Methodological Appendix to

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A. Selecting Agencies and Industries

The selection of agencies and industries for inclusion in the study is explained in the Article's Introduction.

B. Identifying Suits Against Agencies

The threshold question was what repository of lawsuit information to use. Agency-specific repositories were not suitable. A few agencies publish lists of suits brought against them, including the Federal Reserve, FERC, FCC, NRC, and DOT. But most of these lists do not purport to be comprehensive and in some instances clearly are not.[1] Many agencies publish no lists at all.[2]

The comprehensive repository of federal court filings is PACER, but it lacks the search functionality necessary for building a dataset. Fortunately the commercial research services in the last several years have been scraping PACER and building their own docket databases that are far more usable. The trailblazer has been Bloomberg Law, which launched its dockets database in 2012; Bloomberg now covers all U.S. district court dockets back to 1989 and nearly

[1] E.g., https://www.transportation.gov/administrations/office-general-counsel/litigation-news (not stating how suits are selected for inclusion); https://www.fcc.gov/proceedings-actions/fcc-and-courts (focusing only on opinions and briefs, not stating how they are selected); https://www.ferc.gov/court-cases (focusing only on opinions and briefs, not stating how they are selected). The only agency whose published list I have found that purports to be comprehensive is that of the Federal Reserve Board of Governors (not covering the Reserve Banks), which sees little litigation. https://www.federalreserve.gov/publications/2021-ar-litigation.htm.

[2] For instance, officials at the EPA and the SEC told me those agencies do not.

all U.S. courts of appeals dockets for the same period.[3] Recent scholarship on legal database coverage refers to the Bloomberg dockets database as "equivalent to PACER but more user-friendly."[4] Although Westlaw has its own large database of dockets, Bloomberg has the advantage that, when you conduct a search for lawsuits and download the results in a spreadsheet, the spreadsheet includes, for each row/suit, a distinct cell listing all parties to the suit (and for district courts, two cells respectively listing all plaintiffs and all defendants). I therefore opted to use Bloomberg for this study.[5]

Admittedly, many of the dockets appearing in Bloomberg are incomplete and are updated only if a Bloomberg user so requests. When a law school user requests an update, it results in a debit from the limited budget in the law school's subscription contract, meaning that updating for this study would be prohibitively costly if undertaken en masse. That said, Bloomberg generally *has* all the dockets, even if many are incomplete, meaning it is comprehensive as to whether and when agencies were sued to begin with, which is the focus of my study.

There was also the question of what time period to cover. I began with a *core study period* consisting of the second Obama administration and first Trump administration, that is, from Jan. 20, 2013 through Jan. 20, 2021.[6] I began with these two administrations because (a) they were the most recent completed administrations when I began my research and (b) they were of different parties. As noted at various points throughout the Article, searches for certain agencies were extended forward up to Jan. 20, 2024, or backward as far back as 1989.[7]

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[3] Bloomberg's "Coverage Dates" for all U.S. district courts are listed as going back to 1989; those for all U.S. courts of appeals are listed as going back to 1989 or earlier, except for the First Circuit (to 1990), Second Circuit (to 2010), Eleventh Circuit (to 1999), and Federal Circuit (to 1996). See https://www.bloomberglaw.com/dockets/coverage. But in fact the court-of-appeals coverage is even greater than this, particularly as relevant to this study. Of the four circuits just listed, the one I suspect is most likely to see industry challenges to federal agency action is the Second, and a search for Second Circuit dockets *prior to* the earliest year listed for coverage (2010) yields at least 2,600 dockets in every single year from 1991 through 2009, with some years exceeding 6,000. See, for example, this search for the year 1991:
https://www.bloomberglaw.com/product/blaw/search/results/8d4be1b75502fc4c9060c7a6ecd10b9c.

[4] Merritt E. McAlister, *Missing Decisions*, 169 U. Pa. L. Rev. 1101, 1142 (2021). For other scholarship relying on the database, see, e.g., Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. Chi. L. Rev. 2089, 2156-57 (2020); James E. Pfander, Alexander A. Reinhert & Joanna C. Schwartz, *They Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 Stan. L. Rev. 561, 625 (2020).

[5] The SCALES Project at Northwestern University aspires to make all federal court docket materials freely available, holding great promise for research; but during the time I conducted my study, it covered only one year's worth of records. https://scholarlycommons.law.northwestern.edu/nulr/vol119/iss1/3/

[6] In Bloomberg searches, for "Apply Date To," I clicked "Dockets" rather than "Entries." The "Entries" button is not usable for this study, because it is available only for the district courts (not courts of appeals) and will miss entries in dockets that by happenstance have not been updated. Also, searching for suits temporally by "Dockets" (i.e., by date when the complaint or PFR was filed) has the advantage of making it easy to use a new search to expand the study to a new time period without the problem of complicated overlaps with the old search.

[7] *For convenience of the reader, I reproduce here a footnote from the end of the Article's Introduction that discusses those of my searches that were outside the core study period of 2013-2021:* For the industries that have rarely sued (that is, the six that have ended up in Part I), I began by finding what seemed to be sparse litigation in 2013-2021 and then investigated whether that sparseness was longer-lasting than those eight years. To do that, I extended the exhaustive Bloomberg search forward in time to Jan. 20, 2024, for all six. As to the pre-2013 years, I took different approaches with different agencies, depending on research costs. For NHTSA, there are unusually detailed published accounts by insiders and scholars confirming the absence of suits since the 1980s, so I report that. For CPSC and NRC, I extended the exhaustive Bloomberg search back to the start of Bloomberg's coverage in 1989; this was workable because each of those agencies is free-standing and not part of a larger department. For FSIS, FDA, and FAA, extending the Bloomberg search backward before 2013 was far more challenging, because each of those agencies is a component of a larger department whose name (or the title or personal name of the department's

Once the database and time period are selected, the next question is how to identify all suits against a given federal agency. The first thing to note is that suits against agencies can take one of two forms: civil actions originating in U.S. district courts and petitions for review (PFRs) originating in U.S. courts of appeals. (I use general terms like *suits*, *lawsuits*, *challenges*, or *cases* to encompass both civil actions and PFRs.)

In searching for both types of suits, we run up against the problem that neither PACER nor the commercial databases that draw from it offer any convenient way to identify suits against federal agencies as a category, nor suits against a particular agency as a category. To be sure, every civil action in district court is assigned a Nature of Suit (NOS) code, chosen by the plaintiff's attorney from a list. But these codes are generally not assigned to PFRs in the courts of appeals. And even in the district courts, the NOS codes are mostly not reliable for purposes of this study. For each civil action, plaintiff's counsel must choose one and only one NOS code, which means that, for a suit that contains multiple causes of action, some causes of action may not be reflected in the chosen code at all.[8] And even if there were an NOS code for every cause of action, the codes would still be problematic, because they do not map onto federal-agency defendants in any exact way. There is a code "899: Administrative Procedure Act/Review or Appeal of Agency Decision," but it is non-specific as to which agency is being sued. And plaintiffs suing a federal agency do not have to use code 899. Commonly they instead use "890: Other Statutory Actions," a catch-all that covers many suits that are against federal agencies and many that are not. Or they can use a code pegged to the substantive area of law in which the challenged agency action falls, which has the same problem of covering both suits that are against agencies and those that are not; one could give numerous examples, such as "891: Agricultural Acts," or "893: Environmental Matters." Because of these problems, I have made

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head) may be the only defendant or respondent named in a suit that is really against the component. A Bloomberg search encompassing the department will produce numerous suits, some against the department's component of interest and many other suits against the department's other components. Discerning which are which requires reading underlying filings, which is costly, and especially so if suits against the other components are numerous and/or if the search goes into the pre-2010 period, when underlying filings are often missing from the database. Therefore I extended the exhaustive Bloomberg search backward in time to 2009 for FSIS (sifting through all suits against its parent USDA) and for FAA (sifting through all suits against its parent DOT), but not for FDA, since the suits against its parent (HHS) are so numerous as to make the cost prohibitive. That said, scholarship by FDA insiders indicates that one major type of agency action (new-drug approval denials) has not been challenged since 1979, so I report that fact, plus a targeted Bloomberg search for suits by the main drugmaker trade associations back to 1989. As for FAA, I extended the Bloomberg search from 2009 back to 1989 using narrowed search terms (for FAA only, not DOT), and I did the same for FSIS (focusing on FSIS only, not USDA), though for FSIS I went back only to 1994, which is when modern (microbe-focused) meat regulation began. These more targeted approaches for FAA and FSIS can miss suits, though other sources indicate they are likely very few:

- FSIS was the subject of a 2005 law review article by leading industry attorneys documenting the (very few) suits against the agency. Dennis R. Johnson & Jolyda O. Swaim, *The Food Safety and Inspection Service's Lack of Statutory Authority to Suspend Inspection for Failure to Comply with HACCP Regulations*, 1 J. Food Law & Policy 337 (2005).
- For FAA, I was able to conduct a partial check of my component-specific Bloomberg results against a list of one major subset of judicial challenges to FAA that the agency itself happens to publish on its website, and it turned up only one missed suit (not a significant one) in an 18-year period. [See the Article, Section I.D, paragraph 7.]

[8] Christina L. Boyd & David A. Hoffman, *The Use and Reliability of Federal Nature of Suit Codes*, 2017 Mich. St. L. Rev. 997, 1006.

use of NOS codes only on a limited and selective basis,[9] not as a primary method of identifying suits against agencies.[10]

My primary method for identifying suits against a federal agency has been to conduct party searches in Bloomberg using long disjunctive strings of terms that I think will capture virtually all such suits. For each agency studied, I devise a string and use it to conduct two searches: one of the U.S. district courts, entering the string in the "Parties" field under "Defendant," and another of the U.S. courts of appeals, entering the string in the "Parties" field under "Respondent" (since an agency challenged in a PFR is designated "Respondent").[11]

In devising the string for an agency, the trouble is that the names of the parties to the suit are decided by how the plaintiff's counsel chooses to caption the complaint (or how petitioner's counsel chooses to caption the PFR), and these counsel have many different options for how to identify the defendant or respondent.[12] In a PFR, the petitioner is supposed to "name the agency as a respondent,"[13] but in a district court civil action, one can instead name the head of the agency (who is officially responsible for the challenged action), or simply the "United States." Even assuming the agency itself is named, its name can often be written or abbreviated in different ways. And the agency head can be identified by title or simply by name, and both the title and the name might be written or abbreviated in various ways. To complicate matters further, a challenger might name either a parent agency (such the Department of Health and Human Services) or a component thereof that is responsible for the challenged action (such as HHS's Food and Drug Administration), and the dimensions of variation then apply to both parent and component. While the parent-component distinction was not an issue for agencies that do not have components that get sued independently (CPSC, NRC, and EPA), it was an issue for all the other agencies in the study: FSIS is a component of USDA, FDA and CMS are components of HHS; NHTSA, FAA, and FMCSA are components of DOT; and MSHA and OSHA are components of DOL. For these agencies, I conducted a search that included (1) a complete complement of terms for the parent department and (2) complete complements of terms for *at least* all the components of the parent that ended up in the study. For some of the agencies, some searches included not only the terms for the parent and the component(s) that ended up in the study *but also* other components of the parent. These were included for searches that occurred relatively early in my work, before I had settled on the exact selection of agencies for the Article.[14] This inclusion for certain parents of components *not* in the study does not, I think,

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[9] See *infra* text and accompanying note 19.

[10] Data published by the Administrative Office of the U.S. Courts relies substantially on NOS codes and therefore has likewise not been used in this study.

[11] Searches for "Respondent" in the U.S. courts of appeals may also yield suits in which the agency is the target of a petition for a certain writ, such as mandamus (which is rare, but helpful for this study because it is a kind of challenge to the agency) or habeas corpus (which is unusual for agency-name targets in this study, though common when the target is "United States"—a point to which I return in Section C *infra*). Note also: A Bloomberg dockets search of the U.S. courts of appeals for "Defendant" will yield results, but these are all defendant-appellants or defendant-appellees in *appeals* from judgments of district courts. Appeals are not part of this study; the only cases I seek in the courts of appeals are PFRs.

[12] Bloomberg has a "Company Search" feature that allows users to search not only for private firms but also federal agencies. But the feature only picks up instances where the agency is sued by name or when the head official is sued with their title appearing in the main heading; the result is not picked up if the official's title is only in the subheading, and unfortunately it often only appears there. So a company search would be very under-inclusive.

[13] Federal Rule of Appellate Procedure 15(a)(2)(B).

[14] In the early stages of my work, searches for a parent department were highly inclusive, extending to all components that had "promulgated a rule deemed significant under Executive Order 12,866 in the last 15 years"

raise any problems, because any suits against components not in the study were eventually identified as such (see below, on the process of identifying challenged agency actions) and thus dropped out of the analysis.

For every agency (either a parent department or component) that was in any search, my method was to include these terms for that agency:

- the agency's name
- any common variation of the agency's name, given common variations on, or abbreviations of, individual words within the name, such as *Dep't* or *Dept.* for *Department*, or *&* for *and*
- any common acronyms for the agency's name
- the agency head's title,[15] including any common variations or abbreviations of it, such as the root *Sec!* for *Secretary*
- the name of every person who held the agency head's office[16] during the period of the search, including any plausible variations of those names[17]

To search efficiently for many possible variations on the name of an agency or person, I often used ordered proximity searches (e.g., *scott NP/2 pruitt*) and multiple-character wildcards (e.g., *sec! NP/2 "health and human services"*).

To find the names of each person who held office as the head of an agency during the period searched (such as the core study period of Jan. 20, 2013, through Jan. 20, 2021), my default method was to look up the agency in the *United States Government Manual* for each of the relevant years. For each year, I entered the name of the official listed as the head of the agency, even if this was an "acting" official. If the head office were listed as vacant, but other offices in the same agency had incumbents listed, I entered the name of the highest-ranking incumbent. Unfortunately, the *Manual* for some years appeared to be outdated in many

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according to the ACUS Sourcebook of United States Executive Agencies 118-19 (2d ed. 2018), and I occasionally added yet more components that I thought might be of interest (particularly FERC and EERE at the Department of Energy). Also, some of my searches omitted certain components for search-cost reasons, but none of those components ended up in the study.

[15] But I only included this if it would plausibly be used without any version of the agency's name or the head's name. Thus, for USDA, I included *Secretary of Agriculture*. But for EPA, I did not include *Administrator*, because I don't think any challenger would use that word without also including some version of *EPA* or of the head's name. For multi-member commissions, I never included terms like *Chair*, because I did not think these would be used absent some version of the commission's name.

I was concerned about component heads with the title "Assistant Secretary," but entering that term into a search for the core study period (2013-21) produced only 30 results in courts of appeals (Respondent) and only 43 in district courts (Defendant). All of the results that pertained to agencies in the study had party names that included other search terms (such as the name of the agency component); this meant including the title "Assistant Secretary" would add no results relevant to the study.

For USDA, I excluded all terms "Undersecretary" and "Under secretary" (notwithstanding that this is the title of heads of some components, including FSIS), because searches of the core study period in district courts and courts of appeals indicated these terms were very rare in defendant/respondent party names—and never used with regard to USDA where there was not another searched term already in the docket's party names.

[16] In the case of multi-member commission agencies, I treated the chair as if the chair was the agency head.

[17] Searching for the names of individuals who held the office was necessary because, although the box in the docket for a defendant/respondent official's name often has a subheading with the official's title, the Bloomberg search for "Parties" does not crawl those subheadings. So one cannot rely simply on titles. I thank Garrett Cunningham at Bloomberg for explaining this to me.

instances, so I supplemented it by looking at other sources, including agency websites (some of which included historical lists of agency heads, e.g., FAA) and entries for agencies on Wikipedia, which often had complete historical lists of incumbents in the agency's highest office, with dates of incumbency.

If I found that a person held the head office (even on an acting basis) for over 30 days, I included the person's name in the string. For every agency in the study for which neither the *Manual* nor the agency website provided what seemed a reliable historical list for the relevant period (this was particularly the case with FSIS), I conducted more extensive background research on the agency in the trade press to be sure I was covering every official who held the highest office in the agency for 30+ days throughout the period of the search.

This method resulted in long search strings for some agencies, especially those with many components that might be sued independently. For example, the string for the Department of Health and Human Services was:

> (dep! NP/2 "health and human services") OR (dep! NP/2 "health & human services") OR HHS OR DHHS OR USDHHS OR (sec! NP/2 "health and human services") OR (sec! NP/2 "health & human services") OR (kathleen NP/2 sebelius) OR (sylvia NP/2 burwell) OR (norris NP/2 cochran) OR ((tom or thomas) NP/2 price) OR (eric NP/2 hargan) OR (alex! NP/2 azar) OR "administration for children and families" OR "administration for children & families" OR ACF OR (george NP/2 sheldon) OR "mark greenberg" OR "administration for community living" OR ACL OR (kath! NP/2 greenlee) OR (edwin NP/2 walker) OR (mary NP/2 lazare) OR "centers for medicare and medicaid services" OR "centers for medicare & medicaid services" OR CMS OR "center for medicare and medicaid services" OR "center for medicare & medicaid services" OR (marilyn NP/2 tavenner) OR ((andy or andrew) NP/2 slavitt) OR (seema NP/2 verma) OR "food and drug administration" OR "food & drug administration" OR FDA OR "commissioner of food and drugs" OR "commissioner of food & drugs" OR (margaret NP/2 hamburg) OR (stephen NP/2 ostroff) OR (robert NP/2 califf) OR (scott NP/2 gottlieb) OR (norman NP/2 sharpless) OR (brett NP/2 giroir) OR (stephen NP/2 hahn) OR "indian health service" OR IHS OR (yvette NP/2 roubideaux) OR (robert NP/2 mcswain) OR "mary l. smith" OR (michael NP/2 weahkee) OR "national institutes of health" OR NIH OR (francis NP/2 collins) OR "administration on aging" OR AOA

Fortunately Bloomberg allows for these long searches; its limit for characters in a field is 2,048.[18]

Apart from defining the search by jurisdiction (district courts or courts of appeals), date range, party status (defendant or respondent), and search string in party field, I sometimes added additional search parameters to reduce false positives with little to no risk of false negatives. I was not completely consistent in adding these parameters, but I do not think that matters, because the failure to add them would only increase false positives that would be vetted out of the data in later stages of the study anyway.

The first sometimes-added parameter was to confine the search to civil cases rather than criminal (but note this restriction is available only for district courts).

[18] I thank Miche Jean at Bloomberg for this information.

The second sometimes-added parameter was to exclude dockets with certain NOS codes (but note this was useful mainly for the district courts, as dockets in the courts of appeals normally have no NOS code). The NOS codes that I most commonly excluded were:

> • NOS codes indicating the suit was a challenge by an agency employee to the agency, those being: "442: Civil Rights: Employment" and "445: Civil Rights: Americans with Disabilities Act: Employment."
>
> • NOS code "895: Freedom of Information Act." This study does not cover FOIA.
>
> • NOS codes indicating the suit was a challenge by a prisoner or detainee, those being "530: Prisoner Petitions: Habeas Corpus: General," "540: Prisoner Petitions: Habeas Corpus: Mandamus and Other," "550: Prisoner Petitions: Habeas Corpus: Civil Rights," and "555: Prisoner Petitions: Habeas Corpus: Prison Conditions"

For a few agencies, I excluded additional NOS codes that were (1) common for those agencies and (2) seemed extremely unlikely to be business challenges to agency action. In particular, for HHS, I excluded "350: Torts: Personal Injury: Motor Vehicle" and "360: Torts: Personal Injury: Other Personal Injury." And for USDA, I excluded "350: Torts: Personal Injury: Motor Vehicle."[19]

Using all the parameters described above, I conducted searches in pairs, one for the district courts and one for the courts of appeals. I downloaded the results of each search as a CSV file, which I converted to an Excel (XLS) file. Each row in the Excel file is one result, that is, one docket. For some searches, the number of results exceeded the maximum of 1,000 that can be downloaded from Bloomberg in a single CSV file; for those, I broke up the search into shorter date ranges that were each less than 1,000 cases, conducted a download for each date range, and then used the "copy" function to combine the rows from the various files into a single file that encompassed the whole search.

C. Accounting for Suits Against the "United States"

Having explained the search process for suits against defendants or respondents who were named agencies or head officials of agencies, let me now shift to explaining the process of searching for relevant suits in which the challenger simply named the "United States" as its target, without naming any agency or the head official of any agency. Compared to the agency-specific searches, searches for "United States" as defendant (or respondent) involve a much

[19] One of the Excel files supporting the Article (File 33, covering district court challenges to EPA in the core study period) was the first file I created in the course of my research, when I was still refining my approach, and my method for that file was different. I confined the original search to certain NOS codes that I hoped would capture suits against EPA (890, 893, and 899). Later, after generally adopting the method described above that was not *confined to* any NOS code or codes (but might *exclude* certain irrelevant NOS codes), I conducted a supplemental search to see what results the original search for File 33 had missed. This supplemental search had the same parameters as the original except it excluded not only irrelevant codes (442 on employment, 895 on FOIA, and 540, 550, and 555 on prisoner petitions) but also the codes included in the original search (that is, 890, 893, and 899). The supplemental search produced only 5 results, none of which involved any business or association of businesses challenging EPA action. For the supplemental search, see https://www.bloomberglaw.com/search/results/fb25262413218253f4dd60944efddf2e

larger number of results, with a dramatically higher proportion that are irrelevant to the study. In both the district courts and courts of appeals, I conducted the search in several stages (initially automated, then manual), seeking at each stage to vet out more irrelevant results while minimizing the risk of vetting out actual industry challenges to agency action (and also the risk of vetting out challenges to agency action by NGOs, unions, or nonfederal governments, which might be analyzed in some future study).

Here was the process for civil actions with "United States" as defendant in the district courts: For the core study period (Jan. 20, 2013, through Jan. 20, 2021), I conducted a search, restricted to district courts and civil cases, entering in the party field "Defendant" the phrase "United States" followed by a long string of exclusions, each prefaced by the NOT operator, which were designed to vet out suits that *did* name a particular agency or head official as defendant (and thus would be picked up in any agency-specific search I conducted for such agency). These NOT-prefaced terms included phrases that appear generically in federal agency names,[20] plus names, acronyms, and head officials of commonly-sued agencies.[21] I also did an exclusion consisting of *NOT "united states currency"*, which is a common defendant in government enforcement suits that are in-rem. I further restricted the search by excluding several NOS codes, covering subjects that seemed very unlikely to involve a business challenge to agency action.[22] The total results numbered about 14,700, making it necessary to download

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[20] NOT "united states department" NOT "u.s. department" NOT "us department"

[21] NOT epa NOT "environmental protection agency" NOT (lisa NP/2 jackson) NOT ((gina OR regina) NP/2 mccarthy) NOT (scott NP/2 pruitt) NOT (andrew NP/2 wheeler) NOT (dep! NP/2 transportation) NOT DOT NOT (sec! NP/2 transportation) NOT (ray! NP/2 lahood) NOT (anthony NP/2 foxx) NOT (elaine NP/2 chao) NOT (dep! NP/2 energy) NOT (sec! NP/2 energy) NOT "Federal Energy Regulatory Commission" NOT FERC NOT (dep! NP/2 "health and human services") NOT (dep! NP/2 "health & human services") NOT HHS NOT (sec! NP/2 "health and human services") NOT (sec! NP/2 "health & human services") NOT (kathleen NP/2 sebelius) NOT (sylvia NP/2 burwell) NOT (norris NP/2 cochran) NOT ((tom or thomas) NP/2 price) NOT (eric NP/2 hargan) NOT (alex! NP/2 azar) NOT (dep! NP/2 agriculture) NOT USDA NOT (sec! NP/2 agriculture) NOT ((thomas or tom) NP/2 vilsack) NOT ((sonny or george) NP/2 perdue) NOT "forest service" NOT "corps of engineers" NOT USACE NOT (Dep! NP/3 Interior) NOT DOI NOT (Sec! NP/3 Interior) NOT (ken! NP/2 salazar) NOT (sally NP/3 jewell) NOT (sarah NP/3 jewell) NOT (ryan NP/2 zinke) NOT (david NP/2 bernhardt) NOT (dep! NP/2 labor) NOT DOL NOT (sec! NP/2 labor) NOT (eugene NP/2 scalia) NOT (alex! NP/2 acosta) NOT ((tom or thomas) NP/2 perez) NOT "housing and urban development" NOT HUD NOT (shaun NP/2 donovan) NOT (julian NP/2 castro) NOT (ben! NP/2 carson) NOT "trade representative" NOT "trademark office" NOT PTO NOT "citizenship and immigration" NOT "postal service" NOT "social security" NOT SSA NOT (michael NP/2 astrue) NOT (carolyn NP/2 colvin) NOT (nancy NP/2 berryhill) NOT (andrew NP/2 saul) NOT "homeland security" NOT DHS NOT (kirstjen NP/2 nielsen) NOT "john kelly" NOT "john f. kelly" NOT (jeh NP/2 johnson) NOT (janet NP/s napolitano) NOT "veterans affairs" NOT (eric NP/2 shinseki) NOT (bob NP/2 mcdonald) NOT (robert NP/2 mcdonald) NOT (david NP/2 shulkin) NOT (robert NP/2 wilkie)

[22] The codes excluded were:

- Contract - Miller Act [*130] [this Act is about federal contractors' payment bonds]
- Personal Injury - Federal Employers Liability [*330]
- Personal Injury - Motor Vehicle [*350]
- Personal Injury - Medical Malpractice [*362]
- Civil Rights - Employment [*442]
- Other Immigration Actions [*465]
- Prisoner Petitions - Motions to Vacate Sentence [*510]
- Prisoner Petitions - General [*530]
- Prisoner Petitions - Mandamus and Other [*540]
- Prisoner Petitions - Civil Rights [*550]
- Prisoner Petitions - Prison Condition [*555]
- Forfeiture/Penalty - Drug Related Property Seizure [*625]

the results in several searches with shorter time spans and use the "copy" function to combine the results from the various CSV files into one, which I then converted to Excel (XLS). I was then able to sort the dockets in this combined spreadsheet by NOS code and alternatively by the entry for "Statute" (each suit is marked with one and only one statutory provision at issue), and I manually excluded about 3,600 dockets whose NOS code or "Statute" designation indicated the suit was irrelevant to the study, mainly consisting of NOS codes or statutory provisions pertaining to the Federal Tort Claims Act, as well as taxation, immigration and naturalization, habeas corpus and prisoner litigation, FOIA, employment disputes against agencies, and interpleader. After that, there remained 11,100 suits that my research assistants and I vetted manually. Research assistants vetted out any dockets in which (a) the phrase "United States" appeared in any defendant party names only as part of the name of some nonfederal entity, like "United States Steel Corporation," (b) the defendant party name(s) contained the name of a federal agency, meaning the suit would be picked up in any agency-specific search I conducted for such agency, or (c) the plaintiffs consisted only of natural persons, meaning the suit was not a challenge by "industry" as I define that term in Section E below (nor was it by an NGO, union, or nonfederal government). We also excluded suits in which the United States was actually the plaintiff and was sued only on a counter-claim. All this vetting reduced the total dockets to 2,406. Of these, 1,230 had the NOS code "220: Real Property Foreclosure"; a stratified random sample of these suits revealed they were generally foreclosures against land in which the federal government had some interest (often a lien taken by the IRS or HUD),[23] so I excluded them from the study as not generally challenges to agency action. My research assistants and I manually examined the remaining 1,176 dockets, looking at the docket sheet and sometimes the complaint to find out what particular federal agency (if any) was being challenged. Most of the suits turned out to be of a kind not included in the study (e.g., FTCA suits, IRS liens, etc.), but we did find about 300 suits challenging actions of a range of agencies, among which were some agencies ultimately included in the Article plus some other agencies. These were most commonly against the USDA food-stamp program. The only ones that were by industry against agencies included in the Article were two industry challenges to FDA, which were therefore incorporated into File 14,[24] but neither was by a drugmaker, so those two suits did not ultimately play a role in the Article's analysis.

Although parties filing PFRs in the courts of appeals are required to "name the agency as a respondent,"[25] I conducted—out of an abundance of caution—a search for PFRs with simply "United States" as respondent. The process for doing this was largely analogous to the process I have just described for the district courts. For the core study period, I conducted a search, restricted to the courts of appeals, entering the phrase "United States" in the party field "Respondent," followed by a long string of exclusions each prefaced by the NOT operator, designed to vet out suits that *did* name a particular agency or head official as respondent (and thus would be picked up in any agency-specific search I conducted for such agency); the agencies targeted for vetting-out were those that tend to be frequently challenged by PFR.[26]

• Taxes - United States as Plaintiff or Defendant [*870]

• Freedom of Information Act [*895]

[23] The sample had two strata: 72 suits in the district court for Puerto Rico (which accounted for a majority of the suits, due to the foreclosure wave in Puerto Rico in circa 2015-2017); and 50 suits in all other district courts.

[24] See the Article's Dataset, File 14, Rows 239-240.

[25] Federal Rule of Appellate Procedure 15(a)(2)(B).

[26] "united states" NOT "united states department" NOT "u.s. department" NOT "us department" NOT "united states district court" NOT "department of justice" NOT DOJ NOT "attorney general" NOT (jeffrey NP/2 rosen) NOT

Although dockets in the courts of appeals do not normally have NOS codes for PFRs, they do often have such codes for prisoner petitions, so I restricted the search by excluding all prisoner-petition NOS codes.[27] To vet out yet more prisoner petitions, I entered, in the "Attorney/Firm" field, several NOT-prefaced terms that would strongly indicate a prisoner petition or other criminal matter,[28] and I entered *NOT "in re" NOT "in re:"* in the "Case Name" field, to vet out the caption format characteristic of habeas cases (which is not characteristic of PFRs against agencies).[29] The total results were 1,360. Research assistants vetted out any dockets in which (a) the phrase "United States" appeared in any respondent party name only as part of the name of some nonfederal entity, (b) the respondent party name(s) contained the name of a federal agency, meaning the suit would be picked up in any agency-specific search I conducted for such agency, or (c) the petitioners consisted only of natural persons, meaning the suit was not a challenge by "industry" as I define that term in Section E below (nor was it by an NGO, union, or nonfederal government). There remained 54 dockets, which my research assistants and I examined manually. For all those involving agencies that I thought at the time might be included in the Article (encompassing all those that *were* ultimately included), it turned out the dockets were for applications for permission to appeal from a district court order under 28 U.S.C. § 1292(b) or petitions for permission to appeal class certifications under Federal Rule of Civil Procedure 23(f). Hence, there were no suits simply against the "United States" that were petitions for review of actions of any agencies in the Article.[30] (Excel files with the searches conducted for this Section are available upon request.)

(william NP/2 barr) NOT (matthew NP/2 whitaker) NOT (jeff! NP/2 sessions) NOT (loretta NP/2 lynch) NOT (eric NP/2 holder) NOT epa NOT "environmental protection agency" NOT (lisa NP/2 jackson) NOT ((gina OR regina) NP/2 mccarthy) NOT (scott NP/2 pruitt) NOT (andrew NP/2 wheeler) NOT (dep! NP/2 transportation) NOT DOT NOT (sec! NP/2 transportation) NOT (ray! NP/2 lahood) NOT (anthony NP/2 foxx) NOT (elaine NP/2 chao) NOT (dep! NP/2 energy) NOT (sec! NP/2 energy) NOT "Federal Energy Regulatory Commission" NOT FERC NOT "federal communications commission" NOT FCC NOT "Merit Systems Protection Board" NOT MSPB NOT "National Labor Relations Board" NOT NLRB NOT "Securities and Exchange Commission" NOT SEC NOT "Army Corps of Engineers" NOT USACE NOT "Citizenship and Immigration Services" NOT "postal service" NOT "surface transportation board" NOT STB

[27] The codes excluded were:

- Prisoner Petitions - Civil Detainee - Conditions of Confinement [*560]
- Prisoner Petitions - Civil Rights [*550]
- Prisoner Petitions - Death Penalty [*535]
- Prisoner Petitions - General [*530]
- Prisoner Petitions - Mandamus and Other [*540]
- Prisoner Petitions - Motions to Vacate Sentence [*510]
- Prisoner Petitions - Prison Condition [*555]

[28] NOT FCI [which stands for *federal correctional institution*] NOT prisoners NOT inmate NOT penitentiary NOT detention NOT correctional NOT "public defender" NOT "federal defender" NOT "federal defenders"

[29] But unforrtunately, these NOT-prefaced terms *would* have the effect of excluding mandamus petitions against agencies if the only respondent named were "United States."

[30] Consistent with the low number of "United States" cases that ended up being relevant to the study, the canonical administrative law cases in which only the "United States" was named as the challenged party throughout the suit were in the specialized area of import taxation (*United States v. Mead Corporation*) or started as enforcement suits brought by executive agencies (*United States v. Nova Scotia Food Products*) or were criminal cases. None of those types of cases are part of this study.

D. Identifying Challengers in Suits

Once suits were gleaned from the various searches, it was necessary to determine who the challengers were in each suit. For civil actions in district court, this was mostly straightforward. Recall that search results were downloaded from Bloomberg in CSV files that I converted to Excel (XLS) spreadsheets. In the row for each docket, my research assistants and I considered the challengers to be whichever parties appeared in the "Plaintiff Party" cell that is automatically created and filled by Bloomberg. This cell contains the names—separated from each other by slashes—of every plaintiff party, as well as any parties designated "intervenor plaintiff" or "intervenor-plaintiff" or "plaintiff/intervenor" (it seems the term "plaintiff intervenor" is never used).[31] Bloomberg does not include in the "Plaintiff Party" cell any party that is designated simply "Intervenor," even though intervenors on the plaintiff side sometimes have only this general "Intervenor" designation.[32] Therefore, we may have missed industry challengers (as fully defined in Section E below) if they did not initiate a suit but instead only intervened in the suit after it was initiated by others, but this would only happen if *none* of the parties who initiated the suit were themselves companies or trade associations from the industry—something that seems like it would happen rarely if at all. And even then, such challengers would be missed only if the docket sheet happened to label the industry intervenors by the non-specific moniker "Intervenor" as opposed to "intervenor plaintiff" or the like.

For PFRs in the courts of appeals, identifying challengers required some extra work. That is because Bloomberg, when compiling search results into the CSV files that are convertible to Excel spreadsheets, does not separate the parties for each docket/row into petitioners and respondents in the way it separates district-court parties into the different "Plaintiff Party" and "Defendant Party" cells. Instead, Bloomberg's court-of-appeals spreadsheet simply fills in a general "Parties" cell, with petitioners and respondents mixed together. Their names are all separated by slashes within the cell, but it is often hard to tell, simply from the spreadsheet, which of them is a petitioner and which is a respondent. To find out who was who, research assistants went into the docket for each row and looked at the subheadings under the party names, which generally designate each party as "Petitioner" or "Respondent." I created a new column in each spreadsheet, titled "Petitioner Parties," which research assistants filled in with the petitioners' names for each suit. When a party was designated "Intervenor Petitioner" or the like, we entered that party's name in the "Petitioner Party" cell, paralleling Bloomberg's automatic treatment of intervenor-plaintiffs in the district courts as plaintiffs. When a party was simply designated "Intervenor" without a side, we ignored the party, again consistent with Bloomberg's automatic treatment of unclear-sided "Intervenors" in the district courts, discussed in the paragraph above. (That said, in some early searches, I did ask research assistants to do research in the docket filings to determine which side an unclear-sided "Intervenor" was on, but I later decided this was not worth it and ceased.)[33]

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[31] I searched for "plaintiff intervenor" in "dockets only" and looked at the first 50 results. In each result, the term appeared in some entry of the docket sheet, but the actual party name always said something else, like "intervenor plaintiff."

[32] Such unclear-sided intervenors *do* appear in Bloomberg's "Parties" cell.

[33] Also, I took a special approach to the Nuclear Regulatory Commission, for whom challenges overwhelmingly take the form of PFRs. The NRC is unusual in that industry (a) is frequently involved in challenges to the agency but, (b) it turns out, almost exclusively as intervenor *for* the respondent-agency. The extraordinary frequency of industry intervention in NRC cases prompted me to scour the docket sheets to check if any unclear-sided industry

A word about amicus briefs: Bloomberg never includes amici in the "Plaintiff Party" cell (or the "Defendant Party" cell) in district courts.[34] In keeping with Bloomberg's treatment, my study generally has not utilized amici as "hooks" for deciding whether to scrutinize a suit in the first place. Of course, in the industries where industry challenges proved rare, the few suits with industry plaintiffs (or industry petitioners) were always scrutinized closely—including for involvement by amici who were significant in the industry, such as trade associations. Additionally, for several industries I conducted ad-hoc searches for leading trade associations acting as amici, which searches are noted as relevant at various points in the Article.[35]

E. Categorizing Challengers: Industry vs. Other Kinds of Parties

Once we identified challengers to an agency,[36] the key task was to discern which challengers were from the industry under study and were challenging a restrictive health-and-safety action by the agency. Suits were eliminated from the study if (1) the challengers were not from the industry under study or (2) the challenged actions were not restrictive of industry or were not about health or safety. Elimination on the first basis is discussed in this Section. Elimination on the second basis depended on identifying the agency action under challenge (as noted in Section F) and our substantive examination of that action.[37]

My exact process for identifying challengers from the industry under study varied between different spreadsheets, but it always entailed me personally looking at every challenger and deciding whether it was from the industry under study. Sometimes my process involved multi-stage narrowing, in which I would (a) categorize all challengers as to whether they were from *some* industry, i.e., whether they were businesses or associations of businesses of some kind, as distinct from other kinds of parties, and then (b) take the challengers who were from *some* industry and identify those among them who were from the *particular industry at issue*. Or instead the process might occur in a single stage, that is, I would look through all the challengers

"intervenors" were actually on the challenger side; in fact they almost never were (and a handful of cases were inconclusive). For these findings, see the Article's Dataset, File 28, particularly Column P.

[34] Amici do appear in Bloomberg's "Parties" cell.

[35] It is conceivable that, in an industry where we found few industry challenges, some industry association could have been seriously involved in fighting the agency *as an amicus* and yet never come to our attention. But such an oversight would occur only if an unlikely combination of three conditions was met: (a) the association appeared as amicus *solely* in cases *without* industry plaintiffs or petitioners, (b) the association never sued as an actual plaintiff or petitioner, and (c) the association did not feature prominently in the academic literature and trade press that I read on the industry.

[36] I should also note that, before I categorized the challengers in a suit, research assistants or I always manually checked the defendant or respondent to be sure the challenge was in substance against the federal agency studied, not a "false hit," e.g., against the "Department of Transportation" of a state government. Every "false hit" suit was removed from the study entirely, and its challenger was not categorized.

[37] Industry-challenged actions that were *not about health or safety* are noted throughout the Article, e.g., FDA actions on exclusivities, patent extensions, and the like; NHTSA actions on fuel economy; FAA actions on airport slot allocation; or NRC actions on antitrust matters or fees. Industry-challenged actions that were about health or safety *but not restrictive of the challenger* are likewise noted throughout the Article, e.g., brand-name drugmakers' challenges to FDA approvals of generics, or Hawaiian Airlines' challenge to an FAA determination that a crane near a runway was not hazardous and need not be cleared.

in all the suits and identify those who were businesses or associations of businesses from the industry at issue.[38]

For the files on which I conducted a multi-stage process, I typically, at the first stage, put all challengers into one of several categories:

- Business
- Association of businesses
- NGO
- Labor Union
- State government
- Local government
- Tribal government
- Individual
- Other

When I did this kind of full categorization, I typically created a column in the relevant Excel spreadsheet for each of the categories and entered a "1" if any challenger in the suit fit that category. It was possible for a suit to fall into several categories at once, i.e., for there to be a "1" in more than one of the columns.[39] In some files, I entered "1" for each "Business" or "Association of businesses" but entered nothing for challengers that I thought were in other categories; this was to save time.

Let me explain the definitions that I used of the different categories, especially of the key categories "Business" and "Association of businesses"; the definitions of the other categories will be helpful in explaining how the boundaries of those two key categories were drawn. Note that, even when I conducted only a single-stage process for identifying industry challengers, I still relied on those boundaries as defined and elaborated here. *In general, I identified a suit as an "**industry challenge**," or one brought by one or more "**industry challenger(s)**," if the suit's challengers included—as defined below—a "Business" from the industry at issue or an "Association of Businesses" from the industry at issue.*

Business. I defined a *business* broadly as any party (a) that has an organizational name, as opposed to an individual's first and last name,[40] (b) whose primary activity is selling goods or services,[41] or whose primary activity is *not* selling goods or services *but* is suing in its capacity

[38] But even the spreadsheets for which I followed this simpler single-stage elimination process were still subject to the check for industry "front groups" discussed later in this Section.

[39] For several agencies, a large number of challenges were brought solely by individuals. I decided early on that the study would not focus at all on challenges by individuals. To save time, when processing a challenge that was solely by one or more individuals, I often refrained from entering a "1" in any column, so that when the suits/rows were ordered, suits that were solely by individuals simply went to bottom and dropped out of the analysis. (Also, note that the category of "Individual" was, in the standardized format for several of my Excel spreadsheets, divided into "Individual Pro Se" and "Individual Represented by Attorney." Because in most spreadsheets I refrained from entering "1" in *any* column for suits by individuals, this division of the "individual" category into two columns ended up playing no role in the study.)

[40] Thus, the category includes not only a business corporation or business partnership or LLC, but also a sole proprietorship, as long as it has a business name and not simply an individual's first and last name (e.g., it would include *Sally Jones d/b/a Sally's Store*). It would also include an incorporated business with a single named principal, like *Michael Johnson P.C.*

[41] This includes providing goods or services to persons who consume them when payment is made for the particular goods or services by a third party, as with hospitals under Medicare.

as a regulated employer,[42] and (c) is not a labor union or government entity, as those terms are defined below.

Association of Businesses. I define *association of businesses* as any organization whose purpose is to represent the common business interests of its members in their capacity as sellers of goods and services (but excluding employees selling labor) or in their capacity as employers. Sellers/employers represented by such an association can be *businesses* as defined above, but they can also be individuals insofar as they are represented as independent sellers of goods or services or as employers (but not as employees or prospective employees), such as an association of truck owner-operators. Note this means a party can be an *association of businesses* even if each of its individual members would not be characterized as a *business* in its own right as defined above.[43] A party that otherwise meets the definition of *association of businesses* retains that definition even if *some* of its members are government bodies (e.g., an association that includes investor-owned utilities and government-owned utilities).

Advocacy Organization. I define *advocacy organization* as any organization whose purpose is not primarily to sell goods or services (or represent the common interests of member-sellers qua sellers) but instead to advocate for some non-seller cause. This would include any organization whose purpose is:

- to advocate for historically marginalized demographic populations (e.g., NAACP)
- to advocate for people with disabilities (e.g., Paralyzed Veterans of America)
- to protect the environment (e.g., Earthjustice) or some particular natural resource (e.g., Delaware Riverkeeper Network)
- to promote safety (e.g., Center for Auto Safety)
- to protect privacy (e.g., Electronic Privacy Information Center)
- to advocate for workers, but not as an actual labor union (defined fully below)
- to advocate for consumers, either by
    - seeking stronger regulation of seller harms (e.g., Public Citizen) or
    - seeking more consumer access to products (e.g., patient advocacy groups for FDA drug approval—but in fact I saw no such groups challenging FDA actions on drugs, though there were some seeking FDA approval of tobacco products) or
    - seeking other regulatory decisions favoring a good or service that the group's members want (e.g., "Friends of the Local Airport")
- to advocate for historic preservation, or for quality of life in some residential area (e.g., a neighborhood association)
- to advocate for libertarian values or economic growth in a general way, not representing business members or identifiable businesses. I maintain this designation even if the organization receives some industry funding, e.g., the Competitive Enterprise Institute (CEI). I know this choice is contestable, and therefore—as discussed below—I sought to assess the significance of such groups in litigation against agencies by using the CMD list of "front groups," and I found such groups were playing a very minimal role, as discussed below.

[42] E.g., a church or Christian advocacy group challenging, in its capacity as employer, HHS's contraception coverage rule.

[43] Note that a single hospital will sometimes have a legal name that is a variation on the term "hospital association." Such a hospital is, of course, a single business for our purposes.

Typically I was able to identify advocacy organizations simply by looking at their names or briefly researching their websites or their complaints/PFRs. When the category was still unclear, I used IRS tax-exemption forms as tie-breaker: an organization claiming exemption under Internal Revenue Code 501(c)(6) for "business leagues" was an association of businesses, while one claiming under 501(c)(3) for charitable organizations or 501(c)(4) for social welfare organizations was an advocacy group (but note that an organization under (c)(3) could still be simply a *business* if it primarily sells a good or service, like a nonprofit hospital or college).

All that said, I was mindful that industry sometimes sponsors groups that practically advocate for business interests while seeking to present themselves, at least superficially, as advocates for something other than the interests of business members or supporters. To gauge the significance of this issue for my study, I used the list of more than 150 "front groups"[44] published in *Sourcewatch* by the Center for Media and Democracy (CMD).[45] After creating all the Excel spreadsheets for all searches in the entire study, I assembled *all* these Excel files (not just those subject to the multi-stage categorization of challengers) in one folder and used the Windows "Search" function to search the entire folder for the name of every "front group" that appeared on CMD's list as of February 2, 2025. Some of the "front groups" did appear as challengers in some of the files, but they did so in ways that did very little to affect the Article's analysis. For two of the listed groups that appeared—Consumer Federation of America and Susan B. Anthony List—I do not think they are "front groups" in the sense of representing industry.[46] Otherwise, in the industry-agency pairings in the Article's Part I (which witnessed few industry legal challenges to restrictive agency actions on health and safety), the only CMD-designated "front group" to appear as a plaintiff or petitioner was the Washington Legal Foundation (WLF), a libertarian group whose funders include "corporations" whose names WLF does not disclose.[47] WLF was in three suits against FDA, always as an additional plaintiff besides the actual regulated business: one suit by Amarin (which already had obvious industry support without WLF, given that PhRMA was an amicus) and two suits by small companies outside the Torreya 1000 (Prevor and Vanda). And it is not clear that WLF's involvement in Prevor and Vanda's suits indicates broad drug-industry support for those challenges; WLF litigates in a range of areas far beyond pharmaceuticals and is identified with the conservative legal movement generally, suggesting it may not be a simple mouthpiece for the drug industry overall. Beyond WLF's litigation against FDA, challenges by CMD-designated "front groups" were confined to agency-industry pairings not covered in Part I of the Article,[48] meaning the

[44] https://www.sourcewatch.org/index.php/Front_groups

[45] https://www.sourcewatch.org/index.php/Center_for_Media_and_Democracy

[46] Consumer Federation of America (CFA), is a well-known 501(c)(3) group that has accepted some industry money, but the organization has still taken plenty of conventional liberal positions on consumer issues (e.g., defending the CFPB). Susan B. Anthony List is an anti-abortion group, not an industry group.

[47] Washington Legal Foundation, 2024 Annual Report at 28, https://www.wlf.org/wp-content/uploads/2025/03/WLF-2024-AR-final-2.pdf.

[48] These were by WLF (suing EPA), Consumers' Research (suing CPSC on matters other than children's products, plus EPA), Landmark Legal Foundation (suing CMS, EPA, non-health-and-safety components of DOL, and USDA and DOT but only on the social cost of carbon, not meat safety or car or airline safety), Mountain States Legal Foundation (suing EPA), and National Center for Public Policy Research (suing FDA on tobacco matters). Also, Mountain States was involved in litigation against FAA, but as counsel not challenger, and only in cases involving helicopters, not airlines. Mountain States was also counsel against USDA, but the challenge was to the Forest Service and Farm Service, not FSIS. Readers can replicate the results of this search by searching for the names of these groups across all Excel files in the Article's Dataset.

activity of these groups does not undermine the Article's central claim that the Part I industries rarely use courts to challenge health-and-safety restrictions.

Labor Union. I define a *labor union* as an organization formed to collectively bargain with employers on behalf of workers. This is different from an organization that advocates for worker interests but is not formed with the distinct purpose of collective bargaining. Unions are tax exempt under 501(c)(5) as "labor … organizations."

State Government. This category includes a state suing in its own name, any agency of a state government, or any state official suing in their official capacity. It also includes any association of states, state agencies, or state officials. It also includes state-owned utilities (but note many investor-owned utilities take the name of a state, e.g., Alabama Power). I opted to categorize the District of Columbia as a state rather than a local government.

Local Government. This includes a county, city, or other locality suing in its own name, as well as any agency of any local government, plus any local official suing in their official capacity. It also includes any association of localities, local agencies, or local officials. It also includes local-government-owned utilities, airports, or other facilities. But note I generally categorized hospitals as businesses unless their name made it obvious that they were government-owned.

Tribal Government. This includes any tribe, agency thereof, or tribal official suing in their official capacity. It also includes any association of Native American governments or of officials thereof.

Individual. This is defined as a natural person, with a first and last name (or initials if the name is withheld). It also includes a decedent's estate or a family trust.[49]

Other. This was the residuum of anything not in the other categories, generally amounting to less than 1% of the total across many spreadsheets for which I did multi-stage categorization. A common example was recreational associations (e.g., of snowmobilers or motorcyclists).

F. Identifying Challenged Agency Actions

For every suit by a business or association of businesses from the industry at issue—and in many of the spreadsheets for every suit by a business or association of businesses in *any* industry—my research assistants and I identified and recorded the agency action being challenged. This was usually done by me or a research assistant obtaining the complaint or PFR from the Bloomberg database and reading it.[50] For searches that went farther back in time, it was sometimes the case that complaints and PFRs could not be obtained through Bloomberg. In those cases, we identified the agency action by searching Westlaw to see if there was a published

[49] To be sure, individual challengers could turn out to be sole proprietors of regulated businesses, but these businesses would be small and relatively unsophisticated, and their suits would likely have far less impact than other kinds of business suits. And the relatively low significance of individual-only suits for industry-agency relations must be balanced against the cost of vetting and analyzing those suits, which is large, given their high volume at many agencies.

[50] On Bloomberg, many complaints and PFRs—those requested by prior Bloomberg users—are viewable at no charge, meaning (in the case of law-school-wide subscriptions) that they do not involve charges against the annual budget for the law school or the budgets of individual law-school affiliates. But some complaints and PFRs are available only upon request, which does involve charges against the subscription budgets. My research assistants and I incurred those charges when necessary to view the complaint or PFR, but we first checked Westlaw's dockets database to see if the complaint happened to be freely available to us there.

opinion arising from the case, or by searching the trade press, particularly through the Factiva database. In the few cases where all these methods failed, we contacted the court itself or the U.S. National Archives to obtain the complaint or PFR (and sometimes other relevant filings). Where the source is other than the complaint or PFR, it is generally cited in the Article itself and/or the relevant Excel spreadsheet in the posted dataset.

G. Corporate Parents and Subsidiaries Among Industry Challengers

When analyzing challenges by businesses from the industry at issue in each of the industry-agency pairings that were the focus of the Article, I generally used parent companies as the unit of measure. To determine whether each named challenger company had a parent, my research assistants and I used different approaches for different industries, depending on what was most efficient given available sources.

- For pairings with very few individual-company suits (meat processors and FSIS, automakers and NHTSA, and children's product companies and CPSC), the search for challenger companies' parents was incidental to research on individual cases.
- For pairings with more such suits, the search was done systematically by research assistants examining challengers' corporate disclosure statements that are required by Federal Rule of Civil Procedure 7.1 and Federal Rule of Appellate Procedure 26.1 (coal mines and MSHA; generators and EPA; nursing homes and CMS) or by matching challenger names to industry lists of parent companies and conducting follow-up research where no match was found (the Torreya 1000 for drugmakers and FDA; and Airlines-for-America annual report and the annual DOT Yellowbook for airlines and FAA).
- For employers and OSHA and for-hire truckers and FMCSA, no searches were conducted for challenger companies' parents, because industry's high litigiousness against those agencies was already evident from trade association challenges.
- No search for challenger companies' parents was necessary for nuclear plant operators, who never sued NRC individually, or for hospitals, who never sued CMS on patient-safety issues in the sample we took.

H. Interviews

I conducted a total of thirty-three interviews with experienced industry representatives and/or former senior government officials. Among these, there was at least one interview for each industry-agency pairing covered in the Article, as well as several interviews for industry-agency pairings not covered in the Article. A total of nineteen interviewees are cited in the Article.

The interviews' role in the analysis was a supporting one; they added to, and provided a reality check upon, understandings that arose mainly from other sources (especially docket-search-derived lawsuit data and lawsuit filings). Because the interviews were confined to a supporting role, I did not engage in costly efforts to ensure that interviewees were representative except in the simple sense that they were drawn from the full panoply of industry-agency pairings covered in the Article. Achieving interviewee representativeness *within* each industry-agency pairing would have required interviewing a substantial number of people in each pairing

and devising methods to ensure that those people represented some defined population related to that pairing—all of which would have entailed costs out of proportion to the interviews' role in the study. Instead I selected people for interview invitations by a series of convenient methods that made it likely they would each be knowledgeable about the industry-agency relationship at issue. The methods I used, which varied somewhat between industry-agency pairings depending on what was most convenient and appropriate, were as follows: (1) inviting former general counsels or chief counsels of the industry's regulatory agency; (2) inviting general counsels or other regulation-oriented officials of major industry trade associations; (3) inviting attorneys, executives, or officials who had authored publications relating to the industry's willingness to sue its regulator; (4) inviting attorneys, executives, or officials identified as likely to be knowledgeable about the subject by professors I knew who specialized in regulation of each of the industries under study; (5) inviting industry attorneys, executives, or officials publicly involved in agency proceedings or lawsuits against agencies, as identified in databases of court and government documents. Occasionally, an interviewee or interview invitee referred one or more additional potential interviewees to me, whom I then interviewed.

In all, I invited 59 people for interviews, of whom 33 accepted. I went into each interview with a set of themes to explore based on what I had seen in my docket research and other sources, but the interviews themselves did not follow a structured or even semi-structured script, because each industry-agency pairing raised its own unique issues and because I wanted to be sure to learn about any "unknown unknowns." Interviews occurred from August through November 2024. Each was by videoconference (or occasionally phone) and usually lasted between one and two hours. I recorded the interview if the interviewee consented; otherwise I took detailed notes.