

ASSOCIATIONAL RIGHTS AND STANDING: DOES *CITIZENS UNITED* REQUIRE CONSTITUTIONAL SYMMETRY BETWEEN THE FIRST AMENDMENT AND ARTICLE III?

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INTRODUCTION

“Americans of all ages, all stations of life, and all types of disposition . . . are forever forming associations.” – Alexis de Tocqueville

The right of individuals to freely access the polls and vote for the representatives of their choosing is one of the most central aspects of a functional democracy.¹ Unfortunately, equal access to the democratic institution of voting is far from fully realized, and many groups of minority would-be voters face unlawful obstacles to exercising their rights.² Asian Americans³ are one such group.

Asian Americans are one of the fastest-growing minority groups in the nation, estimated to number more than seventeen million,⁴ and more and more are becoming U.S. citizens through naturalizations.⁵ Asian Americans aim to participate in the electoral franchise, but are

1. See *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . .”).

2. For a thorough analysis of the evidence of ongoing voting discrimination presented to Congress in 2006 prior to the reauthorization of the Voting Rights Act, see Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 386, 403–13 (2008) (analyzing several types of discrimination including discrimination based on minority language status, discrimination against growing minority populations, and overt harassment and intimidation inside polling locations).

3. For the purposes of this article, the term “Asian Americans” refers to residents of the United States who trace their ethnicity to East Asia, South Asia, and Southeast Asia.

4. KAREN R. HUMES ET AL., U.S. CENSUS BUREAU, 2010 CENSUS BRIEFS, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 7 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>. The number of persons identifying themselves as part of the Asian racial group grew at a faster rate than any other between 2000 and 2010. *Id.* at 5.

5. See BRIAN C. BAKER, U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, FACT SHEET, TRENDS IN NATURALIZATION RATES 1 (2007), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ntz_rates508.pdf (explaining that, through 2005, Asian immigrants had the highest rate of naturalization).

often unfamiliar with the American electoral process.⁶ Many come from Asian countries with very different political systems or from countries which may even lack a tradition of voting.⁷ Many recent Asian American immigrants are economically disadvantaged.⁸ In New York City's Chinatown, for example, many Asian Americans are poor or working class, and hold jobs in restaurants and garment factories that require physical work and long hours in exchange for low wages.⁹ The day-to-day struggle to make ends meet and a lack of familiarity with the political process severely reduces the ability of some Asian Americans to become involved in the electoral process.¹⁰

Some Asian Americans have been actively discouraged from voting. A significant number of Asian Americans have been treated with discourtesy and hostility at polling sites.¹¹ For example, poll workers have recently referred to Asian American voters as "terrorists;"¹² sent Chinese American voters to the back of the line because they were holding "everyone else up;"¹³ segregated voters into two separate voting lines by race;¹⁴ been impatient with first-time voters and given

6. See *Language Assistance Provisions of the Voting Rights Act, Hearing on S. 2236 Before the H. Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102 Cong. 1 (1992) [hereinafter *Testimony on Language Assistance Provisions*] (statement of Margaret Fung, Executive Director, Asian American Legal Defense and Education Fund); see also S. REP. NO. 102-315, at 12 (1992).

7. See generally *Testimony on Language Assistance Provisions*, supra note 6 (statement of Margaret Fung).

8. See COAL. FOR ASIAN AM. CHILDREN & FAMILIES, HALF-FULL OR HALF-EMPTY?: HEALTH CARE, CHILD CARE, AND YOUTH PROGRAMS FOR ASIAN AMERICAN CHILDREN IN NEW YORK CITY 5-7 (1999), available at http://www.cacf.org/resources_publications.html#halffull.

9. *Testimony on Language Assistance Provisions*, supra note 6, at 1 (statement of Margaret Fung); see also S. REP. NO. 102-315, at 12 (1992).

10. *Testimony on Language Assistance Provisions*, supra note 6, at 1 (statement of Margaret Fung).

11. See Glenn D. Magpantay, *Asian American Access to the Vote: The Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond*, 11 ASIAN L.J. 31, 40-42 (2004).

12. ASIAN AM. LEGAL DEF. & EDUC. FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2002 ELECTIONS IN NYC: AN ASSESSMENT OF NEW YORK CITY COMPLIANCE WITH THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT 14-16 (2003).

13. Letter from Kathay Feng, Staff Att'y, Asian Pac. Am. Legal Ctr., to Conny B. McCormack, Registrar-Recorder/Cnty. Clerk 3 (Jan. 13, 1999) (on file with the author).

14. Poll workers "claimed that separate but equal lines for those who were limited English proficient would speed up the voting process for others." ASIAN AM. LEGAL DEF. & EDUC. FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2004 ELECTIONS: LOCAL COMPLIANCE WITH THE VOTING RIGHTS ACT AND HELP AMERICA VOTE ACT (HAVA) IN NY, NJ, MA, RI, MI, IL, PA, VA 16 (2005) [hereinafter LOCAL COMPLIANCE]. The U.S. Department of Justice brought suit against the City of Boston

them unhelpful instructions;¹⁵ unduly rushed Asian Americans to vote to better accommodate white voters;¹⁶ and scolded voters for their inability to understand English and for reading Chinese language voting instructions.¹⁷

As if hostility from poll workers were not bad enough, some white voters have also created intimidating environments for Asian Americans at polling sites. At one site during a recent election, white voters yelled at Asian Americans, saying: “You all are turning this country into a third-world waste dump!”¹⁸ During another election, voters made a number of racist comments to the effect that Asian Americans were not—or should not have been allowed to become—American citizens.¹⁹ In 2005, shortly before the New Jersey primary election, two talk radio hosts made several disparaging remarks about a Korean American candidate for mayor. Speaking in an incoherent, mock-Asian accent, they responded to a caller saying that “no specific minority group or foreign group should ever dictate the outcome of an American election . . . Chinese should never dictate the outcome of an election, Americans should. . . . Damn Orientals and Indians.”²⁰ On Election Day, poll workers told a number of Gujarati and Hindi speaking voters to “go to the nearest gas station.”²¹ Incidents like these intimidate Asian American voters.²²

for such discriminatory treatment. *See* Complaint, *United States v. City of Boston*, No. 05-11598 WGY (D. Mass. July 29, 2005) (alleging, among other things, that the defendants treated Asian American voters disrespectfully), available at http://www.justice.gov/crt/about/vot/sec_203/documents/boston_comp.pdf.

15. LOCAL COMPLIANCE, *supra* note 14, at 16.

16. *Id.*

17. Letter from Glenn D. Magpantay, Nat’l Assoc. for Pub. Interest Law Equal Justice Fellow, Asian Am. Legal Def. & Educ. Fund, to Daniel DeFrancesco, Exec. Dir., N.Y.C. Bd. of Elections (Oct. 21, 1998). Only after a heated argument and after a police officer recognized the Chinese American sisters’ right to vote were they allowed to enter the voting booth.

18. LOCAL COMPLIANCE, *supra* note 14, at 15.

19. *Id.* at 16.

20. Letter from Glenn D. Magpantay, Asian Am. Legal Def. & Educ. Fund, to Rebecca J. Wertz, Acting Chief, Voting Sec., Civil Rights Div., U.S. Dep’t of Justice (June 3, 2005).

21. *Oversight Hearing on the Voting Rights Act: Section 203-Bilingual Election Requirements, Part I: Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 4 (2005) (statement of Margaret Fung, Executive Director, AALDEF).

22. For a fuller review of anti-Asian voting barriers, see Glenn D. Magpantay & Nancy W. Yu, *Asian Americans and Reauthorization of the Voting Rights Act*, 19 NAT’L BLACK L.J. 1, 3–6 (2005–06).

In response, voting rights associations and other civil rights groups have filed lawsuits under the Voting Rights Act²³ (VRA) to protect Asian American voting rights.²⁴ By acting on behalf of intimidated voters who may not be familiar with the American legal system, voting rights associations play an important role in protecting the rights of Asian American voters. But, as in any lawsuit, plaintiffs must have standing to litigate the case, and the standing requirements of Article III of the Constitution limit the effectiveness of voting rights associations in some instances. Indeed, certain claims have been abandoned because individual voters are sometimes unwilling to participate as plaintiffs.²⁵

Recently, however, the rights of associations may have received a boost from an unlikely source. The logic employed in the recent Supreme Court decision, *Citizens United v. Federal Election Commission*,²⁶ provides a new way of looking at associational standing for voting rights associations to use to overcome Article III standing limitations.²⁷ *Citizens United* affirmed the very special role that associations—groups of people—play in our democracy.²⁸ Although the holding demonstrated that associational rights are important in the context of free speech, it has been criticized as poorly reasoned and as a politically motivated effort to promote the interests of large corporations at the expense of individual voters.²⁹ However, the approach to associational rights in *Citizens United* can be applied to other areas of constitutional jurisprudence. This will provide a balanced foundation to promote the rights of less powerful groups as well as the large,

23. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973-1973bb-1 (2006)).

24. See, e.g., Complaint, Chinatown Voter Educ. Alliance v. Ravitz, No. 06 Civ. 0913 (S.D.N.Y. Feb. 6, 2006); *United States v. Boston*, No. 05-11598 WGY (D. Mass. Sept. 9, 2005).

25. For example, in *United States v. City of Philadelphia*, No. 2:06CV4592 (E.D. Pa. filed Oct. 13, 2006) there was evidence of Vietnamese American voters being prohibited from receiving language assistance entitled to them under federal law, but no Asian Americans intervened in the lawsuit, which resulted in a settlement that did not resolve Asian American voting problems. See Amended Complaint, *United States v. City of Philadelphia*, No. 2:06CV4592 (E.D. Pa. Apr. 26, 2007) (alleging violations of the rights of Hispanic American, but not Asian American, voters), available at http://www.justice.gov/crt/about/vot/sec_203/documents/phillyamended_comp.pdf.

26. 130 S. Ct. 876 (2010).

27. See *infra* Part III.

28. See *Citizens United*, 130 S. Ct. at 900 (noting that “associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster.”) (internal quotation marks omitted).

29. See, e.g., Michael Waldman, *Preface* to MONEY, POLITICS, AND THE CONSTITUTION: BEYOND CITIZENS UNITED, at xi (Monica Youn ed., 2011).

moneyed corporations with which the decision is typically associated.³⁰

This article will review scholarship and court decisions that affirm that the ability to litigate public rights in court is protected. I will argue that this ability should be expanded, not curtailed, by the limited jurisdiction of the federal courts. Specifically, I argue that the broad concept of associational speech rights articulated in *Citizens United* should be extended to the related First Amendment right to petition the government for redress. Doing so may help alleviate Article III standing limitations on the ability of public interest organizations to advocate on behalf of disenfranchised persons. Such a result would balance *Citizen United*'s effect on the law and confirm that the First Amendment ensures the rights of associations to protect the interests of the disenfranchised and powerful alike. To some extent, I argue for a form of associational absolutism.³¹

This article proceeds in three parts. Part I first illustrates generally how the First Amendment protects the rights of advocacy organizations to associate and to sue as a means of petitioning for redress, and then explains how Article III standing requirements limit organizational access to the courts. Part II explains the standing challenges facing voting rights associations and explains why these groups should be permitted wider access to the courts. The Part then uses the experiences of Asian Americans in the voting rights context as a practical example. Part III briefly recaps the expanded concept of associational speech rights expounded in *Citizens United* and argues that this understanding of associational rights should be extended to the right to petition, particularly in the context of voting rights cases. This Part also refutes arguments against expanding associational standing, and concludes that granting broader standing rights would help restore balance to the Supreme Court's First Amendment jurisprudence.

30. See, e.g., Adam Liptak, *Justices, 5–4, Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1 (quoting President Obama who described the *Citizens United* decision as “a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans”).

31. In associational absolutism, associations are primary over all other things and through the associations other problems are reconciled. See Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 995 (2011).

I.

ASSOCIATIONS IN THE COURTS: USES OF AND LIMITATIONS ON THE
RIGHT TO PETITION FOR REDRESS

“Americans of all ages, all stations of life, and all types of disposition . . . are forever forming associations.”³² Specifically, Americans often form and enter into associations that advocate for their collective interest in matters of fundamental public importance. Civil rights organizations such as the NAACP, or environmental organizations such as the Sierra Club are classic examples.³³ The Supreme Court has recognized that organizations should be allowed to litigate claims on behalf of their members.³⁴ Specifically, the Court has stated that “[t]he only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all.”³⁵ Moreover, allowing associations to litigate collectively held interests is practically beneficial not only to members of organizations, but to the court system as well.³⁶ Associations have the capacity to “draw upon a pre-existing reservoir of expertise and capital”³⁷ and their access to “specialized expertise and research resources”³⁸ may help “sharpen[] the presenta-

32. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 513 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1840).

33. See *Our Mission*, NAACP, <http://www.naacp.org/pages/our-mission> (last visited Oct. 18, 2012) (“The mission of the National Association for the Advancement of Colored People is to ensure the political, social, and economic equality of rights of all persons and to eliminate race-based discrimination.”); see also *Sierra Club Policies*, SIERRA CLUB, <http://www.sierraclub.org/policy/> (last visited Oct. 18, 2012) (declaring, in pertinent part, a mission to “educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives”).

34. Karl S. Coplan, *Is Voting Necessary? Organizational Standing and Non-Voting Members of Environmental Advocacy Organizations*, 14 *SOUTHEASTERN ENVTL. L.J.* 47, 48–49 (2005) (citing *Sierra Club v. Morton*, 401 U.S. 727 (1972)) [hereinafter *Is Voting Necessary?*].

35. *UAW v. Brock*, 477 U.S. 274, 290 (1986) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187 (1951) (Jackson, J., concurring)); see also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) (stating that an association “is but the medium through which its individual members seek to make more effective the expression of their views”).

36. *UAW v. Brock*, 477 U.S. 274, 289 (1986).

37. *Id.*

38. *Id.* (quoting Dale Gronemeier, Note, *From Net to Sword: Organizational Representatives Litigating Their Members’ Claims*, 1974 *U. ILL. L. FORUM* 663, 669).

tion of issues upon which the court so largely depends for illumination of difficult . . . questions.”³⁹

Nevertheless, Article III of the Constitution only permits federal courts to hear actual “cases” and “controversies,”⁴⁰ and the party seeking a federal forum for the adjudication of its claim has the burden of proving that it has the requisite standing to sue.⁴¹ In order to demonstrate standing, a plaintiff must show: (1) that he or she has suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely, as opposed to merely speculative, that the injury would be redressed by a favorable decision.⁴² Once standing is shown, a plaintiff may pursue her action in federal court.⁴³ This legal test works well for determining standing in private litigation, but can present difficulties when organizational plaintiffs sue to defend public rights.⁴⁴ Indeed, “Although courts acknowledge the existence and advantages of association” there is “tension in the judicial system between acknowledging these benefits and sticking to an atomistic model of interest [that] manifests itself in inconsistent grants of associational standing.”⁴⁵

This Part explores that tension. Subpart A first explains the important and interlocking associational rights that exist under the First Amendment. Subpart B then discusses the doctrine and limits of associational standing.

39. *Id.* (alteration in original) (quoting *Harlem Valley Transp. Ass’n v. Stafford*, 360 F. Supp. 1057, 1065 (S.D.N.Y. 1973), *aff’d*, 500 F.2d 328 (2d Cir. 1974)).

40. U.S. CONST. art. III, § 2, cl. 1.

41. *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

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

43. In addition to the constitutional limitations on federal power, there are also so-called prudential standing considerations, self-imposed by the federal judiciary. These considerations prohibit (1) claims based on a third party’s rights or interests, (2) “generalized grievances,” and (3) claims based on interests outside the zone of interests protected by a congressional grant of standing. *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153–56 (1970). While the constitutional requirements are absolute, Congress or the courts may abrogate the prudential considerations. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551 (1996).

44. See Heidi Li Feldman, *Divided We Fall: Associational Standing and Collective Interest*, 87 MICH. L. REV. 733, 733–35 (1988) (explaining that the collective interests of organizations and associations often do not fit neatly into the individualistic, atomistic doctrine of Article III standing).

45. *Id.* at 734.

A. *Associational Rights and the First Amendment*

The First Amendment protects the rights to free speech, to freedom of religion, to peaceably assemble and associate, and to petition the government for redress.⁴⁶ The Supreme Court and scholars have focused heavily on the freedoms of speech and religion, but the rights to assemble, associate, and petition the government for redress are less well understood. Still, there is a synergistic relationship among the First Amendment rights:⁴⁷ “[j]ust as association facilitates speech, it also facilitates petitioning the government.”⁴⁸

One scholar has argued that the rights to “assembly, petition, and association are at least as central to the process of self-governance as is free speech and that assembly and petition were historically viewed as more fundamental to a politically functional society than speech.”⁴⁹ Even the Court has intertwined the different rights, noting that “[o]ur form of government is built on the premise that every citizen shall have the right to engage in political expression and association” and that the “[e]xercise of these basic freedoms in America has traditionally been through the media of political associations.”⁵⁰

1. *The Right to Associate*

The leading case with regard to the right of association is *NAACP v. Alabama ex rel. Patterson*.⁵¹ In it, the “Court discussed the rights of association and assembly, not as independent, cognate rights, but rather as a means to enable free speech,” specifically political speech, in the form of advocacy.⁵² The case centered on Alabama’s attempts

46. U.S. CONST. amend. I.

47. See Bhagwat, *supra* note 31, at 998 (“Assembly without free speech, in other words, is impossible.”). Additionally, Bhagwat notes that:

The role of free speech in enabling the formation and maintenance of associations is more subtle but no less fundamental. An association is a coming together of individuals for a common cause or based on common values or goals. Associations do not form spontaneously. Individuals seeking to form an association must be able to communicate their views and values to each other, to identify their commonality. They must also be able to recruit strangers to join with them, on the basis of common values. As Tocqueville points out, “In a democracy an association cannot be powerful unless it is numerous.” But numbers cannot be achieved without publicity.

Id. (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 518 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1840)).

48. *Id.* at 995.

49. *Id.* at 981.

50. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

51. 357 U.S. 449 (1957).

52. See Bhagwat, *supra* note 31, at 987.

during the civil rights movement to compel the NAACP to reveal the names and addresses of all its Alabama members, as was required under state laws.⁵³ The NAACP refused, claiming that the release of its membership lists would subject its members to harassment and retaliation for participating in efforts to end racial discrimination and segregation in Alabama.⁵⁴ The NAACP showed that past release of its membership lists had exposed members to economic targeting, loss of employment, physical coercion, and other forms of hostility.⁵⁵ The Supreme Court unanimously held that compelled disclosure of the NAACP's membership lists would violate its members' right to the freedom of association.⁵⁶

The Court reasoned that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.”⁵⁷ The Court found that the “compelled disclosure of [the NAACP’s] Alabama membership was likely to adversely affect the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly ha[d] the right to advocate.”⁵⁸ This was because compelled disclosure of the NAACP’s membership might have induced members to withdraw from the NAACP, and to dissuade others from joining it out of fear of the consequences of their membership being exposed.⁵⁹

2. *The Right to Petition the Government for Redress*

The Petition Clause of the First Amendment is most often understood as the right to lobby the political branches of government, but it also includes the right of access to the courts.⁶⁰ The Supreme Court

53. See *id.* at 451. For a more detailed treatment of the historical background to the case, see Dale E. Ho, *NAACP v. Alabama and False Symmetry in the Disclosure Debate*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 405, 409–13 (2012) (describing the state of racial unrest in Alabama and state-led efforts to limit the NAACP’s work).

54. *Patterson*, 357 U.S. at 451.

55. *Id.* at 462.

56. *Id.*

57. *Id.* (citing *De Jorge v. Oregon*, 299 U.S. 353, 364 (1937); *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

58. *Id.* at 462–63.

59. *Id.*

60. Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 587–88 (1999) [hereinafter *A Right of Access*] (citing *McDonald v. Smith*, 472 U.S. 479 (1985); *Sure-Tan v. NLRB*, 467 U.S. 883 (1984)); see also Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L.J. 665 (2000) [hereinafter *Motive Restrictions*].

has recognized the right of access to the court under the Petition Clause for many years,⁶¹ but relatively few academic commentators have written about the Petition Clause.⁶² The Court, for its part, has held that the right to petition is “one of ‘the most precious of the liberties safeguarded by the Bill of Rights,’ and . . . is implied by ‘[t]he very idea of a government, republican in form.’”⁶³

In reality, the Court’s jurisprudence on the right to petition begins with its jurisprudence on the rights of association and expression. A line of cases held that organizations, such as the NAACP and labor unions, have a First Amendment right to organize, advocate, and litigate for their members.⁶⁴ “In *NAACP v. Button*, the Court struck down a Virginia statute that effectively prohibited organizations such as the NAACP from providing lawyers to represent civil rights plaintiffs when the organization itself was not involved in the litigation.”⁶⁵ The Court held that the right at issue was the right “to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights.”⁶⁶ The Court considered litigation to be “a form of political expression”⁶⁷ and a form of petition,⁶⁸ concluding that, “[c]ertainly, the right to petition extends to all departments of the government. The right of access to the courts is indeed but one aspect of the right of petition.”⁶⁹

In later cases, the Court recognized the right to petition courts by corporations in antitrust claims⁷⁰ and by labor unions in retaliation cases.⁷¹ In both matters, the Court recognized that the filing of a civil

61. *McDonald v. Smith*, 472 U.S. 479 (1985); *Sure-Tan v. NLRB*, 467 U.S. 883 (1984). *But see* *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2503 (2011) (Scalia, J., dissenting) (arguing that the right to petition does not include the right to go to Court, but rather is restricted solely to the right to petition legislative bodies).

62. For a review of the Supreme Court’s right to court access doctrine under the Petition Clause, see *A Right of Access*, *supra* note 60, at 558 n.4.

63. *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524–25 (2002) (quoting *Mine Workers v. Illinois Bar Ass’n*, 389 U.S. 217, 222 (1967); *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)).

64. *Motive Restrictions*, *supra* note 60, at 674.

65. *Bhagwat*, *supra* note 31, at 987; *see also* *NAACP v. Button*, 371 U.S. 415, 444 (1963).

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

67. *Id.* at 429.

68. *Id.* at 430.

69. *A Right of Access*, *supra* note 60, at 583 (citing *Cal. Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972)).

70. *Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993).

71. *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 740 (1983).

suit was a form of petitioning the government for redress.⁷² As recently as 2011, the Court affirmed its precedents, asserting “that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.”⁷³ The right extends to associations.⁷⁴ “We conclude that it would be destructive of rights of association and of petition to hold that *groups* with common interests may not . . . use the channels and procedures of state and federal agencies *and courts* to advocate their causes and points of view.”⁷⁵

Both the rights of petition and free speech are “precious freedoms at the core of our republican form of government” and democracy.⁷⁶ The Court wrote,⁷⁷

It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, and therefore united in the First Article’s assurance.⁷⁸

More recently, the Court held that:

Both speech and petition are integral to the democratic process, although not necessarily in the same way. The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs.⁷⁹

The Petition Clause is another avenue in which associations can vindicate the rights of their members.

72. *Motive Restrictions*, *supra* note 60, at 667 (citing *Prof’l Real Estate Investors*, 508 U.S. at 60–61; *Bill Johnson’s Rests., Inc.*, 461 U.S. at 742–43).

73. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2494 (2011) (citing *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896–97 (1984); *Bill Johnson’s Rests., Inc.*, 461 U.S. at 741; *Cal. Motor Transp. Co.*, 404 U.S. at 513).

74. However, one scholar has studied the parameters of the right and assessed that the right to petition courts is a narrow right wherein the right of an individual or group is only to file winning civil claims that are within the particular court’s jurisdiction. *See A Right of Access*, *supra* note 60, at 562.

75. *Cal. Motor Transp. Co.*, 404 U.S. at 510–11 (emphasis added).

76. *A Right of Access*, *supra* note 60, at 673 (citing *NAACP v. Button*, 371 U.S. 415, 432–33 (1963)).

77. *Id.* (citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

78. *Thomas*, 323 U.S. at 530.

79. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011).

3. *Realizing First Amendment Rights through Litigation*

The Petition Clause applies both to “the people” collectively and to individual persons.⁸⁰ Beginning with *NAACP v. Button*, the Supreme Court found a collective right to litigate.⁸¹ Since then, “public interest advocacy organizations have waged successful campaigns in the area of civil rights, non-discrimination, and environmental protection.”⁸² The Court has applauded the role that organizations play in asserting interests through litigation that may not be addressed by the political branches of government. In *NAACP v. Button*,⁸³ the Court held that impact litigation suits brought by the NAACP were protected exercises of association, political expression,⁸⁴ and petition.⁸⁵ The Court stated:

[T]he First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. . . . [L]itigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local. . . . It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . . And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.⁸⁶

Indeed, the Court further held that groups that come together to litigate “may be the most effective form of political association.”⁸⁷ The strongest support for the right to petition is in the context of collective political action or public interest advocacy,⁸⁸ and, in particular, when “the petition goes to ‘political’ issues of self-governance.”⁸⁹

80. *A Right of Access*, *supra* note 60, at 626–28.

81. *Id.* at 626.

82. For example, “[t]he NAACP orchestrated and supported litigation striking down racially based restrictive covenants in *Shelley v. Kraemer*, as well as the landmark decision ending segregation in public schools in *Brown v. Board of Education*.” See Karl S. Coplan, *Ideological Plaintiffs, Administrative Lawmaking, Standing, and the Petition*, 61 ME. L. REV. 377, 396 (2009) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

83. 371 U.S. 415 (1963).

84. *Id.* at 428–29.

85. *Id.*

86. *Id.*

87. *Id.* at 431.

88. See Coplan, *supra* note 82, at 440–42; see also *A Right of Access*, *supra* note 60, at 579.

89. See Coplan, *supra* note 82, at 441.

These “petitions for judicial redress that involve political and public issues of broad application . . . deserve the highest protection.”⁹⁰

B. The Doctrine and Limits of Associational Standing

A close reading of the previous Subpart reveals that the questions of whether associational rights exist and, if so, by whom they may be asserted, are inextricably intertwined. Indeed, *NAACP v. Alabama* in addition to articulating the existence of associational rights, also explained why the NAACP as an entity had the right to press the interest:

The Association both urged that it is constitutionally entitled to resist official inquiry into its membership lists, and that it may assert, on behalf of its members, a right personal to them to be protected from compelled disclosure by the State of their affiliation with the Association as revealed by the membership lists. We think that petitioner argues more appropriately the rights of its members, and that its nexus with them is sufficient to permit that it act as their representative before this Court. In so concluding, we reject respondent’s argument that the Association lacks standing to assert here constitutional rights pertaining to the members, who are not of course parties to the litigation.⁹¹

Nevertheless, there are doctrinal limits on the extent to which associations may represent their membership in court. Accordingly, further discussion of the contours of associational standing doctrine is required.

“[T]he doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others.”⁹² As we have seen, the First Amendment recognizes a right of associations to litigate on behalf of their members as a mechanism for petitioning the government for redress,⁹³ and this right may be at its zenith when matters of self-governance are at issue.⁹⁴ Nevertheless, standing doctrine may limit this right only to claims that are justiciable as a matter of Article III standing, and thereby seriously limit the ability of associations to advocate on behalf of their members.

90. *Id.* at 442.

91. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458–59 (1958).

92. *UAW v. Brock*, 477 U.S. 274, 290 (1986) (internal citations omitted).

93. See *supra* text accompanying notes 65–75.

94. See *supra* text accompanying notes 86–90.

Under certain circumstances, organizations have standing to sue to redress injuries to their own interests,⁹⁵ but, as a general matter, organizations do not have standing to challenge policies that they advocate to change.⁹⁶ Thus, if an alleged injury is to a public right,⁹⁷ organizations must sue on behalf of their members.⁹⁸ Under this formulation, membership organizations only have standing to sue when: “(a) [The association’s] members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”⁹⁹

Thus, in *Sierra Club v. Morton*, the Supreme Court held that public interest environmental organizations could not rely on their own institutional interest in environmental resources and policy preferences to establish standing to sue, but rather were required to rely on the interests of identifiable members of the organization.¹⁰⁰ “Ever since, environmental organizations [] have been required to establish standing by identifying specific individual members [of their organizations]

95. See *Havens Realty Co. v. Coleman*, 455 U.S. 363, 378–79 (1982); see also *Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1158 (11th Cir. 2008) (holding that voting rights and civic organizations have standing to sue on their own behalf as organizations whose missions to increase voter registration and voter participation would be impeded and whose resources would be diverted as a direct result of the enforcement of a new voter registration requirement). Heidi Li Feldman has thoughtfully articulated the distinction between organizational standing (where an association sues to redress its own injury) and representational standing (where an association acts as a representative of its members and sues to redress injury to those members). See Feldman, *supra* note 44, at 735 n.9.

96. See, e.g., *Sierra Club v. Morton*, 401 U.S. 727 (1972); see also Feldman, *supra* note 45, at 734–35 (explaining that the ability of associations to press “[r]eal collective interests” is impeded by Article III standing doctrine).

97. Cf. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (requiring that plaintiffs have suffered an injury in fact that is particularized to the plaintiff rather than public in nature).

98. See *Is Voting Necessary?*, *supra* note 34, at 48–49 (citing *Morton*, 405 U.S. at 739–40). In *Sierra Club v. Morton*, the organization, which was concerned with the “special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country,” brought suit to enjoin federal officials from approving an extensive skiing development in the Mineral King Valley in the Sequoia National Forest. *Morton*, 405 U.S. at 730. Their theory was that this was a “public” action involving questions as to the use of natural resources and that the project would adversely change the area’s aesthetics and ecology. The organization asserted no individualized harm to itself or its members and therefore lacked standing to maintain the action. *Id.* at 739–40. For a general discussion of efforts by organizations to sue on behalf of members, see Coplan, *supra* note 82.

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

100. *Morton*, 405 U.S. at 739–40; see also *Is Voting Necessary?*, *supra* note 34, at 88.

whose environmental interests would be adversely affected by the action challenged.”¹⁰¹

Many voting rights organizations, however, are not organized as membership organizations.¹⁰² This organizational structure poses obvious difficulties as non-membership organizations may find it difficult to establish standing.¹⁰³

II.

VOTING RIGHTS ORGANIZATIONS AND THE ASIAN AMERICAN EXPERIENCE

Voting rights associations may not be organized as traditional membership entities, but they nevertheless are a means by which constituents can “express their collective views and protect their collective interests.”¹⁰⁴ Voting rights associations are “appropriate representative[s]”¹⁰⁵ to litigate public rights, and they typically possess special expertise about those rights. Indeed, First Amendment goals of participatory government are often best secured through voting rights litigation because courts are often “more receptive to the efforts of economically and politically disadvantaged minorities than the political branches of government.”¹⁰⁶ Voting rights groups utilize the judicial process by bringing impact litigation to protect the collective right of citizens to vote.¹⁰⁷ In litigation, voting rights organizations also balance the arguments and hone the issues through their special expertise.¹⁰⁸ Voting rights associations work to protect the rights of individuals in a manner that is similar in many ways to membership organizations, and they also bring expertise to voting rights litigation that provides a benefit to the court system. Given these similarities, voting rights associations should be entitled to associational standing to litigate on behalf of individual voters.

In the context of Asian American voting rights litigation, Asian American associations are able to identify the facts as well as the witnesses, victims, and plaintiffs in any lawsuit; their participation can

101. *Is Voting Necessary?*, *supra* note 34, at 49.

102. *Id.* (citing Robin Dimieri & Stephen Weiner, *The Public Interest and Governing Boards of Nonprofit Health Care Institutions*, 34 *VAND. L. REV.* 1029, 1043 (1981) (discussing nonprofit corporation statutes)).

103. *See Wash. State Apple Adver. Comm'n*, 432 U.S. at 344 (testing for associational standing based on whether or not the party is a membership organization).

104. *Id.* at 344–45.

105. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1957).

106. *See Coplan*, *supra* note 82, at 396.

107. *Id.* at 395.

108. *Id.* at 396.

strengthen the claims asserted, and they also have the knowledge and on-the-ground experience to fashion effectual remedies that will have long-lasting impact. This Part discusses two examples—*Chinatown Voter Education Alliance v. Ravitz* and *United States v. Boston*—of voting rights groups using the judicial process to protect Asian Americans. Both cases show the potential limiting impact of Article III standing doctrine, and both cases also confirm the important role that voting rights associations play in protecting vulnerable voters.

A. Chinatown Voter Education Alliance v. Ravitz

Chinatown Voter Education Alliance v. Ravitz was a lawsuit to enforce the language assistance provisions (Sections 203 and 208) of the federal Voting Rights Act for Chinese and Korean voters in New York City.¹⁰⁹ In every major election since 1994, Asian American advocacy groups have monitored elections in New York for compliance with Section 203. They have found a number of violations,¹¹⁰ including: mistranslated ballots;¹¹¹ translated materials hidden from or unavailable to voters;¹¹² insufficient numbers of interpreters to assist voters at poll sites so that voters were turned away with no one to assist them;¹¹³ and interpreters who spoke the wrong Asian language or dialect.¹¹⁴ In some cases, for example, Korean American voters were directed to Chinese interpreters, and interpreters who spoke the Mandarin dialect of Chinese were provided when all voters at that poll site spoke Cantonese.¹¹⁵ The New York City Board of Elections was made aware of these violations through complaint letters that highlighted specific violations of law. Letters were sent reviewing violations during the primary and general elections in 2005, 2004, 2003, 2002, 2001, 2000, 1998, and other years.¹¹⁶ Very little was done to remedy the problems.

109. See Complaint, *Chinatown Voter Educ. Alliance v. Ravitz*, No. 06 Civ. 0913 (S.D.N.Y. Feb. 6, 2006) [hereinafter CVEA Complaint]. For a fuller discussion on the need for language assistance for Latino and Native American voters, in addition to Asian American voters, see James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 195 (2006).

110. CVEA Complaint, *supra* note 109, at ¶ 36.

111. See Magpantay, *supra* note 11, at 37; see also CVEA Complaint, *supra* note 109, at ¶ 39(i).

112. CVEA Complaint, *supra* note 109, at ¶ 39(a).

113. *Id.* at ¶ 39(b).

114. *Id.*

115. *Id.* at ¶ 39(c).

116. *Id.* at ¶ 36.

The Asian American Legal Defense and Education Fund (AALDEF) subsequently brought a lawsuit to compel the Board of Elections to comply with Section 203. Developing plaintiffs for the lawsuit was challenging, however. Although AALDEF met with many voters who encountered voting barriers or were outright denied the right to vote and thus would have been able to demonstrate standing,¹¹⁷ on numerous occasions voters were unwilling to be named as plaintiffs in a lawsuit out of fear that being publically named would lead to retaliation.¹¹⁸ While AALDEF and other voting rights organizations would prefer to seek redress on behalf of these voters without their participation in light of the risk and stress such participation entails for voters, standing requirements necessitate the inclusion of voter plaintiffs.¹¹⁹ AALDEF attorneys tried to coax voters to speak up, saying that discrimination problems affected many Asian American voters, and that the problems would reoccur if nothing was done. Voters responded by asking why, if the problem was so prevalent, were AALDEF attorneys contacting them and why could they not find someone else? As such, finding a plaintiff voter proved to be very difficult.

The experience of one of the voters who wanted to help illustrates common concerns based on persecution that many immigrant families faced in China. As was noted during the voter's client intake interview:

Her grandfather was in the army but didn't know which army to join and so he joined the Nationalist Party, but the Communist Party came into power and persecuted soldiers loyal to the Nationalist Party. Her grandfather never came back. He might have been sent to jail, ran off to Taiwan, or worse [i.e., killed]. When [she] was in grammar school in China, she was a good student and a student leader. But because it was known that her grandfather was in the Nationalist Party her family got less, she was ostracized in school, no one would play with her. The kids were in cahoots with the teachers. Family members were not able to get good jobs and were not given promotions at work.¹²⁰

117. *But see* Fla. State Conference of the NAACP v. Browning, 522 F.3d 1153, 1160 (11th Cir. 2008) ("An imminent injury is one that is 'likely to occur immediately.' The alleged injury in this case, denial of voter registration and hence the right to have one's vote counted, will occur if at all before the scheduled elections in November 2008." (citing 31 Foster Children v. Bush, 329 F.3d 1255, 1265 (11th Cir. 2003))).

118. In *NAACP v. Alabama ex rel. Patterson*, the targeting of NAACP members denied them their First Amendment rights. 357 U.S. 449, 462 (1957).

119. *See supra* text accompanying notes 97–101.

120. Decl. of Shiny Liu, *Chinatown Voter Educ. Alliance v. Ravitz*, No. 06 Civ. 0913 (S.D.N.Y. 2006). However, in *City of Los Angeles v. Lyons*, the Court held that

Given her history, this voter was concerned about repercussions, privacy, and what would happen if the case were lost. Attorneys explained issues of confidentiality, protection against retaliation,¹²¹ and relevant First Amendment protections.¹²² To give the voter plaintiffs some feeling of security, and some anonymity, AALDEF also named a few voting rights organizations to serve as organizational plaintiffs.¹²³ The organizations were the Chinatown Voter Education Alliance (CVEA), Young Korean American Service and Education Center (YKASEC), Korean American Voters' Council (KAVC), and Chinese American Voters Association (CAVA).¹²⁴ With much hand-holding and other organizations standing with the individual voter, the plaintiff voter reluctantly agreed to participate in the lawsuit.¹²⁵

B. United States v. Boston

Similarly, *United States v. Boston*¹²⁶ was a lawsuit to enforce the nondiscrimination provisions (Section 2) of the federal Voting Rights Act for discrimination against Chinese and Vietnamese voters.

a plaintiff lacked standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a realistic threat from the policy. 461 U.S. 95, 106 n.7 (1983). The Court noted that “[t]he reasonableness of Lyons’ fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct,” and that his “subjective apprehensions” that such a recurrence would even *take place* were not enough to support standing. *Id.* at 107 n.8.

121. Decl. of Shiny Liu, *supra* note 120.

122. See *Patterson*, 357 U.S. at 462.

123. It is noteworthy that there is added support in the federal regulations for organizations to enforce Section 203. See 28 C.F.R. § 55.16 (stating that a jurisdiction achieves compliance under Section 203 “if it has worked with the cooperation of and to the satisfaction of organizations representing members of the applicable language minority group”). CVEA, YKASEC, KAVC, and CAVA are “organizations representing members of the applicable language minority groups.” CVEA Complaint, *supra* note 109, at ¶ 8 (citing 28 C.F.R. § 55.16).

124. CVEA Complaint, *supra* note 109, at ¶¶ 4–7.

125. AALDEF’s early theory of its lawsuit also included a constitutional claim for denial of the fundamental right to vote. Any constitutional claim requires state action, which was satisfied by the New York City Board of Elections’ administration of elections. New citizens were the ones who most often faced voting discrimination, but also the least likely to want to challenge the government, let alone the government in their new homeland. The attorneys were unable to incorporate the constitutional claim in the lawsuit for lack of an agreeable plaintiff.

126. “On July 29, 2005, the United States filed a complaint against the City of Boston under Sections 2 and 203 of the Voting Rights Act. The complaint alleged that the City’s election practices and procedures discriminate[d] against members of language-minority groups, specifically persons of Spanish, Chinese, and Vietnamese heritage” See *Cases Raising Claims Under the Language Minority Provisions of the Voting Rights Act*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/crt/about/vot/litigation/recent203.php#boston> (last visited Oct. 19, 2012). On September 9, 2005, the Chinese Progressive Association (CPA), along with other organizations and individu-

In several elections prior to the lawsuit, voters had endured coercion and encountered voting barriers: translated materials were unavailable to voters; interpreters coerced voters and took advantage of their limited English proficiency; poll workers were rude or hostile.¹²⁷ Chinese and Vietnamese Americans who came to poll sites were told that they were not registered and were turned away, even though there were state laws to accommodate such voters. One voter said that:

The poll worker who was giving instructions walked up to me as I was heading toward the voting booth with my ballot. I had not asked for assistance. This poll worker followed me to the voting booth, saying to me, "vote for numbers 6 and 10" for city council. As I marked my ballot for the city council contest, the poll worker was looking over my shoulder.¹²⁸

A local organization, the Chinese Progressive Association (CPA), had received complaints from voters for a number of years, and its staff members had personally observed illegal actions by poll workers. They reported these incidents to local election officials who ignored their complaints.¹²⁹

AALDEF worked with CPA to bring a lawsuit urging injunctive and declaratory relief under the Voting Rights Act,¹³⁰ but, just as in *Chinatown Voter Education Alliance v. Ravitz* in New York, voters were reluctant to participate. Chinese voters recalled retaliation in their homelands, as did Vietnamese voters who had originally emigrated as refugees fleeing government repression and a war. The U.S. Department of Justice initiated its own lawsuit and AALDEF sought to intervene, representing voters and organizations. The proposed Plaintiff-Interveners were CPA¹³¹ and the Chinatown Resident Association.¹³²

als, intervened as plaintiffs and filed a complaint alleging violations of the voting rights of Chinese Americans. See Complaint-in-Intervention at ¶ 18, United States v. Boston, No. 05-11598 WGY (D. Mass. Sept. 9, 2005) [hereinafter Complaint-in-Intervention].

127. Complaint-in-Intervention, *supra* note 126, at ¶ 18(a).

128. Lydia Lowe & Glenn D. Magpantay, *Boston Asian American Voters Win Bilingual Ballots*, MEMBERSHIP NEWSLETTER (Chinese Progressive Ass'n, Boston, Mass.), Winter 2005, at 1.

129. Complaint-in-Intervention, *supra* note 126, at ¶ 19.

130. *Id.* at ¶ 1 (citing 42 U.S.C. §§ 1973, 1973aa-1a; 28 U.S.C. § 2201). Once it was shown that Chinese and Vietnamese voters had lost their right to vote, a remedy could be implemented that would require the City to cease and desist the discriminatory conduct and affirmatively encourage Asian Americans to again participate in the elections.

131. *Id.* at ¶ 7.

132. *Id.* at ¶ 8.

C. *The Asian American Experience*

Through the protection and safety of associations, Asian Americans have been able to vindicate their constitutional rights. Without associations, many voting rights violations would continue to fester unresolved. However, Article III standing requirements for associations present barriers to resolving voting rights claims when no voters will come forward to join organizations, such as AALDEF, in pressing First Amendment claims.

In *Chinatown Voter Education Alliance v. Ravitz* and *United States v. Boston*, non-membership organizations were instrumental to the litigation. Those organizations promote Asian American involvement in electoral processes, advocate for limited English proficient Asian Americans, and educate and register qualified voters.¹³³ They have themselves monitored elections in New York for compliance with the Voting Rights Act and have found a number of violations of law.¹³⁴ Safeguarding and expanding access to the vote was germane to their missions and they sought equitable relief.¹³⁵ But the defendants could have argued that the organizations lacked standing because they suffered no direct organizational injury—they did not vote. A belligerent defense counsel could have sought a dismissal of the organizational plaintiffs; the lawsuit could have continued with the individual voters standing alone, but the voters would most likely not have wanted to continue or have their names publically used in the case.¹³⁶ Fortunately, this did not occur.

The participation of these associations in *Chinatown Voter Education Alliance v. Ravitz* and *United States v. Boston* was essential because they gave individuals cover. Voting rights cases are often widely publicized in the media; plaintiff voters often do not want to stand alone. As such, voting rights cases are sometimes brought by organizations and voters working together, but the requirement of standing also sometimes forecloses meritorious claims.

133. See *supra* text accompanying notes 122–125.

134. CVEA Complaint, *supra* note 109, at ¶ 36.

135. See *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (holding that an association has standing to bring suit on behalf of its members when “the interests it seeks to protect are germane to the organization’s purpose”).

136. At one point in the litigation, one of the individual voter plaintiffs had called the AALDEF attorneys and noted that her sister was applying for naturalization. There seems to have been some routine delays, but the voter became anxious. She was fearful that participating in a lawsuit to challenge the New York City Board of Elections would somehow impair or impede her sister’s naturalization. Even when attorneys explained the significant differences between the federal and local government, she was unwilling to believe that different segments of the government “didn’t talk to each other.”

III.

AN UNLIKELY REMEDY: DOES *CITIZENS UNITED* REQUIRE
CONSTITUTIONAL SYMMETRY BETWEEN
THE FIRST AMENDMENT AND ARTICLE III?

As is evident above, constitutional consistency is needed between the First Amendment and Article III with respect to associations. First Amendment rights of association, while theoretically robust, are limited by a narrow understanding of associational standing in Article III. *Citizens United v. FEC* may offer a new way of thinking about associations which may provide a solution to this dilemma. Subpart A provides a brief overview of the treatment of associations in *Citizens United*. Subpart B then makes an argument for greater symmetry between the First Amendment rights and standing limitations of associations.

A. *Citizens United v. FEC*

In *Citizens United*, the Supreme Court struck down the provision of the Bipartisan Campaign Reform Act that prohibited all corporations, both for-profit and not-for-profit, and unions from broadcasting “electioneering communications.”¹³⁷ Such “electioneering communications” were broadcast, cable, or satellite communications that mentioned a candidate within sixty days of a general election or thirty days of a primary.¹³⁸ The Court held that the government may not, under the First Amendment, “suppress political speech on the basis of the speaker’s corporate identity,” and that the provisions of the Bipartisan Campaign Reform Act barring independent corporate expenditures for electioneering communications violated the First Amendment.¹³⁹

In spite of this focus on corporations, *Citizens United* changed a great deal about the law of associations more generally¹⁴⁰ by effectively combining the right of association with the right to free speech in order to reach the result it did in favor of corporations. With respect to free speech, the Supreme Court noted that “[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citi-

137. See *Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010).

138. See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §§ 201, 203, 116 Stat. 81, 88–91 (codified at 2 U.S.C. §§ 434(f)(3)(A)(i), 441b(b)(2)).

139. *Citizens United*, 130 S. Ct. at 896.

140. Frances R. Hill, *Nonparticipatory Association and Compelled Political Speech: Consent as a Constitutional Principle on the Wake of Citizens United*, in MONEY, POLITICS, AND THE CONSTITUTION: BEYOND CITIZENS UNITED 80 (Monica Youn ed., 2011) (discussing how the case empowered organizational managers beyond the will of organizational members).

zens, or associations of citizens, for simply engaging in political speech.”¹⁴¹ Indeed, political speech is “indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.”¹⁴² The Court concluded that speech is an essential mechanism of democracy, for it is a primary means of holding officials accountable to the people.¹⁴³ In *Citizens United*, the Court not only affirmed the associational rights of corporations, but also noted that “the First Amendment protects the right of corporations to petition legislative and administrative bodies,”¹⁴⁴ and in so doing, the Court extended an associational theory that was not grounded in the association clause of the First Amendment, but rather on the free speech clause.¹⁴⁵

Citizens United extended the First Amendment’s reach, but there are limits. The right to petition a court is not unlimited.¹⁴⁶ But with the understanding of the broad speech rights of associations articulated in *Citizens United* in view, it is possible to argue that associations have a valid interest in protecting other of their First Amendment rights—such as the right to petition for redress—and that Article III should not stand in their way.

B. Towards Greater Symmetry

The First Amendment grants political speech and activities that affect the process of self-governance the highest protection.¹⁴⁷ Political speech directed towards electoral and legislative politics is special, and *Citizens United* is consistent with this view. Indeed, the Court held that political speech by associations is “‘indispensable to decisionmaking in a democracy.’”¹⁴⁸ Likewise, petitioning the judiciary for redress, as in voting rights cases, is another form of First Amendment activity that directly affects the lawmaking process.¹⁴⁹ Voting

141. *Citizens United*, 130 S. Ct. at 904.

142. *Id.* (The worth of speech “does not depend upon the identity of its source, whether corporation, association, union, or individual.” (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978))).

143. *Id.* at 898 (citing *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976)).

144. *Id.* at 907 (citing *Bellotti*, 435 U.S. at 792 n.31).

145. *Cf.* Hill, *supra* note 140, at 87.

146. *See* *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011) (“A petition may seek to achieve results that ‘contravene governmental policies or impair the proper performance of governmental functions.’” (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006))).

147. *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

148. *Citizens United*, 130 S. Ct. at 904 (quoting *Bellotti*, 435 U.S. at 777).

149. *See* Coplan, *supra* note 82, at 443 (arguing that the right to petition extends to the judiciary and that petitions, like speech, can affect the process of self-governance).

rights cases are not outcome specific, but address the structure of democracy and so should be afforded greater protection. But, if associations are to fully exercise this right of their own accord, current Article III standing limitations must give way to some degree.

In *Citizens United*, the Court objected to requiring corporations to form intermediaries to engage in political speech during elections. The law challenged in *Citizens United* had alternatives that allowed corporations to form Political Action Committees (PAC) to influence elections.¹⁵⁰ But the Court ruled that this was too “burdensome”¹⁵¹ and that corporations should be allowed to speak directly for themselves, free of any curtailment. Similarly, for voters to vindicate their rights, Article III standing requires a particularized showing of harm to the plaintiff organization or its members. Whereas *Citizens United* held that corporations should be able to speak for themselves in elections, voting rights associations—even if they are not membership organizations per se—should be allowed to litigate without substantial abridgment.

Just as *Citizens United* recognized that associations have strong speech rights under the First Amendment that should not be unduly limited, associations should have similarly strong rights to petition for redress that should not be unduly limited by Article III. Voting rights litigation is one area where the need for this consistency is especially stark. Standing doctrine ought to yield to the right to petition for redress when public rights are implicated. In the case of public rights, litigation provides for a “full airing of competing views[] essential to the judicial review function, and the dangers to the constitutional assignment of functions is at a minimum.”¹⁵² I believe that *Citizens United* compels bringing the First Amendment and Article III into symmetry, and this Part discusses ways in which that symmetry may be realized.

1. *In Search of Proper Limits*

One scholar has written about the interplay between associational rights under the First Amendment and standing doctrine under Article III¹⁵³ and has observed that, generally, the Petition Clause of the First

150. *Citizens United*, 130 S. Ct. at 897.

151. *Id.* (“For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.”).

152. *See* Coplan, *supra* note 82, at 381.

153. *Id.* at 442.

Amendment does affect justiciability under Article III.¹⁵⁴ Professor Karl S. Coplan has argued for an expanded notion of organizational standing based on the values implicit in the First Amendment rights to assembly and to petition for redress of grievances.¹⁵⁵ He observed that the Court's standing doctrine is not amenable to purely ideological causes raised by civil rights organizations.¹⁵⁶ But, recognizing that Article III serves competing "practicalities and prudential considerations,"¹⁵⁷ namely federalism and keeping the judiciary from being overwhelmed, Professor Coplan has argued that "[a]s long as the justiciability doctrine balances competing interests, it ought to consider the constitutional interest to petition all branches for redress of grievances."¹⁵⁸

On the other hand, another scholar believes that the right of court access under the Petition Clause means only that an individual or group of persons has a right to file meritorious claims that are within the court's Article III jurisdiction.¹⁵⁹ Professor Carol Rice Andrews argues for a reading of the Petition Clause that imposes "jurisdictional" limits on the ability to petition, pursuant to Article III's "cases" and "controversies" requirement.¹⁶⁰ Nevertheless, courts are where injustices are corrected and public rights vindicated. Courts achieve the broader goals of the First Amendment, such as participatory government, "by allowing people in civil suits to inform the government of their needs and to request changes in the law."¹⁶¹ Public interest civil suits may at times represent the only practical means for people to achieve their civic objectives.¹⁶²

Indeed, organizational plaintiffs "who invoke the judicial process to establish and enforce public rights for the benefit of many people, [and] who are not primarily motivated by individual gain," should be

154. *Id.*

155. *Id.* at 381.

156. *Id.* at 383.

157. *Id.* at 442 (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 406 n.11 (1980)).

158. *Id. But see id.* at 443 ("This is not to say that the right to petition trumps justiciability concerns in all cases. The Supreme Court has rejected the idea of an 'absolute' right to petition just as it has rejected the notion of absolute First Amendment freedom of speech rights." (citing *McDonald v. Smith*, 472 U.S. 479 (1985))).

159. *A Right of Access*, *supra* note 60, at 625.

160. *Id.* at 666 ("Thus, a fair reading of the Petition Clause, when viewed under the entire constitutional scheme, is that it does not include the right to petition federal courts on matters outside of their Article III jurisdiction.").

161. *Motive Restrictions*, *supra* note 60, at 674.

162. *Id.* (citing *NAACP v. Button*, 371 U.S. 415, 430 (1963) ("[L]itigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.")).

encouraged.¹⁶³ They should enjoy more freedom in vindicating the rights of those who are fearful of asserting their own individual rights.¹⁶⁴ In voting rights litigation, associations are needed because they provide an intermediary through which individuals can vindicate their claims. This is especially important for groups that are occasionally targets of discrimination or repression.¹⁶⁵ Among Asian Americans, for example, the ability of associations to vindicate their rights is especially important because individual voters are sometimes too fearful to be plaintiffs in a lawsuit.¹⁶⁶ The association allows individuals to preserve their individual anonymity.¹⁶⁷

As discussed above, the logic of *Citizens United* affirms that associations have *their own* First Amendment rights. Just as corporations are allowed to vindicate their own speech rights, voting rights associations should be allowed to press their own right to petition for redress, particularly given that voting rights litigation generally seeks to vindicate public rights intimately connected to representational democracy. As Professor Coplan has argued, the interest in the constitutional right to petition for redress should factor into justiciability determinations.¹⁶⁸ Where, as here, the interest in petitioning for redress is high, Article III should yield.

But what, then, should be the proper limit on the right of associations to petition the government for redress? The limit should be based on guarding against baseless litigation.¹⁶⁹ As Professor Carol Rice Andrews has ingeniously argued, Rule 11 of the Federal Rules of Civil Procedure provides just such a limit. Rule 11 is a precondition to filing suit and she argues that it provides this necessary safeguard.¹⁷⁰ "Under Rule 11, a plaintiff must certify, before he files his complaint, that he has a proper motive and that his paper have legal and factual merit."¹⁷¹ Moreover, "the court may later sanction the plaintiff and

163. Coplan, *supra* note 82, at 379–81 (citing Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1033 (1968)).

164. See generally Coplan, *supra* note 82.

165. See *NAACP v. Button*, 371 U.S. 415, 431 (1963) ("The NAACP . . . while serving to vindicate the legal rights of members . . . makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society.").

166. See *supra* notes 120–25 and accompanying text.

167. See *supra* text accompanying note 123.

168. See *supra* text accompanying notes 153–57.

169. "Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983).

170. *Motive Restrictions*, *supra* note 60, at 704–05 (citing FED. R. CIV. P. 11(b)).

171. *Id.* at 704. The certification provisions of paragraph (b) in Rule 11 are:

lawyer if their certifications prove untrue.”¹⁷² Rule 11 should be the standard to limit access to the courts for cases involving public rights.

2. *Recognizing a Trend*

Even before *Citizens United*, lower courts were moving towards allowing organizations to litigate for the rights of voters.¹⁷³ Modern voting rights litigation uses both individual voters and organizations to challenge voting requirements, practices, or procedures that harm the ability of racial and ethnic minority voters to participate in the electoral franchise in violation of the Voting Rights Act, or that will place an undue burden on citizens to exercise their fundamental right to vote in violation of the Fourteenth Amendment. Voters protect their individual right to vote, while organizations have an institutional interest in their ability to continue to register and educate voters, and to advocate for greater participation in the political process. The organization and individuals overlap when the organizations represent members who are voters themselves. As is demonstrated below, a nationwide shift in favor of granting broader associational standing would only be following the example of courts in Florida,¹⁷⁴ Georgia,¹⁷⁵ and California¹⁷⁶ which have already favorably considered the standing of organizations in voting rights cases.

(b) *Representations to Court.* By presenting to the court a pleading, written motion, or other paper—whether by saying, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or to needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

FED. R. CIV. P. 11(b).

172. *Motive Restrictions*, *supra* note 60, at 704–05.

173. *Cf. League of Women Voters of Ind. v. Rokita*, 929 N.E.2d 758 (Ind. 2010) (considering a challenge to Indiana’s Voter ID Law in which the League of Women Voters, a membership organization, was the only plaintiff).

174. *Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008).

175. *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

176. *Olagues v. Russionello*, 797 F.2d 1511 (9th Cir. 1986).

a. Common Cause/Georgia v. Billups

In *Common Cause/Georgia v. Billups*,¹⁷⁷ several civic and minority advocacy organizations and one registered individual voter sued state officials challenging Georgia's new photo identification (ID) requirement.¹⁷⁸ The plaintiffs argued that the new law would discriminate against and disenfranchise minority voters in violation of the Georgia State Constitution, the Fourteenth and Twenty-Fourth Amendments to the U.S. Constitution, the Civil Rights Act of 1964, and Section 2 of the Voting Rights Act.¹⁷⁹

The plaintiffs included the following organizations: Common Cause/Georgia, the League of Women Voters of Georgia, the NAACP Georgia State Conference of Branches, the Georgia Association of Black Elected Officials, the Georgia Legislative Black Caucus, and other organizations.¹⁸⁰ One individual plaintiff was an African American registered voter.¹⁸¹ The voter did not possess a Georgia driver's license, passport, or other form of government-issued photo ID, and could not readily obtain a photo ID card from the State Department of Driver Services.¹⁸²

In the suit, plaintiffs submitted a number of declarations and affidavits from voters who were injured by the new voting requirement.¹⁸³ Most of the voters indicated that they could not afford to pay the fee to get photo ID.¹⁸⁴ Most did not have a driver's license, passport, tribal photo ID, or other form of government-issued ID because they had no need for one prior to the new law.¹⁸⁵ Other voters reported that they faced obstacles to obtaining necessary credentials, such as birth certificates or valid driver's licenses from other states, required for issuing a photo ID card.¹⁸⁶ The plaintiffs sought a preliminary injunction against the new voting requirement;¹⁸⁷ they did not seek any monetary damages.

The court considered whether the organizational plaintiffs had standing to pursue the action for injunctive relief.¹⁸⁸ In accord with the

177. 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

178. *Billups*, 406 F. Supp. 2d at 1328–30.

179. *Id.* at 1329.

180. *Id.* at 1329–30.

181. *Id.* at 1330.

182. *Id.*

183. *Id.* at 1340.

184. *Id.*

185. *Id.* at 1341.

186. *Id.* at 1341–42.

187. *Id.* at 1329.

188. *Id.* at 1355.

arguments of the plaintiffs, the court found that because the organizations had members who would have standing to sue in their own right, and because the interests which each of the organizations sought to protect were germane to their organizational purposes, neither the claim nor the relief sought required participation by individual members.¹⁸⁹ The court concluded that the plaintiffs satisfied the organizational standing requirements for their motion for a preliminary injunction.¹⁹⁰

*b. Florida State Conference of NAACP v. Browning*¹⁹¹

In another voting rights case in Florida, the Court of Appeals for the Eleventh Circuit held that organizations representing the interests of racial and ethnic minority communities had standing to challenge a new Florida voter registration statute, enacted pursuant to the Help America Vote Act.¹⁹²

The Florida State Conference of the NAACP, the Southwest Voter Registration Education Project (SVREP), and the Haitian-American Grassroots Coalition (HAGC) challenged Florida's new law requiring voters to disclose their driver's license numbers or the last four digits of their Social Security numbers on their voter registration applications.¹⁹³ The law further required that the numbers provided match with the numbers contained in the state driver's license database or the Social Security Administration's database.¹⁹⁴ The plaintiffs sought a preliminary injunction against the law under the Fourteenth Amendment to the U.S. Constitution, Section 2 of the Voting Rights Act, and other federal statutes.¹⁹⁵ The Eleventh Circuit held that the organizations had standing to sue on behalf of their members *and* on their own behalf.¹⁹⁶

189. *Id.* at 1356.

190. *Id.*

191. 522 F.3d 1153 (11th Cir. 2008).

192. *Browning*, 522 F.3d at 1155 ("We affirm the district court's decision on plaintiffs' standing to prosecute this action . . ."). The challenged statute, FLA. STAT. § 97.053(6), was enacted as part of Florida's implementation of the Help America Vote Act of 2002, 42 U.S.C. §§ 15301–15545 (2012), which called for states to, among other things, create unique identification numbers for registered voters. The Florida statute at issue imposed a "matching ID" requirement for new voter registrations. *See Browning*, 522 F.3d at 1156. If the identification number provided by the registrant did not match the identification number provided by Department of Highway Safety and Motor Vehicles or the Social Security Administration, the voter registration was not completed. *Id.* at 1156–57.

193. *Id.* at 1153–55.

194. *Id.*

195. *Id.* at 1158.

196. *Id.*

All three plaintiff organizations worked to increase voter registration and participation among racial and ethnic minorities in Florida. The Florida NAACP and the HAGC are both umbrella organizations with local chapters throughout the state, and have approximately 13,000 and 700 members statewide, respectively; SVREP is not a membership organization and has no members in Florida.¹⁹⁷ Though SVREP could have been dismissed, because the other organizations had standing, the case proceeded.

The lower court held, and the court of appeals affirmed, that the plaintiff organizations had Article III standing in two different capacities.¹⁹⁸ First, plaintiffs had standing to sue on their own behalf as organizations whose missions would be impeded and whose resources would be diverted as a direct result of the enforcement of Florida's new voter registration requirement.¹⁹⁹ Second, the Florida NAACP and the HAGC also had standing as representatives of their members who were otherwise eligible voters but nonetheless faced an imminent threat of being disenfranchised by enforcement of the new requirements.²⁰⁰ However, SVREP did not have associational standing because it was not a membership organization.²⁰¹

c. *Olagues v. Russioniello*²⁰²

In California, the Court of Appeals for the Ninth Circuit held that organizations representing Asian American and Latino voters had standing to challenge the United States Attorney's investigation of foreign-born voters who requested bilingual ballots.²⁰³

Before the 1982 California primary election, the U.S. Attorney for the Northern District of California commenced an investigation of "recently registered, foreign-born voters who requested bilingual ballots so that the Immigration and Naturalization Service (INS) could verify their citizenship."²⁰⁴ Translated voting materials were available pursuant to the Voting Rights Act.²⁰⁵ One voter, along with the His-

197. *Id.*

198. *Id.*

199. *Id.* (noting that the plaintiff organizations work to increase voter registration and participation among members of racial and ethnic minority communities in Florida).

200. *Id.* (noting that the Florida NAACP and the HAGC are both umbrella organizations with local chapters throughout the state and have approximately 13,000 and 700 members statewide, respectively).

201. *Id.* at 1158 n.6 (noting that SVREP has no members in Florida).

202. 797 F.2d 1511 (9th Cir. 1986).

203. *Id.* at 1519.

204. *Id.* at 1513-14.

205. *Id.* (citing 42 U.S.C. § 1973aa-1a).

panic Coalition for Human Rights, the Chinese for Affirmative Action, and the San Francisco Latino Voter Registration Education Project filed a suit alleging violations of the Voting Rights Act, and the First, Fifth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution.²⁰⁶

The court found that the organizations raised sufficient claims of potential direct injury to both themselves and their members to find that they had standing,²⁰⁷ noting that “the organizations’ voter education and registration efforts are unquestionably protected from unwarranted interference by prosecutorial officials.”²⁰⁸ The court further noted that “whether the investigation actually involved any unwarranted intrusions into their associational activities affects the merits of their claim, not their standing.”²⁰⁹ “Moreover, . . . members who participated in the Organizations’ counseling activities and voter registration drives [were considered] potential targets of future prosecutions.”²¹⁰

Second, the court found that the interests the organizations sought to protect were germane to their purposes, since the organizations all conducted voter registration and voter education activities.²¹¹ The activities were directly related to the individual members’ interests in registering voters free from unwarranted governmental intrusions. Third, the injunctive and declaratory relief the organizations requested did “not require the participation of individual members in the suit.”²¹² The court concluded that the organizations had standing to sue for equitable relief.²¹³

Olagues was similar to *NAACP v. Alabama*, where the compelled disclosure would have exposed members to harassment and hostility and the organization would suffer a decline in membership.²¹⁴ In *Olagues*, the voter registration investigation dissuaded foreign-born citizens from registering to vote and from requesting bilingual voting materials.²¹⁵ The voter registration fraud investigation also directly interfered with the organization’s constitutional rights of association and

206. *Id.*

207. *Id.* at 1519.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* (citing *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)).

212. *Id.*

213. *Id.*

214. *Cf.* *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462–63 (1958).

215. *Olagues*, 797 F.2d at 1522.

political expression under the First Amendment.²¹⁶ Member “participation dropped off because the investigation: (1) discredited the Organizations’ activities in their communities; (2) caused members to lose confidence in the democratic process; and (3) targeted members for a prosecutorial investigation.”²¹⁷

In all of these cases, courts have allowed organizational plaintiffs to challenge purportedly illegal conduct abridging the right to vote. The organizations brought expertise to the suit and their participation was appropriate.

3. *A Final Policy Argument*

A final argument for supporting the right of groups to access the courts to vindicate public rights is that litigation imposes a duty to respond.²¹⁸ As a general rule, complaints to the government do not necessarily require a response. The Supreme Court has stated that “[n]othing in the First Amendment or in this Court’s case law interpreting it suggest that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals’ communications on public issues.”²¹⁹ But “a lawsuit demands a response.”²²⁰

A number of scholars have argued that the government does have a duty to respond to complaints.²²¹ They say that a failure to respond to a petition is itself an abridgment of the right to petition.²²² The Court, however, has not subscribed to this view. Campaigns to the political branches have often been ignored.²²³ This was the problem in

216. *Id.* at 1523.

217. *Id.* In response to these allegations, “[t]he government did not refute any of these assertions.” *Id.*

218. *Motive Restrictions*, *supra* note 60, at 681.

219. *Id.* (alteration in original) (quoting *Minn. State Bd. of Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984)).

220. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2496 (2011).

221. See *A Right of Access*, *supra* note 60, at 636 (citing Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 *YALE L.J.* 142, 142–43 (1986)).

222. For a discussion of this argument, see *id.* (citing Edmund G. Brown, *The Right to Petition: Political or Legal Freedom*, 8 *UCLA L. REV.* 729, 732–33 (1961); David C. Frederick, *John Quincy Adams, Slavery and the Disappearance of the Right of Petition*, 9 *LAW & HIST. REV.* 113, 114–15 (1991); Higginson, *supra* note 221, at 145–49, 155–67 (1986)).

223. “The Declaration of Independence of 1776 arose in the same tradition. After listing other specific grievances and wrongs, it complained, ‘In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.’” *Guarnieri*, 131 S. Ct. at 2499 (citing *THE DECLARATION OF INDEPENDENCE* para. 30 (1776)).

the voting rights cases on behalf of Asian Americans in Boston and New York.²²⁴

In New York, the organizational plaintiffs, voters, and other community groups, had complained to the Board of Election defendants about the failure to provide effective language assistance to Asian American voters, as required by law. Written complaints were given to defendants after almost every major election since 1998. These complaints had, for the most part, gone unanswered.²²⁵ The plaintiff experienced many years of frustration in seeking to remedy defendants' failure to comply with the law.

Likewise, in Boston, the CPA sent letters to the city detailing the voting problems during the primary and general elections of 2003 and 2004. Despite these multiple communications, the city did not remedy the deficiencies in the voting process for Chinese Americans with limited English proficiency.²²⁶ Their complaints went unanswered as well, and the organizations faced a history of frustration in rectifying these barriers and in requesting voluntary language assistance to vote.²²⁷

But when the complaints were finally made to the court, an entirely different situation arose. In Boston, for example, the CPA noted that the lawsuit was quite helpful.²²⁸ The government has a duty to respond to judicial petitions,²²⁹ and the judiciary, unlike the legislative branch of government, has historically given petitioners some form of response.²³⁰ Admittedly, "the source of the duty to respond is due process, not the Petition Clause."²³¹ Due process requires the government to give civil complaints fair and reasonable consideration once they

224. *See supra* text accompanying notes 116, 129.

225. CVEA Complaint, *supra* note 109, at ¶ 43.

226. *See* Complaint-In-Intervention, *supra* note 126, at ¶ 20 (indicating that the deficiencies in the voting process persisted following letters sent by the Chinese Progressive Association).

227. *Id.* at ¶ 20.

228. "Boston's efforts to comply with the federal laws have been uneven. I have written letters to the City of Boston with voter complaints. The City had refused to acknowledge the most serious of these complaints and until earlier this year had refused to meet with me about remedies for these complaints. I saw no significant progress on remedies that I had proposed since 2003 until the Department of Justice filed suit this year." Declaration of Lydia Lowe at ¶ 12, *United States v. City of Boston*, No. 05-11598 WGY (D. Mass. Sept. 9, 2005).

229. *A Right of Access*, *supra* note 60, at 645.

230. *Id.*

231. *Id.*

are filed.²³² The Petition Clause gets the organization into court; the Due Process Clause gets its claim heard.²³³

The Supreme Court has noted the importance of such responses in group litigation; petitions to the courts and similar bodies can likewise address matters of great public import.

In the context of the civil rights movement, litigation provided a means for the distinctive contribution of a minority group to the ideas and beliefs of our society. “Individuals may also engag[e] in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public. Litigation on matters of public concern may facilitate the informed public participation that is a cornerstone of democratic society. It also allows individuals to pursue desired ends by direct appeal to government officials charged with applying the law.”²³⁴

Due process creates another bridge between the right to petition courts and Article III standing. “The right to ask for relief from courts (as opposed to the political branches) is especially significant because it triggers independent obligations of the government under the Due Process Clauses.”²³⁵ Associations are the ones who invoke the due process right for individuals who are harmed.

CONCLUSION

Over the past several years there has been a significant increase in scholarship on the less-commonly judicially invoked rights of the First Amendment, notably on the rights of association, assembly, and petition.²³⁶ Political scientists and philosophers are “discussing the role that civic associations play in American political and social life,

232. *Id.* at 645 (noting that a cause of action is a “property” interest subject to due process protection once suit is filed (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807–08 (1985))).

233. There is a debate as to whether the right to petition courts extends beyond the mere filing of the complaint. Some courts have applied the right to various stages of litigation, such as motions and appeals, without first considering whether the right extends beyond initial access. *See id.* at 594 & n.128 (collecting authority).

234. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2500 (2011) (internal quotation marks and citations omitted).

235. *A Right of Access*, *supra* note 60, at 645.

236. *See* Bhagwat, *supra* note 31, at 980 & n.3 (citing FREEDOM OF ASSOCIATION (Amy Gutmann ed., 1998); MARK E. WARREN, DEMOCRACY AND ASSOCIATION (2001); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009); John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565 (2010); John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010); Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639 (2002)); *see also id.* at 990 (citing NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA (1998)).

both historically and in modern America.”²³⁷ Legal theory has yet to catch up. Our “understanding of the role of these associations in our constitutional democracy has historically been largely unexamined and under theorized.”²³⁸

The right to act through an association to achieve political goals is a core liberty.²³⁹ Petitioning requires association.²⁴⁰ “Effective petitioning[] is almost inevitably a group activity.”²⁴¹ “In a large republic, it is unlikely that individual citizens can make themselves heard by those in power”²⁴² It is often only in litigation that a small minority can effectively petition the government for redress.²⁴³ Historical civil rights litigation and modern litigation for public rights have required associations.

Over the years, there has been a narrowing of the types of organizations that have the standing to sue, limiting them to membership organizations. Today, advocacy organizations are more dynamic and do not necessarily follow a traditional membership structure. Public interest lawsuits that aim to vindicate public rights still require the participation of individuals, but these individuals are sometimes too fearful to be named as plaintiffs in a lawsuit that challenges a government act. The organizations give the individuals cover and a feeling of security. While many organizations can overcome the legal test for standing, it is burdensome and should not be required in light of the logic of *Citizens United*—at least not when rights that affect democracy and government are at issue.

Strengthening the ability of public interest organizations to vindicate voting rights also balances the grant of strong rights to corporations in *Citizens United*. The Court’s conclusion that all corporations should be viewed uniformly as “associations of citizens,” and that all

237. *Id.* at 990.

238. Mark Ladov, Counsel, Democracy Program, Brennan Ctr. for Justice, Remarks at the Brennan Center for Justice at New York University School of Law Accountability After *Citizens United* Symposium: The First Amendment Rights of Associations and Individuals (Apr. 29, 2011) (transcript available at http://www.brennancenter.org/content/pages/accountability_after_citizens_united_transcript_section_vi).

239. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (citing Staub v. City of Baxley, 355 U.S. 313, 321 (1958); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Palko v. Connecticut, 302 U.S. 319, 324 (1937); Gitlow v. New York, 268 U.S. 652, 666 (1925)).

240. Bhagwat, *supra* note 31, at 997.

241. *Id.*

242. *Id.*

243. *Id.*

such associations are entitled to the same First Amendment rights, is seen as unbalanced by some.²⁴⁴

It could be argued, as Professor Coplan has noted, that the associational and structural role that public interest organizations play in the courts balances the opposite pressures of industry lobbying groups in the legislature, and now in elections under *Citizens United*.²⁴⁵ Industry interest groups play a “lopsided role” “in all three branches of government as compared to public interest and consumer groups.”²⁴⁶ The Court should more significantly recognize the ideological standing of public interest groups.²⁴⁷

Even before *Citizens United*,

the Supreme Court issued two decisions that greatly expanded the role and influence of business organizations in politics. In *Buckley v. Valeo*, the Court struck down portions of the Federal Election Campaign Act of 1971 that limited the total amount of expenditures permissible in a federal election campaign, holding that the expenditure by political campaigns was a form of political speech protected by the First Amendment. In *First National Bank of Boston v. Bellotti*, the Court struck down a Massachusetts statute that prohibited business corporations from making expenditures to support or oppose ballot initiatives unrelated to their business interests.²⁴⁸

Citizens United was the apex.

Professor Coplan observed that America’s “republican form of self-government has evolved into the twenty-first century with well-financed narrow” business interests “that exert a strong influence in the legislature through campaign contributions that buy access, and lobbying efforts that convert this access into action.”²⁴⁹ *Citizens United* affirmed and expanded this role. “Broad[er] public interests and the interests of the economically disadvantaged are becoming less influential in the legislature.”²⁵⁰ “Public interest and civil rights groups have had more success asserting their interests in the judicial branch of government.”²⁵¹ Therefore, increased participation of these public interest associations would be better suited to, and situated in, the courts.

244. Ladov, *supra* note 238.

245. Coplan, *supra* note 82, at 383.

246. *Id.* at 383–84.

247. *Id.* at 383.

248. *Id.* at 388–89.

249. *See* Coplan, *supra* note 82, at 397 (internal citations omitted).

250. *Id.*

251. *Id.*

Unfortunately, the standing doctrine limits the kinds of organizations that can litigate in court.²⁵² This limit thereby also limits the substantive claims that can be brought. In light of *Citizens United*, Article III should yield to greater associational rights. *Citizens United* is arguably overly broad because it protects the speech and right of association for all corporations, but nevertheless, that over-breadth yields strong associational rights which should be consistently applied across the Constitution, encompassing Article III.²⁵³

In order “to limit the breadth of issues that must be dealt with in particular litigation,” the Supreme Court “has generally insisted that parties rely only on rights that are personal to themselves.”²⁵⁴ But the Court will adjudicate “constitutional rights of persons who are not immediately before the Court” when they can be effectively vindicated.²⁵⁵ Public interest organizations, especially in the voting rights context, are always “appropriate representative[s] before the Court,”²⁵⁶ and they should enjoy a relaxed ability to meet the requirement for standing. I believe that the Court’s holding in *Citizens United* compels this strengthening of associational rights.

252. *Id.*

253. For a discussion of how *Citizens United* is right on the facts but wrong on the law with regard to associations, see Bhagwat, *supra* note 31, at 1020–26.

254. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) (citing *Tileston v. Ullman*, 318 U.S. 44; *ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT* § 298 (1951 ed.)).

255. *Patterson*, 357 U.S. at 459 (citing *Barrows v. Jackson*, 346 U.S. 249, 255–59; *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 183–87 (1951) (Jackson, J., concurring)).

256. *Id.*

