. This Section addresses these distinctions in turn.

1. How the Injury Is Viewed

In general, the goal of standing is to ensure that the individual bringing the suit is the one injured.[89] In administrative law, the conceptualization and evaluation of what constitutes an injury can vary significantly between adjudications and rulemakings.[90] This distinction fundamentally affects how courts assess standing and, subsequently, how they review challenges to different types of agency action.[91]

a. *Injury in Adjudication*

In an adjudication, the injury is generally specific and direct. The decision of an administrative agency directly affects the rights, duties, or privileges of the individual party to the decision.[92] This specificity makes it easy to establish standing: the injury is typically direct and concrete.[93]

There is also unquestionably an individualized impact. Because the proceeding leading to the injury generally involves only the individual at issue, it is virtually *by definition* individualized.[94]

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87 *Id.* at 564.

88 *See id.* at 564 & n.2.

89 *See* MOORE, *supra* note 1, § 101.71.

90 *See Lujan*, 504 U.S. at 561–62.

91 *Id.*

92 Adjudications can involve more than one party, but they generally affect a defined and limited group such that the analysis remains functionally the same.

93 *See* HARRINGTON & SHEFFNER, *supra* note 54, at 2.

94 *Id.*

Finally, since a challenge to an unfavorable adjudication decision directly challenges the government action, rather than the expected actions of a third party based on the government action, a favorable court determination will unquestionably address the issue.[95] The importance of the negative initial agency determination can be seen in the rare cases where an individual attempts to challenge an adjudication that was already fully in their favor, and is consequently denied standing.[96]

b. *Injury in Rulemaking*

In rulemaking, the broad nature of the process means that many individuals are likely to experience the same harm. While more than one individual being similarly affected does not automatically disqualify a plaintiff, a more broadly dispersed harm makes it harder for any individual plaintiff to demonstrate which one should be the one to bring suit.[97] Normally, the plaintiff must show a direct, personal injury distinct from the public or a large segment of it.[98]

The timing of the injury can also be an issue when challenging rulemaking. In an adjudication, the harm occurs when the adverse ruling comes down.[99] It is therefore already present (and concrete) when the

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[95] *See Lujan*, 504 U.S. at 561–62. In this context, the general expected remedy is a remand to the agency, at which point the agency may well reach the same result. *See* Calcutt v. FDIC, 143 S. Ct. 1317, 1320 (2023) (explaining that, except in rare circumstances, remand to the agency is proper if the record does not support the agency action or the agency has not considered all relevant factors). Redressability in this context does not mandate that the government result be different; the remand itself is considered sufficient redress. *See, e.g.*, SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80, 93, 95 (1943) (refusing to uphold an agency order and remanding to the agency without expressly vacating or reversing the agency order); SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 199–200 (1947) (upholding an agency order when the agency reached the same conclusion following remand). Instead, a lack of redressability is present when, even if the government were to change its actions, it is unclear whether a third party would necessarily change their actions in a corresponding manner. *See, e.g.*, Haaland v. Brackeen, 143 S. Ct. 1609, 1639 (2023) (explaining that injunctive relief against the federal government would not redress the injury because state entities were the ones executing the statute).

[96] *E.g.*, Wells v. McDonough, No. 22-0259, 2023 WL 3298928 (Vet. App. May 8, 2023). In *Wells*, the veteran sought compensation for PTSD. *Id.* at *1. The agency determined that the veteran did not suffer from PTSD, but instead suffered from generalized anxiety and depression. *Id.* at *2. Because compensation for all psychiatric disabilities is evaluated based on symptoms, not the underlying diagnosis, the change from PTSD to anxiety and depression made no difference to the final benefit calculation. *Id.* at *2–3.

[97] *See Lujan*, 504 U.S. at 562; *supra* text accompanying note 64.

[98] *Id.* at 574–75 ("[The plaintiff] must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." (quoting Ex parte Levitt, 302 U.S. 633, 634 (1937))).

[99] *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2450 (2024) ("An APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action . . . .").

determination is appealed. In rulemaking, however, the harm is often based on actions that may still be taken in the future.[100] This speculative harm can be difficult to prove given its comparatively uncertain nature.[101]

Rulemakings are also more likely to have an injury that would be considered abstract. This in turn leads to a more searching judicial inquiry of the injury (certainly more searching than the lack of a formally noted inquiry in an adjudication). This abstract injury could also help explain why it can be more difficult to find an appropriate person to challenge it, as explained in Section III.C.2. below.

2. Who Can Potentially Challenge an Action?

The differing nature of the injury, as described above, has implications for who can potentially challenge the action. Individuals affected by an adjudication typically have a clear pathway to standing.[102] But those claiming harm from rulemaking face a more complex and uncertain journey.

To challenge an adjudication, the potential challenger should have been a party to the initial determination or, in some way, the successor in interest.[103] It is, therefore, easy to determine who the potential challengers are for any given adjudication, and individuals who were not parties to the initial adjudication will not have standing to challenge it.[104]

For rulemaking, many people may be affected and wish to challenge the rule. But it is these types of cases that can be the most difficult to find a suitable plaintiff, as a potential plaintiff must show that the injury is more significant than many others who will be affected (or that the

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100 *See Lujan*, 504 U.S. at 562–64 (deliberating standing for harm that would potentially occur in the future).

101 *See id.* at 564.

102 The requirement that the injury be to a legally recognizable interest generally has little effect on the analysis, as most injuries are injuries to a legally affected interest. However, the legal interpretation of "affected interest" does not always fully comport with the common understanding. For instance, in *Pai v. United States Citizenship & Immigration Services*, Pai sought to challenge the USCIS's denial of an immigrant petition for an alien worker in which Pai was the named beneficiary. 810 F. Supp. 2d 102, 104 (D.D.C. 2011). The court denied standing for Pai to challenge the denial, since the "petition must be filed and prosecuted by the employer, who is the only party with standing in the agency to challenge the decision with respect to that petition." *Id.* at 105, 107. This has been distinguished when the prospective immigrant or a family member already has ties to the United States. *See* Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affs., 45 F.3d 469, 471 (D.C. Cir. 1995) (granting standing, in the case of an immigrant petitioner, to a U.S. resident who was sponsoring the petitioner).

103 *See, e.g.*, Bushnell, Inc. v. Brunton Co., 673 F. Supp. 2d 1241, 1244 (D. Kan. 2009) (correcting an initial lack of standing by assigning patent ownership, a central aspect of the challenge, from a non-party to the plaintiff).

104 This requirement is interpreted strictly. *See Pai*, 810 F. Supp. 2d at 104 (discussed more fully *supra* note 102).

individual is one of a comparative few individuals so affected).[105] This was the exact problem discussed in *Lujan*.[106]

The two primary standing cases show how difficult it can be in certain situations to find suitable plaintiffs to challenge rules. In *Bennett*, it was relatively easy to find appropriate plaintiffs because the action was taking place at a specific location in the United States.[107] In *Lujan*, the entire challenge was about consultations not being made for actions overseas.[108] The plaintiff needed to be someone directly impacted by the overseas actions: a requirement the Court determined the organizations were unable to fulfill.[109]

IV. The Role of a Petition for Rulemaking

In administrative law, there is typically only one method an individual can use to try to update outdated regulations to match the current reality: a petition for rulemaking.[110] This Part begins by describing what these petitions are before addressing how they apply to changed facts in rulemaking. It then explains the procedures used in these petitions before concluding with an explanation of how a denial would be reviewed on appeal.

A. *What Is a Petition for Rulemaking?*

A petition for rulemaking is the official way a member of the public can request an agency to create, modify, or remove a regulation or other agency rule. These petitions are part of the APA-mandated agency procedures.[111] APA Section 553(e) states that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."[112] This "interested person" language is the same used to describe who can comment on a proposed rule.[113] This extremely brief section provides no additional guidance, and little is found elsewhere in the APA. The exception to this is that an agency must promptly respond to such a petition and give a brief statement of the grounds for denial if

105 *See Lujan*, 504 U.S. at 562–63.

106 *Id.*

107 *See* Bennett v. Spear, 520 U.S. 154, 158 (1997).

108 *See Lujan*, 504 U.S. at 558–59.

109 *See id.* at 563, 565–66.

110 *See* 5 U.S.C. § 553(e) (granting interested parties the right to petition for the issuance or amendment of a rule).

111 *Id.*

112 *Id.*

113 *Id.* § 553(c) (codifying an agency's duty to "give interested persons an opportunity to participate in the rule making").

the petition is denied.[114] Despite the admonition in the Attorney General's manual for agencies to adopt procedures governing such submissions, decades later many agencies still have not done so.[115] And the procedures vary in those that have, with some agencies allowing notice and comment on the petitions received, while others remain more of a black box.[116]

Importantly, an individual submitting a petition for rulemaking does not bind the agency to do the rulemaking.[117] If the agency does agree to do the rulemaking, it must treat it as any other rulemaking, going through any required steps (such as the regular notice-and-comment process, even if notice and comment was done with the petition originally).[118] The most important reason someone would want to submit such a petition is that facts surrounding a rule may have changed since the initial promulgation, causing the rule to no longer make sense. This is explained in Section IV.B.

B. *A Petition for Rulemaking Is the Only Way to Address New Facts After Rulemaking*

These petitions are so critical because there are effectively no other ways to challenge a rule if the relevant circumstances have changed since the time the rule was initially adopted.[119] In many situations regarding adjudications, mechanisms are in place to address changing facts.[120] This

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114 *Id.* § 555(e) ("Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.").

115 *See* U.S. DEP'T OF JUST., ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 38 (Wm. W. Gaunt & Sons 1973) (1947); William V. Luneburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1, 20 n.112 (1988).

116 ADMIN. CONF. OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2014-6: PETITIONS FOR RULEMAKING 2 & n.8 (2014) [hereinafter ADMINISTRATIVE CONFERENCE RECOMMENDATION] ("[W]ith respect to agency procedures governing petitions for rulemaking, '[s]ome have none; others largely mirror, without elaborating much on, statutory procedures; and still others have adopted rather detailed requirements . . . going considerably beyond the procedures expressly mandated by statute.'" (second alteration in original) (quoting William V. Luneburg, *Petitions for Rulemaking: Federal Agency Practice and Recommendations for Improvement*, 1986 ACUS 493, 510 (1986))).

117 MAEVE P. CAREY, CONG. RSCH. SERV., R46190, PETITIONS FOR RULEMAKING: AN OVERVIEW 8 (2020), https://perma.cc/9FE6-DEK4.

118 *See id.* at Summary.

119 Regardless of changed circumstances, agencies remain bound by Section 553(e) of the APA if they choose to amend or repeal a rule. *See* 5 U.S.C. § 553(e).

120 *See, e.g.*, Procedures for Handling Requests to File Subsequent Applications for Disability Benefits, 76 Fed. Reg. 45309, 45310 (July 28, 2011) (allowing disability pay applicants to submit claims for reconsideration based on "new medical conditions or a worsening in [their] existing medical conditions").

may involve a new application to the agency or instances where a statute explicitly allows reconsideration of an adjudication based on changed facts.[121] This Section compares the problems faced when facts change after rulemaking with those faced when facts have changed in an adjudication.

1. Addressing Changed Facts in Rulemaking

Regulations are generally put in place with the expectation that they will continue to apply forever unless altered.[122] This forward-looking action is the essence of what makes a rule *a rule* rather than an adjudication, and it provides needed consistency and predictability.[123] It will also, however, inevitably result in some situations where the regulation is no longer applicable.

When facts have changed after a regulation is issued, such that the regulation is no longer suitable, the agency may notice the change and seek to amend the regulation or, in instances where the regulation is no longer needed, remove it altogether.[124] Multiple Presidents have tried to remove outdated regulations from the federal code.[125] However, an agency will never be aware of every changed fact, or the impact those facts could have on regulations. This is where the petition for rulemaking in the APA is critical. It is the only method where the public must formally inform the

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121 *See, e.g.*, 42 U.S.C. § 405(g) (permitting reviewing courts to remand disability pay claims to the Commissioner of Social Security to consider new or additional evidence).

122 There is no statutory authority governing the permanence of agency rules. In practice, however, there are limited circumstances in which a rule does *not* remain in effect permanently. *See* OFF. OF THE FED. REG., A GUIDE TO THE RULEMAKING PROCESS (2011), https://perma.cc/9P47-AABZ ("Based on its experience in enforcing a rule, an agency may decide to change a rule, remove it from the [Code of Federal Regulations] entirely, or let it stand. A law or a Presidential directive may require a formal review process every few years. An agency may undertake a review based on a petition from the public. Its own experts may also begin a review process when conditions change and rules seem outdated. If an agency decides to amend or revoke a rule, it must use the notice-and-comment process to make the change.").

123 *See supra* note 46 and accompanying text; *see also* Exec. Order No. 12,866 § 1(b)(5), 58 Fed. Reg. 51735 (Oct. 4, 1993) (reminding federal agencies that, among other regulatory objectives, effective regulating promotes "consistency [and] predictability").

124 Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968) ("[A]dministrative authorities must be permitted . . . to adapt their rules and policies to the demands of changing circumstances."); Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 51–52 (1983) ("[A]n agency may also revoke a standard . . . if supported by the record and reasonably explained.").

125 *See* 2020 EXEC. OFF. OF THE PRESIDENT, ANN. ECON. REP. 105 (noting that President Trump's deregulation policy included the removal of outdated regulations); Press Release, Off. of the Press Sec'y, The White House, White House Announces New Steps to Cut Red Tape, Eliminate Unnecessary Regulations (May 10, 2012), https://perma.cc/U5N3-3KU8.

agency of changed facts, thereby putting the agency on notice and allowing it to determine whether to respond to those facts.[126]

While someone could, of course, simply write a letter to the agency explaining why facts have changed, there would be no obligation on the agency to respond, or to do so in a manner that could easily be judicially reviewed.[127] This is a completely different situation than when facts have changed after an adjudication, as described in Section IV.B.2.

2. Addressing Changed Facts in an Adjudication

In many instances, when an adjudication is done, as with a court case, the determination is final and will not be revisited. This does not mean that agencies cannot respond to changing facts, but that the system is merely, in many ways, already set up to accommodate them.

For instance, those who are denied disability benefits because they did not qualify as disabled can reapply for benefits as their condition changes.[128] The reapplication is not the same adjudication but will often still result in relief.

However, there are also a few specific exceptions created in the law to allow certain determinations to be revisited in light of changed facts. For instance, an individual may have been denied asylum upon an initial application, but if still in the United States, the individual is statutorily allowed to re-petition based on changed facts.[129] This differs from the disability example because it is the initial determination being revisited rather than a new application.[130] The distinction is important because in these situations the individual who applied for asylum is required to leave the country and typically unable to start a new petition.[131]

In both methods, however, after facts have changed, an individual is able to obtain appropriate relief from the government by following the

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126 *See* ADMINISTRATIVE CONFERENCE RECOMMENDATION , *supra* note 116, at 3 (discussing informal methods of suggestion in contrast to the official method of petitioning).

127 The APA merely mandates that the agency respond promptly, and with an explanation of a decision, to formal petitions for rulemaking. *See* 5 U.S.C. § 555(e).

128 Earley v. Comm'r of Soc. Sec., 893 F.3d 929, 932 (6th Cir. 2018) ("An individual may file a second application . . . and obtain independent review of it so long as the claimant presents evidence of a change in condition . . . .").

129 8 U.S.C. § 1229a(c)(7)(A) ("An alien may file one motion to reopen proceedings . . . ."); *id.* § 1229a(c)(7)(B) ("The motion to reopen shall state the new facts that will be proven at a hearing . . . .").

130 *See* Immigr. & Nationalization Serv. v. Abudu, 485 U.S. 94, 107 (1988) (discussing how a motion to reopen is inherently contrary to the public's interest in finality because it allows the court to revisit prior decisions).

131 8 U.S.C. § 1158(a)(2)(C) (forbidding an alien to apply for asylum "if the alien has previously applied for asylum and had such application denied"). *But see id.* § 1158(a)(2)(D) (creating an exception to the reapplication rule in cases of material changed circumstances).

appropriate procedures.[132] The affected party may also receive judicial review of an adverse determination.[133] Before a petition for rulemaking can be reviewed, it must first be filed.[134] Section IV.C explains the exact procedure needed to petition for rulemaking.

C. *Procedural Process to Petition for Rulemaking*

The APA provides little guidance on the exact procedure an interested individual should go through to file a rulemaking petition. Nor have all agencies, contrary to the expectation of the Attorney General when the APA was passed in the 1940s, sought to make the requirements clear.[135]

While some agencies do have clear requirements in place, like the Food and Drug Administration ("FDA"), others do not. The FDA's position is that petitions should include the action requested;[136] the statement of grounds for the petition, both factual and legal;[137] an environmental impact when required or a statement that no environmental impact section is needed;[138] a certification that the petition "includes all information and views on which the petition relies, and that it includes representative data and information known to the petition which are unfavorable to the petition"; and a signature including contact information.[139] In certain circumstances, the FDA may also request an economic impact statement after the petition has been submitted.[140] The

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132 *See id.* §§ 1158(a)(2)(C)–(D); *id.* § 1158(d) (explaining the procedure for reapplication of an asylum claim); *see also* Procedures for Handling Requests to File Subsequent Applications for Disability Benefits, *supra* note 120, at 45310–11 (explaining the Social Security Administration's procedures for filing subsequent and amended claims for disability benefits).

133 Tania Galloni, *Keeping It Real: Judicial Review of Asylum Credibility Determinations in the Eleventh Circuit After the REAL ID Act*, 62 U. MIAMI L. REV. 1037, 1039 (2008) ("If [a refugee's asylum] appeal is denied, federal law provides for judicial review by the U.S. court of appeals in which the immigration judge completed the proceedings.").

134 *See* Luneburg, *supra* note 115, at 11 (discussing filing methods for a rulemaking petition); 5 U.S.C. § 553(e) (providing the individual right to file a petition at any agency).

135 *See* ADMINISTRATIVE CONFERENCE RECOMMENDATION, *supra* note 116, at 2–3.

136 *Comment on Proposed Regulations and Submit Petitions*, U.S. FOOD & DRUG ADMIN. (Mar. 22, 2023), https://perma.cc/4KNH-HCL4 ("What rule, order, or other administrative action does the petitioner want FDA to issue, amend or revoke?").

137 *Id.* ("The factual and legal grounds for the petition, including all supporting material, as well as information known to the petitioner that may be unfavorable to the petitioner's position.").

138 *Id.* (requiring an environmental impact statement "if the petition requests approval of food or color additives, drugs, biological products, animal drugs, or certain medical devices, or for a food to be categorized as GRAS (generally recognized as safe)").

139 *Id.*

140 *Id.*

petitions can be submitted electronically through the *regulations.gov* web page.[141]

Ultimately, the FDA decides whether to grant a petition—but first, agency staffers evaluate it, a process that may take several weeks to more than a year depending on the issue's complexity.[142] After the FDA grants or denies the petition, the agency will notify the petitioner directly.[143] If not satisfied, the petitioner can take the matter to court.[144]

If the final agency decision is a denial of the petition, that denial can potentially be subjected to judicial review,[145] as described in Section IV.D.

D. *How These Petitions Are Reviewed on Appeal*

The denial of a petition for rulemaking is potentially subject to judicial review.[146] This review, however, is significantly limited—in part because the agency's only requirement when responding to the petition is that the agency provide prompt notice "accompanied by a brief statement of the grounds for denial."[147] Furthermore, this standard of review is done under the incredibly lenient arbitrary and capricious standard.[148]

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141 *Id.*

142 U.S. FOOD & DRUG ADMIN., *supra* note 136.

143 *Id.*

144 *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). In addition to the general APA provision described by the FDA example, statutory provisions containing more explicit instructions may also grant individuals the right to petition certain agencies in specific circumstances. For instance, the Clean Air Act allows individuals to petition for the inclusion of chemicals to the EPA's list of controlled Class I and Class II substances based on adequate data:

> At any time, any person may petition the Administrator to add a substance to the list of class I or class II substances. . . . [W]ithin 180 days after receiving such a petition, the Administrator shall either propose to add the substance to such list or publish an explanation of the petition denial. In any case where the Administrator proposes to add a substance to such list, the Administrator shall add, by rule, (or make a final determination not to add) such substance to such list within 1 year after receiving such petition. Any petition under this paragraph shall include a showing by the petitioner that there are data on the substance adequate to support the petition.

42 U.S.C. § 7671a(c)(3).

145 21 C.F.R. § 10.45(d) (2024) (stating that "the Commissioner's final decision constitutes final agency action" that is "reviewable in the courts" under statutory authority).

146 *Id.*

147 5 U.S.C. § 555(e).

148 *See id.* § 706(2)(A); *see also* Kakar v. U.S. Citizenship & Immigr. Servs., 29 F.4th 129, 132 (2d Cir. 2022) (explaining the arbitrary and capricious standard of review is met "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the

Judicial review of such petitions, then, is merely a check on unbridled agency discretion. And in those few instances where the court does find the agency to have violated its broad discretion, the general remedy is a remand to the agency to reconsider.[149]

This Section begins by addressing a court's standard when reviewing these petitions and what is at stake in the review. It then examines cases where the plaintiffs succeeded and cases where the plaintiffs lost, both at the initial standing stage as well as on the merits.

1. Standard of Review for the Denial of a Petition for Rulemaking

It is important to understand both what can be challenged and what standard of review will be used in that challenge. When an individual challenges an agency's denial of a petition for rulemaking, the only issue is whether the petition was properly denied.[150] As further explained in Section V.A, *infra*, if the agency chooses to go forward with the requested rulemaking, the petition itself has been granted, and the petition process is complete.[151] At that point, the petitioner loses all control over the process and has no say in the final result (other than to comment as a member of the public).[152]

Therefore, when a denial of such a petition is being reviewed, the court is looking at only whether the agency appropriately declined to move forward with the process,[153] which is frequently reviewed under the very deferential abuse of discretion standard.[154] This deferential standard is lenient because the agency is granted discretion in whether to approve

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agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise" (quoting Alzokari v. Pompeo, 973 F.3d 65, 70 (2d. Cir. 2020)).

149 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 20.3 (7th ed. Supp. 2024) (explaining the common practice of courts to remand a rule without vacating if the court finds that the agency improperly denied a petition).

150 *See* CHARLES H. KOCH & RICHARD MURPHY, ADMINISTRATIVE LAW AND PRACTICE § 4.31 (3d ed. 2010 & Supp. 2024) (explaining how a denial would be improper and how a court's denial of a petition is narrowed to these reasons).

151 *See* Luneburg, *supra* note 115, at 32 (suggesting that an agency's commencement of a rulemaking procedure based on a petition signifies that the agency has considered the proposal).

152 *See id.* at 26 (discussing agency discretion in considering disposition of a petition, including whether to elicit public comments).

153 *See, e.g.*, Defs. of Wildlife v. Gutierrez, 532 F.3d 913, 919 (D.C. Cir. 2008) ("[W]e look to see whether the agency employed reasoned decisionmaking in rejecting the petition." (citing Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 5 (D.C. Cir. 1987))).

154 *See, e.g.*, Military-Veterans Advoc. Inc. v. Sec'y of Veterans Affs., 38 F.4th 154, 160 (Fed. Cir. 2022) (noting that the review of a VA denial of rulemaking petition renders the already "highly deferential" standard "even more deferential by the treatment accorded by the courts to an agency's rulemaking authority.").

the petition and thereby initiate rulemaking.[155] Given that agencies must balance competing priorities and limited budgets, it is reasonable to grant the agencies discretion in these matters. In such cases, the court is primarily making sure the agency did not go beyond its wide berth of discretion.

The extremely limited nature of the challenge and the strict standard of review were both recently discussed in the Court of Appeals for the D.C. Circuit, where the court reiterated that the challenge is strictly to the denial of the petition itself, not to the underlying rule.[156] When reviewing that denial, the court said it was "evaluated with a deference so broad as to make the process akin to nonreviewability."[157] It is not, in fact, unreviewable—just very difficult, as the court would "reverse the agency's choice 'only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency.'"[158] While the abuse of discretion standard is an extremely high hurdle to overcome, it is not impossible, as Section IV.D.2 demonstrates.

2. A Successful Challenge

A challenge to the denial of a petition for rulemaking is unlikely to be successful, even when a court determines the parties have standing, due to the extremely deferential standard of review used as described above. However, there are occasional wins that show how critical this method of agency oversight is.

An example was shown recently in *Sea Shepherd New Zealand v. United States*.[159] The case was brought by two environmental organizations in response to the denial of a rulemaking petition submitted to the U.S. Department of Commerce.[160] The petition concerned the critically endangered Māui dolphin, which lives within New Zealand waters.[161] The fishing methods challenged—using gill nets or trawls—are dangerous for the dolphins, although the parties disagreed on whether that was the most significant threat.[162]

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155 *See, e.g.*, Conservancy of Sw. Fla. v. U.S. Fish & Wildlife Serv., 677 F.3d 1073, 1085 (11th Cir. 2012); *see also* Massachusetts v. EPA, 549 U.S. 497, 527–28 (2007) ("[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.").

156 *See* Pub. Emps. for Env't Resp. v. EPA, 77 F.4th 899, 912 (D.C. Cir. 2023).

157 *Id.* (quoting Verizon v. FCC, 770 F.3d 961, 966 (D.C. Cir. 2014)).

158 *Id.* (quoting McAfee v. FDA, 36 F.4th 272, 274 (D.C. Cir. 2022)).

159 606 F. Supp. 3d 1286 (Ct. Int'l Trade 2022).

160 *Id.* at 1292, 1300.

161 *Id.* at 1292, 1297.

162 *Id.* at 1298 ("[P]arties agree that [set net and trawl] fishing poses a threat to Māui dolphins," but disagree on whether more than one dolphin was being killed on average per year). An expert report submitted to the International Whaling Commission ("IWC") Scientific Committee concluded that

The suit was based on the Marine Mammals Protection Act, which requires the Secretary of the Treasury to "ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards."[163]

Based on this Act, the petitioners submitted a petition for rulemaking seeking to ban the import of any fish from New Zealand caught within the dolphin's range using either gill nets or trawls.[164] The government denied the petition, reasoning that New Zealand was currently updating its protection protocol for the dolphins.[165]

When the initial denial was challenged in court, the government sought a remand to the agency, which was granted.[166] On remand, the agency again denied the petition, viewing the New Zealand government's actions as equivalent to what would be required by the U.S. government.[167]

The plaintiffs challenged the denial again, alleging that the government acted arbitrarily and capriciously in denying the petition for the rulemaking and in issuing the comparability finding.[168] The plaintiffs also sought a preliminary injunction "requiring the U.S. Government to ban the importation of all fish and fish products from New Zealand's commercial gillnet and trawl fisheries within the Māui dolphin's range."[169]

The court agreed and issued the preliminary injunction.[170] The panel found that the agency had failed to consider statutorily mandated factors, such as how the protections put in place in New Zealand compared to those in similar situations in the United States.[171] Similarly, the agency had

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"only one Māui dolphin could be removed from the population roughly every 20 years to allow Māui dolphins to reach or maintain their optimum sustainable population." *Id.* at 1299.

163 *Id.* at 1294 (quoting 16 U.S.C. § 1371(a)(2)).

164 *Sea Shepherd*, 606 F. Supp. 3d at 1299–1300.

165 *Id.* at 1300.

166 *Id.* at 1302.

167 *See id.* at 1303.

168 *Id.* at 1307. The court dismissed Plaintiff's first claim that the agency unlawfully withheld an action, stating that "NOAA has not 'unlawfully withheld or unreasonably delayed' agency actions" because its rejection of Plaintiff's request amount to agency action. *Id.* at 1308–09 (quoting 5 U.S.C. § 706(1)).

169 *Sea Shepherd*, 606 F. Supp. 3d at 1307–08.

170 *Id.* at 1310.

171 The defendants initially argued that NOAA's silence in its response should be taken "as an assessment by the agency that any undisclosed [regulatory] factors are irrelevant." *Id.* at 1314. However, the court drew a comparison to a previous interpretation of the factors based on a declaration submitted by the lead analyst for NOAA's Hawaiian Monk Seal Recovery Program. *Id.* The defendants argued that monk seals could not be compared to dolphins, but the court rejected this argument. *Id.* at 1315. The court had earlier noted the requirement that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Id.* at 1314 (quoting Motor Vehicles Mfrs.

erroneously determined that New Zealand had 100% electronic monitoring coverage despite the fact that not all boats were required to have cameras and that no data was given on the number of nets viewed by the cameras.[172] Because the other factors in the preliminary injunction analysis were also in the plaintiffs' favor, the court granted the injunction.[173]

The court was able to reach this determination because the government did not contest that the parties had standing.[174] Standing could have been more challenging in this case than a typical one since redressability depended (in the court's analysis) not only on the actions of the government but how the New Zealand government would react to the requested action: "New Zealand is likely to respond to a United States import ban in a way that reduces danger to the Māui dolphin . . . ."[175] While the plaintiffs were successful in this case, it is generally not how such cases turn out, as Section IV.D.3 discusses.

3. Not Every Challenge Is Successful

Plaintiffs seeking to challenge the denial of a petition for rulemaking generally fail.[176] That is, the court does not find the denial to be arbitrary and capricious. However, there are two methods the court can use to get there. Ideally, if the plaintiff loses, it is because the court reached the merits, and the plaintiff simply failed to demonstrate that the denial was an abuse of discretion. This is the type of case described in Section IV.D.3.b, *infra*. However, too commonly the case does not formally reach the merits, as the plaintiff is determined not to have standing to bring the case. The discussion begins with these cases in the following section before concluding in Section IV.D.3.c with an explanation of why it is so problematic to decide the case at this stage.

Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983)). Finally, the court found that NOAA failed to consider all mandatory factors. *Id.* at 1315 ("In short, an agency acts 'arbitrarily and capriciously' where it 'entirely fail[s] to consider an important aspect of the problem,' and . . . NOAA did not consider all mandatory regulatory factors when issuing comparability findings to New Zealand." (alteration in original) (quoting *Motor Vehicles*, 463 U.S. at 43)).

172 *See id.* at 1320.

173 *Id.* at 1330 ("Having determined that the weight of the balancing test favors Plaintiffs, the court deems preliminary injunctive relief appropriate . . . .").

174 *Id.* at 1307 n.38 ("The court briefly notes that parties agree Plaintiffs have standing to pursue their claims.").

175 *See Sea Shepherd*, 606 F. Supp. 3d at 1307 n.38 (citing an "internal New Zealand Government memo discussing Plaintiffs' February 6, 2019 petition and proposing . . . interim measures that 'would enable NOAA to reject [Plaintiffs'] petition.'" (alteration in original) (quoting Second Decl. of Brett Sommermeyer at Ex. 4 ¶ 6)).

176 *See* Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. 1805, 1816 (2019).

a. *Plaintiffs Can Lose for Lack of Standing*

In many cases, plaintiffs are unable to challenge the denial of a petition for rulemaking because of a lack of standing, as demonstrated by two recent cases. In the first one, *Farm Sanctuary v. United States Department of Agriculture*,[177] the plaintiffs—a number of different animal-welfare organizations, including some focused on the treatment of farm animals—had petitioned the Department of Agriculture ("USDA") for a rule that addressed how to handle downed pigs in 2014.[178] Specifically, the plaintiffs wanted the USDA to prevent the slaughter of downed pigs, as it already prevented the slaughter of downed cattle.[179] This petition was denied in 2019 because the USDA's Food Safety and Inspection Service ("FSIS") determined that "its existing regulations and inspection procedures are sufficient and effective in ensuring that [non-ambulatory] pigs are handled humanely at slaughter and in preventing diseased animals from entering the human food supply."[180]

The plaintiffs then sought judicial review of this denial.[181] To obtain organizational standing, the court required the plaintiffs to demonstrate "an involuntary, material burden on their core activities."[182] The plaintiffs argued that they needed to "divert organizational resources away from their core mission activities, such as public advocacy, education, and farmed animal care, to combat the effects of [the USDA's] failure to prohibit the slaughter of nonambulatory pigs."[183] The court held the plaintiffs' claims to be insufficient, explaining that the claims did not include "any evidence that [the USDA's] denial of the Petition caused pigs to become downed and in need of rescue, versus merely maintaining the status quo."[184] Standing was also denied despite claims that members of the organizations feared they were more likely to eat contaminated pork.[185]

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177 664 F. Supp. 3d 334 (W.D.N.Y. 2023).

178 *See id.* at 343 & n.1 (introducing the claims and defining the category of non-ambulatory livestock qualifying as "downed").

179 *Id.* at 349. Downed cattle were prohibited from slaughter due to concerns about bovine spongiform encephalopathy (mad cow disease). *Id.* at 348–49.

180 *Id.* at 349.

181 *Id.* at 359 (summarizing Plaintiffs' three causes of action, including an "arbitrary and capricious denial of Plaintiffs' Petition for Rulemaking").

182 *Id.* at 355.

183 *Farm Sanctuary*, 664 F. Supp. 3d at 355 (citation omitted).

184 *Id.* (emphasis omitted). One letter submitted in support of standing for this claim described Farm Sanctuary's efforts and expenses to care for injured downed pigs, but the court reiterated that there was no injury without evidence that the denial of the petition caused any pigs to be downed. *See id.* at 355–56.

185 *See id.* at 358.

In *Farm Sanctuary*, multiple animal welfare organizations identified what they perceived to be a current problem, believing the rule did not adequately address animal welfare, so they filed a rulemaking petition to address that deficiency.[186] Subsequently, the court prevented them from challenging the denial of that petition because the defendant had voluntarily sought to correct the situation.[187]

Something similar occurred in *Animal Welfare Institute v. Vilsack*.[188] As in *Farm Sanctuary*, animal welfare organizations petitioned the government for new regulations regarding animal welfare, except that here the petition-denying agency was the FSIS, and the petitioned regulations addressed the humane handling of poultry rather than pigs.[189] An initial petition was submitted in 2013, and an additional one was submitted in 2016.[190] The FSIS denied these petitions in 2019 in a single letter, stating in part:

> We have decided to deny your petitions because the [controlling statute] does not give FSIS the specific authority to prescribe requirements for the humane handling of live birds at slaughter. . . . FSIS regulations require poultry to be slaughtered in accordance with good commercial practices (GCP), which means that poultry should be treated humanely. FSIS inspection activities verify and enforce adherence to GCP at official poultry establishments. Through this existing framework, FSIS addresses the poultry handling concerns that you raise in the petitions.[191]

Similar to *Farm Sanctuary*, the court denied standing at the summary judgment phase.[192] Analyzing both organizational and associational standing, the court first determined that the plaintiffs lacked both.[193] Despite lengthy recitations from the directors of the organizations

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186 *See id.* at 343–44.

187 *See id.* at 368–69. Denial of standing hardly prevented judicial work in this case because the court found that even if the plaintiffs had established standing, they would have lost on the merits—an unsurprising result given the strong deference due to the agency when reviewing denials of a petition for rulemaking. *Id.* at 358, 369 ("[T]he Court concludes that Defendants' denial of the Petition was not arbitrary and capricious. Particularly given the high level of deference . . . ."). The court likely judged the case on the merits regardless of standing because this decision was made at the summary judgment phase. *See id.* at 349.

188 No. 20-CV-6595, 2022 WL 16553395 (W.D.N.Y. Oct. 31, 2022).

189 *Id.* at *1 & n.1.

190 *See id.* at *2. Each petition included discussion of both traditional concerns about adulteration as well as humane treatment of the animals. *See id.* The first petition "identified multiple points in the poultry preparation process that they believed to be both inhumane and to contribute to poultry adulteration." *Id.* However, the petition was formally intended only to prevent poultry adulteration, or "practices and actions that result in adulterated poultry products." *Id.* The second petition focused on inhumane treatment of birds during severe weather events and the correlation of that treatment with adulteration. *See id.*

191 *Id.*

192 *Id.* at *10.

193 *Id.* at *4.

regarding the effect the current regulations had on their activities,[194] the court found that they did not constitute the mandatory "'perceptible impairment' by showing 'an involuntary material burden on its established core activities.'"[195] Nor did any plaintiff qualify for organizational standing: affidavits from selected members that each had routinely traveled over an hour to obtain humanely slaughtered poultry—but were not *always* able to—demonstrated only that any injury was "contingent and far-off rather than imminent."[196]

The analysis in these cases demonstrates the fundamental problem with the typical standing analysis when the plaintiff is challenging the denial of a petition for rulemaking. During the analysis, the court looks at the challenge as a general challenge to the rule rather than a challenge to the denial of the petition for the rulemaking.[197] But these cases do not show the only way a plaintiff can lose such a lawsuit; they can also lose on the merits, as shown in Section IV.D.3.b.

b. *Plaintiffs Can Lose on the Merits*

Just as plaintiffs have not won if they merely survive a motion to dismiss for failure to state a claim, plaintiffs have not won if they have merely survived a standing challenge. They can still lose on the merits, as demonstrated in *Public Employees for Environmental Responsibility v. EPA*.[198] Public Employees for Environmental Responsibility ("PEER"), an environmental group, submitted a petition for rulemaking to the Environmental Protection Agency ("EPA") in 2011, asking the agency to reduce the pH limit for corrosive waste and expand the definition of corrosive waste to include nonaqueous waste.[199] The petition argued that the EPA relied on erroneous information when creating the challenged regulation in 1980 and that the definition was not in line with current world standards.[200]

The relevant statute granted "'[a]ny person' the right to 'petition the [EPA] for the promulgation, amendment, or repeal of any regulation

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194 *See Animal Welfare*, 2022 WL 16553395, at *5 (noting that Animal Welfare Institute "has suffered a litany of harms as a result of Defendants' denial of Plaintiffs' rulemaking petitions, including the diversion of resources to" a multitude of tasks required to ensure humane animal treatment).

195 *Id.* (quoting Conn. Parents Union v. Russell-Tucker, 8 F.4th 167, 173 (2d Cir. 2021)).

196 *Id.* at *8. As in the *Farm Sanctuary* case, the court went on to address the merits of the case, ruling that the plaintiffs' claims would fail. *Id.* This was also likely because the court did not rule against standing for the plaintiffs until the summary judgment stage. *See id.* at *6.

197 *See* Lunenburg, *supra* note 115, at 44–46.

198 77 F.4th 899 (D.C. Cir. 2023).

199 *Id.* at 907.

200 *Id.*

under' the statute."[201] The agency's regulations state that it will publish the tentative determination of such a petition in the Federal Register for public comment,[202] and use the comments when making a final determination.[203] The agency followed this procedure, ultimately denying the petition.[204] As part of the denial, the agency reiterated that it believed 12.5 was an appropriate upper limit for pH, because that was the level needed to allow the use of treated sewage sludge.[205] One argument in the petition was that any material with a pH *that* high would inherently be corrosive and that the agency had erred initially by misinterpreting an entry in the International Labour Office's 1972 Encyclopedia of Occupational Health and Safety that the agency believed involved corneal tissue but had not stated as such,[206] thereby allowing the agency to believe a higher overall pH would not pose a problem.[207]

PEER sought judicial review of the denial, attempting to challenge both the denial itself and the agency's original regulation involving what it claimed was the erroneous encyclopedia entry reading.[208] The statute contained an explicit ninety-day limit to challenge any agency action, unless it involved changes occurring after the action itself. This meant that PEER could not challenge the agency's reading of the encyclopedia since that was part of the original agency determination. PEER was instead limited to challenging only the agency's denial of the petition for rulemaking.[209]

PEER attempted to get around this by claiming that the agency had reopened the issue when it published the tentative denial of the

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201 *Id.* at 908 (alterations in original) (quoting 42 U.S.C. § 6974(a)).

202 40 C.F.R. § 260.20(c) (2024).

203 *Id.* § 260.20(e).

204 *Public Emps.*, 77 F.4th at 908–09.

205 *Id.* at 909 ("Because this process requires raising 'the pH of the sludge . . . to pH 12 or higher . . . the proposal to revise the corrosivity regulatory value to 11.5 could have a significant impact on the implementation of available treatments and management options for municipal wastewater treatment sludges.'" (quoting Corrosive Waste Rulemaking Petition; Denial, 86 Fed. Reg. 31622, 31625 (June 15, 2021))).

206 *Id.* at 906.

207 *Id.*

208 *Id.* at 910. Review was sought under the judicial review provision of the controlling environmental statute, which states:

> [A] petition for review of action of the [EPA] Administrator in promulgating any regulation, or requirement under this chapter or denying any petition for the promulgation, amendment or repeal of any regulation under this chapter may be filed only . . . within ninety days from the date of such promulgation or denial, or after such date if such petition for review is based solely on grounds arising after such ninetieth day . . . .

Id. n.6 (alterations in original) (emphasis omitted) (quoting 42 U.S.C. § 6976(a)(1)).

209 *Id.* at 910.

rulemaking petition for comment.[210] But the court correctly noted that a reopening must be a voluntary action rather than merely being reactive to a petition; otherwise, a petitioner could force full reconsideration of the rule at any time, negating administrative finality.[211]

That left only the review of the denial of the rulemaking petition itself, which the court had previously described as using a "deference so broad as to make the process akin to nonreviewability."[212] In this case, the changes were not significant enough to overcome the strong presumption in favor of the agency's actions, and the court upheld the denial of the rulemaking petition.[213]

Public Employees is not atypical of the cases where a plaintiff is able to demonstrate standing.[214] The court slightly overstated the degree of deference, as it is not, in fact, functionally akin to nonreviewability, but is undoubtedly difficult.[215] This is because it is only the denial which initiates the rulemaking that is being reviewed, and it is being reviewed under the extremely deferential abuse of discretion standard.[216]

The deferential standard means that the court is looking only at the information presented to the agency and whether, given that information, the agency abused its discretion in failing to undertake the rulemaking. When could such discretion be abused? This high barrier was overcome in *Sea Shepherd*, when the plaintiff presented overwhelming compelling evidence to show that the rationale given by the agency was, in fact, in direct contradiction with the current facts.[217] It also helped that the statute in *Sea Shepherd* provided very clear guidelines on exactly how the agency

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210 *Public Emps.*, 77 F.4th at 911.

211 *Id.* at 913–14 ("PEER cites no cases, and we are aware of none, in which an agency reopened an issue by merely responding to a petition for rulemaking submitted by a third party.").

212 *Id.* at 912 (quoting Verizon v. FCC, 770 F.3d 961, 966 (D.C. Cir. 2014)).

213 *Id.* at 918.

214 *See, e.g.*, Flyers Rts. Educ. Fund, Inc. v. U.S. Dep't of Transp., 957 F.3d 1359, 1363 (D.C. Cir. 2020) (granting petitioners standing but deferring to the agency's explanation of petition denial).

215 *See* WWHT, Inc. v. FCC, 656 F.2d 807, 818 (D.C. Cir. 1981) ("It is only in the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment not to institute rulemaking.").

216 *See id.* at 817–18 ("[W]here the proposed rule pertains to a matter of policy within the agency's expertise and discretion, the scope of review should 'perforce be a narrow one, limited to ensuring that the Commission has adequately explained the facts and policy concerns it relied on and to satisfy ourselves that those facts have some basis in the record.'" (quoting Nat. Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1053 (D.C. Cir. 1979))); *see also* Military-Veterans Advoc. Inc. v. Sec'y of Veterans Affs., 38 F.4th 154, 160 (Fed. Cir. 2022) (reviewing a VA denial of rulemaking petition under the abuse of discretion standard).

217 *See* Sea Shepherd N.Z. v. United States, 606 F. Supp. 3d 1286, 1319–23 (Ct. Int'l Trade 2022) (concluding that the National Oceanic and Atmospheric Administration—in finding that New Zealand fisheries met wildlife monitoring regulations promulgated under the Marine Mammal Protection Act effectively enough to refuse an emergency import ban—used misguided or insufficient metrics).

was supposed to make its determination, so there was little potential wiggle room for the agency.[218] But most determinations are not as tightly constrained, further increasing the difficulty of someone trying to challenge the action.[219] This was the case in *Public Employees* , where it appears the agency did not understand the relevant facts.[220] However, since the agency was still balancing competing priorities and had made a decision favoring other priorities, there was sufficient discretion to allow that decision to stand.[221]

What possible benefit is there to enabling plaintiffs to bring cases where they have very little likelihood of winning? Because the alternative is worse: plaintiffs having no opportunity to make their case to anyone with no oversight over the agency's actions. This is true for cases like *Public Employees* where the primary concern is a misunderstanding that predates the initial regulation, but it is even more of a concern in cases involving changed facts.[222] The question can arise, however, if a plaintiff loses: Why did the plaintiff lose? That question is answered below in Section IV.D.3.c.

c. *Why It Matters if the Plaintiff Loses on Standing Versus on the Merits*

What is the harm if the plaintiff loses on standing grounds? Traditionally, in procedural cases, the harm is the agency's failed procedure, so that is the focus of the analysis.[223] Looking at these cases as traditional challenges to the rules themselves fundamentally misunderstands the type of challenge being brought and the likelihood of success.

In a typical challenge to a rule, the plaintiff challenges the agency's legal interpretation of a requirement. When *Chevron* deference existed, it was still far less deference than an agency would receive under the abuse of discretion standard that will be applied when challenging the denial of a rulemaking petition. Now, without *Chevron*, the difference is between a standard with virtually no deference in a typical review[224] and the very

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218 *See id.* at 1293–95, 1318–19.

219 *Cf.* Dena Adler & Max Sarinsky, *With or Without Chevron Deference, Agencies Have Extensive Rulemaking Authority*, YALE J. ON REGUL.: NOTICE & COMMENT (May 13, 2024), https://perma.cc/H46W-C2LN (noting that "[m]any statutes . . . instruct agencies to regulate in the 'public interest' or . . . 'public convenience and necessity[,]'" only requiring that rules "are 'feasible,' 'practicable,' or 'appropriate[,]'" or that the agencies "use their discretion to balance various factors").

220 Pub. Emps. for Env't Resp. v. EPA, 77 F.4th 899, 906–07 (D.C. Cir. 2023).

221 *Id.* at 917.

222 *See* discussion *supra* Section IV.B.

223 GARVEY, *supra* note 47, at 15–16.

224 *See* Transcript of Oral Argument at 32, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451), https://perma.cc/K9W6-Z9X5 (quoting Justice Kagan saying "*Skidmore*, I mean, what does *Skidmore* mean? *Skidmore* means, if we think you're right, we'll tell you you're right. So the

deferential abuse of discretion standard for the denial of a petition for rulemaking.

What specifically is being challenged is also far different. When looking at the denial of a rulemaking petition, the court looks only at the evidence put forth in the petition (and any additional comments submitted, if public comment was available).[225] The court also checks whether the agency abused its very broad discretion in not taking note of the issues brought to it in the petition and acting on them in some form.[226] It is not a legal interpretation question, and it is not challenging everything that could have potentially been raised had the initial regulation itself been challenged shortly after finalization.

The area examined is far more constrained: merely what the petitioners presented to the agency in an action taken under a statute that granted them the explicit right to do so.[227] The petitioners were interested persons—the general standard in the APA[228]—because they took the time and energy to not only submit the petition but to then challenge it in court after it was denied. This puts them in a fundamentally different position than everyone else who was displeased with a rule but did not take any steps to bring potential issues to the agency's attention.

Can this be an end run around traditional standing? No—a plaintiff who can make a traditional challenge to the regulation (as opposed to challenging the denial of a petition for rulemaking) will have a higher chance of success, but as only one of many potentially interested individuals, may not be in the best position to make that challenge. In contrast, here, the claim is far harder since the plaintiffs must contend with such a strong deferential preference in favor of the agency,[229] but they are also the only ones to have suffered this harm: It was *their* petition that was denied.

They are thus injured in a different way than someone simply unhappy with how a regulation turned out. They sought a benefit from the agency that they were legally entitled to and were denied that benefit. The benefit may have been discretionary, but the benefit is not committed exclusively to agency discretion.

Not only is the likelihood of success lower, the focus of the inquiry and result are different. Winning a challenge to a rule can invalidate the rule. Winning a challenge to a denial of a petition for rulemaking will

idea that *Skidmore* is going to be a backup once you get rid of *Chevron*, that *Skidmore* means anything other than nothing, *Skidmore* has always meant nothing.").

225 *See* Luneburg, *supra* note 115, at 46–47.

226 JASON A. SCHWARTZ & RICHARD L. REVESZ, PETITIONS FOR RULEMAKING: FINAL REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 18–19 (2014), https://perma.cc/9YAF-MG3H.

227 *See* Massachusetts v. EPA, 549 U.S. 497, 527–28 (2007).

228 SCHWARTZ & REVESZ, *supra* note 226, at 10–11.

229 Massachusetts v. EPA, 549 U.S. at 527–28.

generally only (1) remand the issue to the agency for reconsideration or (2) direct the agency to commence a new rulemaking (without necessarily invalidating the current rule in the meantime).

This type of challenge makes sense to bring only when it is, in fact, the true issue, such as if the plaintiff wanted to bring changed facts to the attention of the agency in hopes that the agency would take a new look at the issue. That is the principal purpose of such a petition, and one that cannot be realized if a denial cannot be challenged in court. Even if plaintiffs are automatically granted standing in these cases, as Part V argues they should be, this does not mean they will win the case. Rather, it merely allows the case to proceed to a discussion of the merits.

Plaintiffs who lose on the merits at least have the satisfaction of knowing that they have been heard, even if they end up losing. And, as *Sea Shepherd* shows, not every plaintiff will lose on the merits, although it is a high bar. Next, Part V discusses the fundamental distinction between rulemakings and petitions for rulemakings that should necessitate treating them differently.

V. A Challenge to a Petition for Rulemaking Should Be Treated Differently on Review than a Direct Challenge to Rulemaking

As previously discussed, these petitions for rulemaking are vital in order to address changed facts. This Part begins by showing that the petitioning process itself is actually an adjudication rather than rulemaking, as it has always traditionally been viewed. It then explains why this distinction has gone unnoticed for decades and highlights the harm this oversight has caused. Finally, this Part argues that even if these petitions continue to be viewed as rulemakings, they should at the least be viewed differently than traditional challenges to a rule.

A. *A Petition for Rulemaking Is Functionally an Adjudication and Should Be Treated as Such*

In administrative law, the consideration of a petition for rulemaking has historically been considered a type of rulemaking, likely because of the name and because it is found in the section of the APA that governs rulemaking in general.[230]

This statutory placement alone, however, should not be sufficient to definitively conclude that an agency's determination about the petition itself is a type of rulemaking rather than a type of adjudication. This discussion addresses only the petition for the rulemaking and the agency's

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230 *See* discussion *supra* Section IV.D; 5 U.S.C. § 553(e).

determination on whether to grant the petition, not what comes after if the agency decides to do the rulemaking as requested.[231]

When examined more closely, it becomes clear that the characteristics of such a petition are, in fact, in alignment with adjudications rather than rulemakings. In a typical adjudication, such as a claim for benefits, the agency receives the application and supporting documentation from a member of the public requesting the benefit.[232] The agency then uses that documentation, potentially along with additional information obtained by the agency, to decide whether to grant the request.

In a petition for rulemaking, as described in Section IV.C, *supra*, an agency receives the petition from a member of the public (or a small defined group of individuals or organizations).[233] The petition includes supporting documentation, submitted by the petitioner, explaining why the agency should grant the petition.[234] The agency then evaluates the petition and supporting documents,[235] and may obtain additional information on its own to assist the decision-making.[236] Applying the specific facts presented in the petitioner's supporting material and from the additional material obtained internally by the agency to the relevant law, the agency then makes a determination whether to deny or grant the petition, either in full or modified form.[237] Once that process is complete and the results are delivered to the petitioner, as required under the APA, the petition process is complete.[238] If the result is a denial, no further action is expected from the agency.[239] However, even if the result of the

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231 Note that an agency action commenced after an agency accepts a petition unquestionably constitutes rulemaking.

232 *See, e.g.*, 20 C.F.R. § 422.130 (2024) (explaining the Social Security Administration's claims procedures).

233 Luneburg, *supra* note 115, at 9–12; *see* 5 U.S.C. § 553(e).

234 *See, e.g.*, U.S. FOOD & DRUG ADMIN., *supra* note 136.

235 *See, e.g.*, *id.* ("Ultimately, FDA management decides whether to grant a petition. But first, agency staffers evaluate it, a process that may take several weeks to more than a year, depending on the issue's complexity.").

236 *Cf.* CAREY, *supra* note 117, at 5–6 (noting that "[t]he text of the APA itself provides little information, however, on how agencies are to consider petitions, thus leaving quite a bit of discretion regarding the process," allowing for agencies to supplement the factual record supporting their decision).

237 *See, e.g.*, U.S. FOOD & DRUG ADMIN., *supra* note 136.

238 *See* CAREY, *supra* note 117, at 7–8 (noting that a combination of APA Sections 555(e), 555(b), and 555(e) require an agency to "at least" respond to petitioners, regardless of whether the agency accepts or rejects the petition).

239 *See id.* at 8 (explaining that an agency denying a petition completes its obligation by meeting the "minimum requirements of receiving the petition and responding to it in a timely manner").

petition is a full or partial grant of the petition for the rulemaking, the petitioning process itself is still complete.[240]

And even if the petition is granted, the process is complete because the party initially requesting the agency to undertake the rulemaking has no further say on the final rule ultimately adopted by the agency.[241] Instead, the agency simply proceeds through the regular process, most likely publishing a proposed rule.[242] If the petitioner wanted to challenge the final rule, they would challenge it the same way as any other member of the public.

A petitioner is considered not the same as any other member of the public, however, if the petitioner wishes to challenge a denial of the petition for the rulemaking.[243] In that case, the petitioner alone requested a specific agency action, which the petitioner was explicitly able to do under the relevant statute but one that the agency refused to comply with. This should be functionally the same analysis as an individual seeking other government benefits such as social security disability benefits. The individual applicant, and only that individual, is able to challenge the denial and would be automatically found to have standing to do so. In that case, the disability benefits are something the individual claims a statutory entitlement to, just as with the petition for rulemaking.

Rulemaking, as described in Section II.A, is generally broadly applicable and always forward-looking. Once the rule is in place, it remains the rule that must be complied with—this is the entire reason these petitions are so critical. The petition that could initiate the rulemaking, in contrast, does not have the same forward-looking effect. The true rulemaking commences only if the petition is granted. There is no permanent forward-looking change from the petition itself. Like in a traditional adjudication, the determination process for the petition involves evaluating the supporting evidence submitted with the petition and deciding whether to grant the relief sought.

Treating these petitions as typical rulemakings is particularly problematic because the standing issues, as discussed in Part I, mean that reviewing these petitions as rulemakings rather than as adjudications

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240 *See id.* at 7–8.

241 The petitioner can, however, participate in the rulemaking process by, for instance, submitting a comment during a proposed rule's notice-and-comment period. *See id.* at 5 ("If an agency grants a petition requesting that it issue, amend, or repeal a rule, any relevant procedural requirements for rulemaking or other type of action would still apply"); 5 U.S.C. § 553(c) (requiring an agency to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" regardless of how the rulemaking process initiates).

242 The agency may have already published the petition for the rulemaking and elicited comments under its authority to independently information-gather. *See supra* note 236. In this case, the agency can take those comments into consideration as well, potentially altering the proposed rule.

243 This analysis is identical if the agency chose to do something different than what the petitions initially requested. Since that is far less frequent, it will not be analyzed further.

forces courts to apply incorrect review standards to determine standing. Because a lack of standing means the case will not be heard, this cuts off access to the courts to review agency action that should rightfully be reviewable. The biggest question this analysis raises is simply why the issue is only being raised now.

B. *A Petition for Rulemaking Is a Unique Procedural Right Guaranteed by the APA*

It is not surprising that a petition for rulemaking has long been lumped in with a general rulemaking on review, given that it is in the section of the APA otherwise dealing entirely with rulemaking. But it is critically important to separate the petition itself from the actions that would come after the petition, were the rulemaking to be commenced, or other generally applicable agency procedures.

Equating a petition for rulemaking with other agency procedures fails to account for its unique place in the APA. There are very few "rights" explicitly granted by the APA. Instead, there are frequent prohibitions against infringing on other rights, such as disclosing information if it "would deprive a person of a right to a fair trial or an impartial adjudication"[244] or merely stating that a section has no impact on rights, like the right of "a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding."[245] The section regarding the petition for rulemaking is unique in granting such a broad procedural right to "an interested person."[246] Nor is there any other instance in the APA where individuals are explicitly allowed to petition the agency. This is a fundamentally different relationship than commenters on a rule, where the agency need not address comments at all if the comments do not present substantive issues. The APA demands that the agency respond in writing to each petition for rulemaking,[247] further demonstrating how petitions are, in fact, between the agency and the individual petitioner.

For decades, courts have erroneously treated review of these petitions as equivalent to other agency procedures. And so, the idea that an individual needed to show a distinct and personal harm to enforce a broad procedural right[248] was transformed into the idea that all procedural

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244 5 U.S.C. § 552(b)(7)(B).

245 *Id.* § 555(b).

246 *See id.* § 555. The closest similar example is specifically stating that "the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction" may bring suit to enforce liability for record violations. *Id.* § 552a(h).

247 *See id.* § 555(e).

248 Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 664 (D.C. Cir. 1996) ("[I]n order to show that the interest asserted is more than a mere 'general interest [in the alleged procedural violation] common

violations are imaginary. But a court must look past the procedural violation to examine it as a traditional rulemaking challenge.

At least part of this error can be traced back to *Lujan v. Defenders of Wildlife*, but it has been further compounded since then.[249] In *Lujan*, the relevant statute stated that each agency must

> insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, *after consultation as appropriate* with affected States, to be critical.[250]

In 1986, the Fish and Wildlife Service and the National Marine Fisheries Service changed their interpretation of this consultation mandate to no longer require consultations when the action would be taking place in a foreign country.[251] This changed interpretation is what the plaintiffs were challenging.[252] Their claim was that "the lack of consultation with respect to certain funded activities abroad 'increas[es] the rate of extinction of endangered and threatened species.'"[253]

The plaintiffs based their claim on the Endangered Species Act's citizen suit provision, which states that "any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter."[254]

In holding that provision insufficient to allow the plaintiffs to challenge the Secretary's failure to engage in the proper consultation procedures, the Court stated,

> We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.[255]

While these were the plaintiffs who chose to bring suit under the citizen suit provision, there was no previous specific interaction with the agency that they were challenging. They were, indeed, effectively claiming

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to all members of the public,' the plaintiff must show that the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff. The mere violation of a procedural requirement thus does not permit any and all persons to sue to enforce the requirement." (second alteration in original) (citation omitted)).

249 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992), discussed *supra* Section III.B.

250 *Lujan*, 504 U.S. at 558 (emphasis added) (quoting 16 U.S.C. § 1536(a)(2)).

251 *Id.* at 558–59.

252 *Id.* at 559.

253 *Id.* at 562 (alteration in original) (citation omitted).

254 *Id.* at 571–72 (quoting 16 U.S.C. § 1540(g)).

255 *Id.* at 573–74.

an interest in having the government follow the law,[256] albeit a law they cared deeply about.[257]

This was extended by the Court of Appeals for the D.C. Circuit in *Fund Democracy, LLC v. SEC*,[258] which denied standing in a case where Fund Democracy, an organization with no actual members, was unable to petition to force a hearing in an investment advisor exemption case.[259] While the rule in this case required the SEC to grant a hearing upon the application of any interested person, the specifications for an interested person was circumscribed by statute to those with connected financial interests.[260] But rather than simply say the organization did not qualify under the statute, the court reached back to the procedural language in *Lujan* and said that this lack of connection meant that Fund Democracy had "not shown a distinct risk to its particularized interest" as would be required for standing to challenge the agency action.[261]

Fund Democracy was then cited by the Court of Appeals for the D.C. Circuit the same year in *Gettman v. DEA*,[262] a case challenging the denial of a petition for rulemaking.[263] The court in *Gettman* relied on language from *Fund Democracy*—that "[b]ecause agencies are not constrained by Article III, they may permit persons to intervene in the agency proceedings who would not have standing to seek judicial review of the agency action."[264] The court then quoted another case for the proposition that the "criteria for establishing 'administrative standing' therefore may permissibly be less

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256 *Lujan*, 504 U.S. at 573 n.8 ("We do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing. The dissent, however, asserts that there exist 'classes of procedural duties . . . so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty.' If we understand this correctly, it means that the Government's violation of a certain (undescribed) class of procedural duty satisfies the concrete-injury requirement by itself, *without any showing that the procedural violation endangers a concrete interest of the plaintiff* (apart from his interest in having the procedure observed). We cannot agree." (second emphasis added) (citation omitted)).

257 Nor was the analysis helped by the Court's footnote, quoted *supra* note 256, likely considering only these broad procedural challenges and essentially equating an expectation for a procedure to be observed in the abstract with an expectation for a procedure to be observed in one's individual interaction with the agency.

258 278 F.3d 21 (D.C. Cir. 2002).

259 *Id.* at 25.

260 *Id.* at 23 & n.1.

261 *See id.* at 27.

262 290 F.3d 430 (D.C. Cir. 2002).

263 *Id.* at 432.

264 *Id.* at 434 (quoting *Fund Democracy*, 278 F.3d at 27).

demanding than the criteria for 'judicial standing.'"[265] This rule continues to be applied in such cases.[266]

The initial view in *Lujan*—that it would be inappropriate for all people to claim a violation of a broadly applicable procedural protection[267]—is in many ways analogous to challenging a rulemaking itself, morphed into the idea that all procedural challenges should be viewed equally. There is a fundamental difference between (1) prohibiting someone from challenging a broadly applicable rule based on a broadly applicable procedural protection (of which the person is a concerned observer, but no more directly connected to the action), and (2) prohibiting someone from challenging the results of an individual determination of which the person is personally involved (like a petition for rulemaking). The first one grants broad power to any interested member of the public to challenge the entire rule itself. The second—the one at issue in this Article—grants only the individual petitioner the power to ensure that the agency did not abuse its discretion in denying the petition. Also in the first one, the court could arguably be seen as stepping beyond its rightful place. At the very least, such a case gives the court broader authority to state whether or not the final result of the agency action (the rule) was proper. And in the second, in failing to oversee the agency's actions, the court is failing to fulfill its duty to ensure that the executive is following the law. Agencies are afforded significant discretion when reviewing these petitions, but the court cannot evaluate whether that discretion is being abused if it cannot examine the action at issue.

C. *Preventing the Petitioner from Challenging the Denial of a Petition for Rulemaking Cuts Off All Access for Changing Facts and Makes Critical Agency Action Unreviewable*

It is critical that individuals be allowed to challenge the denials of these petitions because there is no other way to challenge this type of agency action. The only thing a member of the public can do if facts have changed since a previous rulemaking (or changed to suddenly require rulemaking) is to file a petition requesting the agency to undertake rulemaking.[268]

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265 *Id.* (quoting Envirocare of Utah, Inc. v. NRC, 194 F.3d 72, 74 (D.C. Cir. 1999)). *Envirocare* discussed the differences for someone to intervene at the agency level versus to bring an action in federal court, which has no relevance to a petition for rulemaking if the petitioner is not attempting to intervene in an already-existing adjudication. 194 F.3d at 74–75.

266 *See* US Inventor, Inc. v. U.S. Pat. & Trademark Off., No. 22-2218, 2023 WL 4488913, at *4, *10 (D.D.C. July 12, 2023) ("Not every denial of a petition for rulemaking confers Article III standing on the petitioner." (citing *Gettman*, 290 F.3d at 433)).

267 Lujan v. Defs. of Wildlife, 504 U.S. 555, 573–74 (1992).

268 This analysis does not change after *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* eliminated nearly all agency statutes of limitations, making it possible to challenge agency

In a best-case scenario, the agency receives the petition, realizes it has overlooked an important change of relevant facts, and promulgates a new, updated regulation to better reflect the current facts. But that is not always what happens. If the plaintiff is unable to obtain judicial review of such a petition, there is neither a way to ensure that the agency is addressing the new situation nor judicial oversight over agency rules once they have been properly enacted, regardless of any changes in the situation the petition was intended to address.

Given the adjudicatory nature of the determination, there are no other individuals who would be better positioned to challenge the denial, and no opportunity for a better or more interested litigant to come along, as no one else has been injured by the agency's actions. The bystanders' option, if they disagreed with the denial, would be to file their own petition for rulemaking with the agency, and then attempt to challenge the denial of their petition in court.

The critical role judicial review of agency action plays in the balance of power between branches has been repeated for decades by courts[269] and

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regulations long after they were promulgated. *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2447, 2460 (2024). A challenge to a regulation in this way can at most result in the invalidation of the regulation. The focus of this Article, in contrast, is on situations where the plaintiff is actively seeking for the agency to create new regulations or to alter existing regulations, a result that still cannot be achieved in court.

269 *See* Judulang v. Holder, 565 U.S. 42, 53 (2011) ("Agencies . . . have expertise and experience in administering their statutes that no court can properly ignore. But courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking. When reviewing an agency action, we must assess, among other matters, 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' That task involves examining the reasons for agency decisions—or, as the case may be, the absence of such reasons." (citations omitted)). The Supreme Court has stated, "From the beginning 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 670 (1986) (alteration in original) (quoting Abbott Lab'ys v. Gardner, 387 U.S. 136, 140 (1967)). In *Bowen*, the Court also found support for the presumption of judicial review in the APA's congressional record. *Bowen*, 476 U.S. at 671. The Senate Committee on the Judiciary remarked on Congress's intent that there be judicial review:

> Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

Id. at 671 (quoting S. REP. NO. 79-752, at 26 (1945)). The House Judiciary Committee agreed:

> The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.

by commenters.[270] Even in situations where the plaintiff is granted standing but loses on the merits, the plaintiff at least had her day in court—and an opportunity to be heard—one of the most foundational features of our legal system.[271]

Id. (quoting H.R. REP. NO. 79-1980, at 41 (1946)). *See also* Bowen v. Massachusetts, 487 U.S. 879, 903 (1988) (stating that the "central purpose" of the APA's authorization for review of agency action is to "provid[e] a *broad spectrum* of judicial review of agency action" (emphasis added)). This sentiment has been echoed by lower courts as well. *E.g.*, Calma v. Holder, 663 F.3d 868, 877 (7th Cir. 2011) (highlighting "the importance of judicial review to protect the procedural fairness of the agency process"); Saylor v. U.S. Dep't of Agric., 723 F.2d 581, 582 (7th Cir. 1983) ("The legitimacy of an adjudication by an administrative agency depends to a great extent on the availability of effective judicial review. The [APA] recognizes the importance of judicial review when it provides that agencies must explain the basis for their decisions . . . .) (citation omitted). Courts have also drawn inspiration from the Founding Era on the importance of judicial review. *Cf.* In re U.S. Dep't of Educ., 25 F.4th 692, 699 (9th Cir. 2022) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." (alteration in original) (quoting THE FEDERALIST NO. 51, at 286 (Alexander Hamilton) (E.H. Scott ed., 1898)).

270 *E.g.*, William D. Araiza & Robert G. Dreher, *Judicial Review Under the APA of Agency Inaction in Contravention of a Statutory Mandate:* Norton v. Southern Utah Wilderness Alliance, 34 ENV'T L. REP. NEWS & ANALYSIS 10443, 10444 (2004) ("Judicial review promotes fidelity by agencies to statutory directives and guards against undue influence by private interests in the regulatory process. The lack of normal safeguards of electoral accountability and separation of powers for administrative agencies makes concerns regarding factional influence over governmental processes and disregard of democratically reached public policies especially intense in the administrative context. The availability of judicial review for persons injured by agency action moderates these concerns, serving as an essential constraint upon the exercise of arbitrary or venal power by administrative agencies. . . . In the largest sense, judicial review 'provides, and has always provided, vital legitimacy to actions of administrative agencies in the American system of government.'" (footnotes omitted) (quoting Peter H.A. Lehner, Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 627 (1983)).

271 The importance of this right is expressed in many different types of cases. *E.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) (addressing class action damages and proclaiming the "deep-rooted historic tradition that everyone should have his own day in court" (quoting Martin v. Wilks, 490 U.S. 755, 762 (1989)) (internal citation omitted)); Beck v. Jarrett, 363 P.2d 215, 218 (Okla. 1961) (addressing default judgment and stating that "it is also important that all litigants be given a reasonable opportunity to have their day in court, and to have their rights and liberties tried upon the merits. The latter is and should be the primary right of the parties and duty of the courts"); Mihans v. Mun. Ct. for Berkeley-Albany Jud. Dist., Cnty. of Alameda, 87 Cal. Rptr. 17, 21 (Ct. App. 1970) (dealing with eviction and declaring that "[i]mplicit in the motion of fairness and central to our legal and social system is the idea that if the interest being defended is of value, the defendant ought to have his 'day in court' and the opportunity to be heard"). "That 'day in court'—i.e., a person's 'opportunity to be heard'—is a 'fundamental requisite of due process of law.'" Balt. City Police Dep't v. Esteppe, 236 A.3d 808, 825 n.13 (Md. Ct. Spec. App. 2020) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)) (regarding joinder necessary to hold a governmental entity responsible for the actions of an employee).

D. *Even if a Petition for Rulemaking Is Not Considered an Adjudication, the Standing Analysis Should Still Be Different than that of a Traditional Challenge to the Rule Itself Because It Is a Fundamentally Different Inquiry*

The constitutionally required elements of standing are modified in procedural standing due to a recognized need to adapt the typical requirements for standing. This adaptation is needed because strictly applying the conventional constitutional criteria could unjustly bar many legitimate claims. This flexibility when interrupting the conditional standards illustrates an understanding of the practical realities faced in legal proceedings and that concessions can be made to reflect the actual situation faced by the court.

The constitutional standing requirements are also intended to ensure that the plaintiff bringing the suit is the appropriate one to assert the rights in question. Otherwise, the plaintiff could inadvertently injure other parties who have a true interest in the dispute. This concern does not apply when addressing the challenge to the denial of a petition for rulemaking, as it is an issue strictly between the agency and the initial petitioner. Only the petitioning party would be expected to have the capacity to challenge the denial. And because only *that* petition is being reviewed, there is no danger of deciding someone else's rights. If a third party disagreed with the arguments made by the petitioner or felt the arguments made had not been as strong as they could have been—and, therefore, led to the denial of the petition—that third party could simply submit its own petition directly to the agency, thereby correcting the error.

The constitutional requirements should, therefore, be relaxed in these cases to ensure that all these challenges can be brought in court to acknowledge the unique nature of these disputes, which are between only the petitioner and the agency. Failing to do so ensures that effective agency oversight will be significantly hindered.

VI. The Limited but Critical Impact of this Change

While this change—ensuring all petitions for rulemaking would have standing to challenge a denial—would make a critical difference to the ability of some plaintiffs to challenge the denial of their rulemaking petition, it would not fundamentally upset the current balance of power. Given the strong deference to the agency when the review reaches the merits, most (although critically not all) denials would be upheld when reviewed in court.

But, what it would do is ensure that agencies are required to fully consider all the petitions received and provide appropriate reasons for failing to act if that is the agency's decision after review. It would not provide an incentive for floods of people to start petitioning for

rulemakings because what is being reviewed in these determinations is the agency denial, not the underlying rule (although it will obviously be examined in comparison with the denial). In most cases, if the denial were overturned it would only be going back to the agency, where the agency would be required to consider the petition again, and then either deny it with better reasons or choose to initiate the rulemaking.

Once the rulemaking begins, as described in Section II.A, the original petition is no longer a part of the process other than as a regular member of the public, which is all the petitioner asks for from the beginning.

Conclusion

A petition for rulemaking is not rulemaking itself—it is an adjudication. The nature of the determination mirrors that of an adjudication because the agency evaluates evidence, applies legal standards, and makes a final determination which concludes the process. Additionally, the agency must explain why it rejects a petition (if it does) and must do so in relation to what the initial petitioners put forth in the petition. It is, therefore, unlike rulemaking where most comments would not be expected to receive a personal response.

This is not merely an academic exercise. Standing is generally automatic when the party of an agency adjudication seeks to challenge the results of that adjudication, as *that* party is the only one directly connected to it. In contrast, those challenging rulemaking must undergo a strict, separate standing analysis as inherently one of many who could potentially challenge the rulemaking.

Rethinking how to classify these petitions would ensure that agencies are required to reasonably consider them and to explain their reasoning. It would still leave the agencies all the traditional discretion they enjoy on whether to grant the petition and ensure that this discretion could not be abused.