Summers v. Earth Island Institute: Injury, Precedent, and the Environmental Standing Saga

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I. OVERVIEW OF THE CASE

The United States Forest Service (Forest Service) sells billions of board feet of timber harvested in national forests each year.[1] Generally, the public may participate in the planning of such sales by submitting suggestions and objections through a notice, comment, and appeals process conducted by the Forest Service prior to each sale.[2] However, based on an agency determination that smaller sales do not cause a significant environmental impact, Forest Service regulations categorically exempt timber salvage sales that cover 250 acres or less from the usual notice, comment, and appeals process.[3] These exemptions, therefore, exclude members of the public from contributing insights to the administrative decision to carry out the sale.[4] Individuals who wish to challenge such timber sales are relegated to the judicial process, where they must meet the "Case" or "Controversy" standing requirements of Article III of the Constitution of the United States.[5]

In 2003, environmentalists challenged the notice, comment, and appeal exemptions of the Forest Service's regulations as they applied to a 238-acre timber salvage sale in the Sequoia National Forest known as the Burnt Ridge Project.[6] Alleging injury to their aesthetic and recreational interests at Burnt Ridge, five environmental organizations filed a complaint in the United States District Court for the Eastern District of California challenging eight regulations, including the exemptions.[7] The

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1. U.S. FOREST SERV., FY 1905-2008 NATIONAL SUMMARY CUT AND SOLD DATA AND GRAPH (2008), http://www.fs.fed.us/forestmanagement/reports/sold-harvest/documents/1905-2008_Natl_Sold_Harvest_Summary.pdf.
2. 36 C.F.R. § 215, .6, .13 (2008).
3. *Id.* § 215.4(a), .12(f).
4. *Id.*
5. U.S. CONST. art. III, § 2, cl. 1.
6. Summers v. Earth Island Inst., 129 S. Ct. 1142, 1147-48 (2009).
7. *Id.* at 1148.

district court granted a preliminary injunction halting the timber sale, and the parties subsequently settled the Burnt Ridge Project dispute.[8] Although the court concluded that Burnt Ridge was no longer an issue in the case, it went on to try the merits of the environmentalists' regulatory claims.[9] The court issued a nationwide injunction against the implementation of five of the challenged regulations, including the exemptions, over the Forest Service's objections that the claims were not ripe for adjudication in the absence of a specific challenged project.[10] On appeal, the United States Court of Appeals for the Ninth Circuit found that the district court erred in adjudicating the merits of the regulatory challenge outside of the Burnt Ridge Project because they were not ripe.[11] Nevertheless, the court upheld the nationwide injunction against the notice-and-comment exemptions because they applied to the Burnt Ridge Project.[12]

The Supreme Court of the United States granted certiorari to review the issue of whether an environmental challenge to agency regulations constitutes a "Case" or "Controversy" under Article III of the Constitution when the specific action challenged has ceased to be an issue in the case.[13] The Supreme Court *held* that Earth Island Institute did not have standing to make a generalized challenge to Forest Service regulations in the absence of their specific application, reasoning that the environmentalists had not sufficiently alleged imminent, concrete, and personal harm. *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1149-51 (2009).

II. BACKGROUND

The Supreme Court's decision in the noted case is grounded in the principle of standing derived from the "Case" or "Controversy" Clause of the Constitution.[14] The Court has construed this clause to act as a constraint on judicial power so that courts may not independently review executive or legislative actions, but may only act to "redress or prevent

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*; U.S. CONST. art. III, § 2, cl. 1.
14. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . [and] to Controversies to which the United States shall be a Party. . . .").

actual or imminently threatened injury to persons."[15] Thus, plaintiffs seeking injunctive relief must show that (1) they face an "injury in fact," or an "actual and imminent" threat of concrete, particularized harm; (2) the threat is "fairly traceable" to the challenged action; and (3) a favorable judicial outcome would prevent or redress the threatened injury.[16] Environmental plaintiffs have particular difficulty meeting the first element of standing in challenges to agency regulations because they are generally third parties to the government action, meaning that the regulations "neither require nor forbid action" on the part of the plaintiffs.[17] Environmental plaintiffs must therefore show that the government's *application* of the challenged regulations injures or threatens to injure them.[18]

Defining the "injury in fact" element of standing in environmental cases has animated vigorous debate in the Supreme Court since the advent of the environmental movement.[19] As one scholar has put it, "After many decades of effort, the Court cannot forge a consensus regarding the nature of the injury requirement because the Justices fundamentally disagree over whether the basic purpose of standing doctrine is to block federal courts from usurping the policymaking power of the political branches," or whether its purpose is "to ensure that plaintiffs bring the right kind of personal stake to litigation to ensure that it is properly adversarial."[20] The following cases demonstrate the tension between these two lines of judicial thought and the inconsistencies that have resulted in the environmental standing doctrine.

In *Sierra Club v. Morton*, the Supreme Court defined "injury in fact" as it applied to environmental challenges to agency actions.[21] The Sierra Club sought a permanent injunction against a series of permits issued by the Forest Service for the construction of a resort and highway in the Sequoia National Forest.[22] Sierra alleged that as an organization with a "special interest" in conservation, it would be injured by the construction projects because they would destroy scenery, natural objects, and wildlife, forever impairing the ability of future generations

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15. *Summers*, 129 S. Ct. at 1148.
16. *Id.* at 1149.
17. *Id.*
18. *Id.*
19. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 522 (2007); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 183 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-63 (1992); Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972).
20. Richard Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943, 945, 947 (2008).
21. *Morton*, 405 U.S. at 734-35.
22. *Id.* at 729-30.

to enjoy the park's natural offerings.[23] The Court observed that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."[24] Nevertheless, the Court found that the injury alleged did not merit standing because the Sierra Club failed to allege that it or its members had ever even used the part of the forest in question.[25] The Court reasoned that injury in fact requires "more than an injury to a cognizable interest. It requires the party seeking review be himself among the injured."[26]

Since *Morton*, the greatest challenge to environmental plaintiffs regarding injury in fact has been establishing that threatened injuries from agency regulations are imminent. In *City of Los Angeles v. Lyons*, a highly instructive yet nonenvironmental case, the Supreme Court elaborated on the degree of imminence required for a plaintiff to obtain injunctive relief.[27] Lyons, the victim of an illegal chokehold administered by police officers, sought an injunction against the city from authorizing the use of such tactics absent a threat of immediate deadly force to the officer.[28] He alleged that the police routinely employed chokeholds in nondeadly situations, that such techniques resulted in numerous irreparable injuries, and that he justifiably feared that he would be put in a chokehold again and suffer death or permanent harm.[29] The Court held that in order to show a threat of imminent injury sufficient to obtain injunctive relief, the victim must allege (1) that he would have another encounter with the police in the future and (2) that all police officers always use chokeholds during their encounters with citizens, or that the city ordered its officers to act in that way.[30] Reasoning that the "*reality* of the threat of repeated injury . . . is relevant to the standing inquiry, not the plaintiff's subjective apprehensions," the Court found that the odds of both conditions occurring were too remote to constitute imminent future harm, and the possibility that such events *might* happen in the future was mere conjecture.[31]

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23. *Id.* at 734-35 n.8.
24. *Id.*
25. *Id.* at 735.
26. *Id.* at 734-35.
27. 461 U.S. 95, 101-02 (1983).
28. *Id.* at 97-98.
29. *Id.*
30. *Id.* at 105-06.
31. *Id.* at 107-08 n.8.

Similarly, the Supreme Court held in *Lujan v. Defenders of Wildlife* that plaintiffs must allege specific facts showing how a government action would cause them imminent harm.[32] In *Defenders of Wildlife*, several environmental organizations challenged regulations promulgated by the Secretary of the Interior that limited the application of the Endangered Species Act (ESA)[33] to domestic federal actions.[34] The organizations sought an injunction to compel the Secretary to promulgate a new regulation that would extend ESA protection to federal actions overseas.[35] Members of the organizations alleged that exempting federal actions abroad from ESA enforcement threatened endangered species by potentially increasing the pace of extinction.[36] They further alleged that they had traveled to the site in question before to observe the endangered animals' habitat and intended to do so again with the hope of actually viewing the animals.[37] Writing for the majority, Justice Scalia found that the members did not allege a sufficiently imminent threat of injury because the members did not actually have current plans to return to the site.[38] The Court defined injury in fact as "an invasion of a legally-protected interest" that is "(a) concrete and particularized" and "(b) actual or imminent, not conjectural or hypothetical."[39] Although the Court found that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for the purpose of standing," it reasoned that alleging threatened injury at "some indefinite future time" did not show the high degree of immediacy required by the second element of injury in fact.[40] Justice Scalia further explained that "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."[41]

Following *Lyons* and *Defenders of Wildlife*, where the Supreme Court discussed but did not find imminent threat of injury in fact, the Court heard several cases in which environmental plaintiffs successfully

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32. Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992).
33. 16 U.S.C. §§ 1536-1599 (2006).
34. *Defenders of Wildlife*, 504 U.S. at 557-58.
35. *Id.* at 559.
36. *Id.* at 562.
37. *Id.* at 563.
38. *Id.* at 564.
39. *Id.* at 560 (internal quotations omitted).
40. *Id.* at 562-64 n.2.
41. *Id.* at 564.

alleged imminent injury.[42] In *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, the Court found that individuals living downriver from a factory that violated pollutant discharge limits showed a threat of injury sufficiently imminent to merit standing.[43] The plaintiff organizations' members claimed that they lived near the contaminated river and that they wanted to use the river for recreation, but that fears of pollution prevented them from doing so.[44] The Court distinguished *Lyons*, finding that the plaintiffs' "subjective apprehensions" constituted an actual and imminent threat because there was no question that Laidlaw was violating pollution regulations.[45] Furthermore, the Court found that the plaintiffs' desire to use the river was distinguishable from the "some day intentions" alleged in *Defenders of Wildlife*, reasoning that Laidlaw's actions directly affected their enjoyment of the river since they lived on or around the river.[46]

Finally, in *Massachusetts v. EPA*, the Supreme Court found that the widely-shared, ongoing threat of climate change constituted a sufficiently imminent threat to the interests of several states and organizations to merit standing.[47] Challenging the EPA's refusal to regulate vehicle emissions under the Clean Air Act,[48] Massachusetts asserted that vehicle emissions contributed to global warming, which caused glaciers to melt, which in turn caused the loss of coastal property due to rising sea levels.[49] The Court found that the state showed a sufficient personal stake in the outcome of the case by alleging property loss as a coastal landowner.[50] The Court reasoned that a showing of property loss over time as the effect of climate change, regardless of the relatively slow pace of loss and the widely shared harm, constituted a particularized, imminent injury for the purposes of standing.[51] Ultimately, though the language of the "injury in fact" standard has not changed significantly since the Supreme Court decided *Morton* in 1972, the Court's interpretation of what constitutes an "actual and imminent threat" of "concrete, particularized

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42. *See* Friends of the Earth, Inc. v. Laidlaw, 528 U.S. 167, 83-84 (2000); Massachusetts v. EPA, 549 U.S. 497, 521 (2007).
43. *Laidlaw*, 528 U.S. at 183.
44. *Id.* at 181-83.
45. *Id.* at 184. The district court in this case found that Laidlaw had knowingly and continually violated pollution regulations on hundreds of occasions. *Id.* at 176.
46. *Id.* at 183-84.
47. *See Massachusetts*, 549 U.S. at 522-23.
48. 42 U.S.C. §§ 7521-7590 (2006).
49. *Massachusetts*, 549 U.S. at 521-22.
50. *Id.* at 522-23.
51. *Id.*

harm" is far from settled as it applies to standing in environmental challenges.

III. THE COURT'S DECISION

In the noted case, the Supreme Court examined injury-in-fact precedent to determine whether Earth Island's members could challenge the Forest Service regulatory exemptions despite the fact that the Burnt Ridge timber sale was no longer an issue.[52] Drawing on the constitutional principle that courts may not review legislative or executive action absent a specific "Case" or "Controversy," the majority, led by Justice Scalia, looked to precedent to support its conclusion.[53] The Court first held that absent a dispute over a specific Forest Service action, the organization's members could not sufficiently show a concrete and particularized injury for the purposes of standing.[54] The Court next held that the same standard applied to "procedural" injuries, even where Congress granted certain individuals a right to standing.[55] Finally, the Court rejected the Dissent's argument that Earth Island's members had alleged a sufficient injury because they had shown that they faced a "realistic threat" of future injury resulting from the Forest Service's regulations.[56]

The Court first examined affidavits submitted by two of Earth Island's members to determine whether they had properly shown injury in fact under the rule set out in *Morton* and developed by *Defenders of Wildlife*.[57] The first affidavit, submitted by Asa Marderosian, specifically addressed the Burnt Ridge Project.[58] Marderosian alleged that he had repeatedly visited Burnt Ridge, that he had imminent plans to return, and that his esthetic interests would be harmed if he did not have the opportunity to comment on the Forest Service's actions at the site.[59] The Court found that the affidavit alleged sufficient facts for standing on the Burnt Ridge Project, but that the injuries had been remedied by the Project's settlement.[60] The Court therefore held that Marderosian failed to meet the requirements of standing to challenge the regulations

52. Summers v. Earth Island Inst., 129 S. Ct. 1142, 1149-51 (2009).
53. *Id.* at 1148.
54. *Id.*
55. *Id.* at 1151.
56. *Id.* at 1151-53.
57. *Id.* at 1149-51.
58. *Id.* at 1149.
59. *Id.*
60. *Id.*

generally.[61] The Court rejected the proposition that after settlement of his original claim, Marderosian retained standing to challenge "the basis for that action (. . . the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests."[62] The Court reasoned that it had found no precedent to support Marderosian's claim to standing, and that "[s]uch a holding would fly in the face of Article III's injury-in-fact requirement."[63]

The Court went on to find that the second affidavit, submitted by Jim Bensman, to be insufficient as well.[64] Bensman alleged that he had suffered injury in the past due to Forest Service actions, that he had visited over seventy national forests on hundreds of occasions (including the Allegheny National Forest, the site of several proposed small timber sales), and that he intended to do so again.[65] The Court rejected each allegation in turn. It began by holding that Bensman's past injuries did not suffice for standing because (1) they did not identify specific sites, (2) they were not tied to a specific application of the challenged regulations, and (3) they related to past events rather than imminent future injury.[66]

Moreover, although the Court found that Bensman had visited many forests in the past and intended to do so in the future, he failed to identify any timber sale in particular that would be unlawfully exempted under the Forest Service regulations.[67] The Court reasoned that this showed a chance but not *likelihood* that the agency's unlawful actions would injure Bensman in the future.[68]

Finally, the Court rejected Bensman's reference to the projects in the Allegheny National Forest because he did not demonstrate a "firm intention" to visit the Forest.[69] The Court found Bensman's desire to visit the Forest constituted a "some day intention," which the Court had rejected for the immininency requirement in *Defenders of Wildlife*.[70] Moreover, Justice Scalia compared Bensman's allegations to those made by the plaintiff in *Lyons*, finding Bensman's showing of injury to be significantly weaker.[71] He reasoned that "[a]ccepting an intention to visit

61. *Id.* at 1149-50.
62. *Id.*
63. *Id.*
64. *Id.* at 1150.
65. *Id.*; *id.* at 1157 (Breyer, J., dissenting).
66. *Id.* at 1150 (majority opinion).
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 1151 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 (1992)).
71. *Id.*

the National Forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact."[72]

The Court next examined whether an alleged "procedural injury" modified the standing requirements of Article III.[73] Earth Island claimed that the Forest Service's unlawful regulations constituted a continual denial of its rightful ability to comment on certain actions.[74] The Court found that Earth Island could not assert such a claim absent a concrete application of the regulations, reasoning that the "depravation [of a procedural right] *in vacuo* . . . is insufficient to create Article III standing."[75] The Court once again emphasized the need for a "concrete and particularized" harm, holding that plaintiffs must show that "the action injures [the]m in a concrete and personal way," no matter what kind of injury they allege.[76] Furthermore, although the Court accepted the assertion that Congress had specifically accorded the notice, comment, and appeal procedure to individuals potentially affected by Forest Service actions, it rejected Earth Island's contention that the general denial of procedure by an agency constituted an injury in fact.[77] The Court reasoned that the analysis of such congressional grants is better conducted under the redressability element of standing because the right to comment does not mean that a commenter would certainly persuade an agency against conducting a proposed action.[78]

The Court closed its opinion by addressing the arguments of the dissent.[79] The dissenting opinion, written by Justice Breyer, asserted that the majority's holding directly contradicted the precedent set forth in *Massachusetts*, where a state had standing to challenge a procedural failure although the injury alleged was unlikely to occur for several decades.[80] The dissent further concluded that the "imminent threat" standard put forth by the majority improperly applied the precedents set

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72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 580-81 (1992) (Kennedy, J., concurring in part and concurring in the judgment)). Justice Kennedy wrote a short concurring opinion in the noted case emphasizing this point as well. *Id.* at 1153 (Kennedy, J., concurring).
77. *Id.* at 1151 (majority opinion).
78. *Id.*
79. *Id.* at 1151-53.
80. *Id.* at 1155-56 (Breyer, J., dissenting) (citing Massachusetts v. EPA, 549 U.S. 497, 522-23 (2007)).

forth in *Defenders of Wildlife* and *Lyons*.[81] Looking at those three cases, the dissent proposed that for the purposes of defining "injury in fact" where past injury has occurred, a threat need not be "imminent" so much as it need be "realistic."[82] For example, the dissent postulated that the Court used the word "imminent" in *Defenders of Wildlife* not to set a standard but to emphasize the fact that the plaintiffs had only alleged conjectural and speculative future harm.[83] The dissent also suggested that *Lyons* supported a "realistic threat" standard, finding that "where, as here, a plaintiff has *already* been subject to the injury it wishes to challenge, the Court has asked whether there is a *realistic likelihood* that the challenged future conduct will, in fact, recur and harm the plaintiff."[84] In support of the realistic threat standard, Justice Breyer argued that such a standard was typical in traditional common law actions.[85] For example, he suggested, a court would grant standing in equity for an injured person seeking a protection order for "future realistic (but nongeographically specific) threats."[86]

The dissent then examined the affidavits of Earth Island's members for their sufficiency under the realistic threat standard, suggesting that Earth Island's members had alleged sufficient facts for standing.[87] Based on admissions by the Forest Service that it would conduct thousands more exempted salvage timber sales in the "reasonably near future," the dissent reasoned that Marderosian and Bensman did not need to allege specific projects in their allegations considering the high likelihood that they would be affected in the future by at least one of those sales.[88]

The majority ultimately rejected the dissent's realistic threat standard, calling it a "mockery" of Supreme Court precedent that has required specific allegations that at least one organizational member would be "directly affected" by the unlawful activity.[89] Justice Scalia

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81. *Id.*

82. *Id.*

83. *Id.* at 1155 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

84. *Id.* at 1155-56 (citing City of Los Angeles v. Lyons, 461 U.S. 95, 107-08 n.8 (1983)).

85. *Id.* at 1156.

86. *Id.* Justice Breyer also used examples in property law (a court would not deny standing to a holder of future interest in property in a case of waste) and tort law (a court would not deny standing to a person whose neighbor built a dam that creates a nuisance even though the harm will not occur for several years). *Id.*

87. *Id.*

88. *Id.* at 1157. The dissent distinguished *Morton* based on the magnitude of the agency action in the noted case. *Id.* In *Morton*, the Sierra Club challenged the use of a single eighty-acre parcel of land. Sierra Club v. Morton, 405 U.S. 727, 729 (1972). The noted case involves thousands of sites on hundreds of times more acres whose specific locations are undetermined. *Summers*, 129 S. Ct. at 1157.

89. *Summers*, 129 S. Ct. at 1151-52.

reiterated the need for "a factual showing of perceptible harm" and not of a mere likelihood that a member would be adversely affected.[90] Justice Scalia concluded by finding that even by the dissent's standard, the injuries alleged by Marderosian and Bensman did not show a "realistic threat" because the affidavits failed to demonstrate that either person would ever visit one of the sites affected by exempted timber sales.[91]

IV. ANALYSIS

The Supreme Court's holding in the noted case places a stringent limitation on when an individual may bring a procedural challenge to an agency action. The holding frustrates an individual's ability to communicate with agencies through the notice-and-comment process prior to decision making by effectively postponing agency and judicial consideration of such actions until such action is imminent or until it has passed. From an environmental standpoint, this limitation effectively defeats the purpose of a statute requiring agencies to consider public comment before taking action, which is to promote reasoned decision making and administrative transparency. As affiant Jim Bensman aptly commented, the fundamental effect of the Supreme Court's decision in the noted case is on "public accountability" and "whether or not the public has a right to be involved" in agency actions.[92]

Ultimately, the noted case leaves two lingering questions regarding standing. The first deals with the effects that settlement has on litigation strategy and policy, particularly when an agency may use it as an escape hatch to avoid challenges to their procedures. The second deals with precedent. The noted case exemplifies a sort of judicial cherry-picking, wherein the Court selectively followed some precedents while ignoring others. This approach renders the line between concrete future harm and conjectural future harm difficult to determine for potential environmental litigants. Thus the holding in the noted case sends a cautionary message to environmental plaintiffs, underscoring the need for precise allegations of injury to avoid the risk of losing on standing grounds.

For parties in environmental litigation, the noted case provides important strategic implications arising from the role played by the Forest Service's settlement of the Burnt Ridge Project. Although the dissent, lower courts, and plaintiffs urged that the Project's settlement did not bar standing because the Project constituted a concrete application of the

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90. *Id.* at 1152 (quoting *Defenders of Wildlife*, 504 U.S. at 566).

91. *Id.* at 1153.

92. Michael Doyle, *Sierra Logging Case in Supreme Court Stalled Timber Sale To Become Next National Environmental Flash Point*, FRESNO BEE, Aug. 23, 2008, at C1.

agency's regulations, the Court nonetheless held that it could not review the regulations in light of that specific past injury.[93] The effect of the Forest Service's settlement of the issue, therefore, was to remove the regulations from judicial consideration absent a separate challenge to a different application of the regulations. Thus the Court's holding provides an explicit "out" for agencies hoping to insulate their regulations from judicial scrutiny.[94] At the same time, the holding removes any incentive for environmental plaintiffs to settle in cases involving both specific and procedural injury, even where the opportunity for a fair settlement presents itself. Consequently, the decision in *Summers* reduces the value of settlement in environmental litigation and encourages parties to expend resources and time to litigate issues that they might otherwise settle.

Another troubling issue that arises from the holding in the noted case is the Supreme Court's failure to apply standing precedent. In its decision, the Supreme Court relies on precedent only to set out the rules pertaining to injury, ending its deference to most past decisions there. The Court's application of specific precedent in its reasoning is sparse at best, and when it does apply such precedent, it does not truly follow their holdings.

For example, the holding in *Massachusetts*, the most recent Supreme Court case addressing environmental standing, is directly contrary to the holding in the noted case and only reluctantly discussed by the majority. The *Massachusetts* Court allowed a state alleging procedural harm and broad-but-distant future injury to prevail because it had demonstrated a sufficient personal stake in the case.[95] The majority in the noted case (Justice Kennedy excepted) vigorously dissented in *Massachusetts* because the harm of global warming was not particularized and the alleged threat of land loss was not imminent based on the evidence presented.[96] Unsurprisingly, those same Justices all but ignored *Massachusetts* in their standing discussion in the noted case. The only mention the Court made of the majority's holding in *Massachusetts* came in a discussion of the necessity of geographic specificity in alleging harm.[97] The use of *Massachusetts* in this context is

93. *Summers*, 129 S. Ct. at 1148-50; *id.* at 1157 (Breyer, J., dissenting).

94. While settlement is a possible outcome in any challenge, the distinction here is that the Court explicitly found that in regulatory challenges where the parties settle on a matter concerting an agency's specific application of regulations, the courts will not hear the merits of a challenge to the regulations themselves.

95. Massachusetts v. EPA, 549 U.S. 497, 522-23 (2007).

96. *Id.* at 541-42 (Roberts, J., dissenting).

97. *Summers*, 129 S. Ct. at 1156 (Breyer, J., dissenting).

incongruous, considering that the same Justices in that case who insisted that the harm was far from geographically specific used the case here to demonstrate that requirement. The Court did not treat *Massachusetts* in any further detail, though, preferring to overlook the precedent that most strongly undermines its holding.

The Court instead relied heavily on *Lyons*, despite its factual dissimilarities from the noted case, to support its finding that Earth Island's injury was insufficient for standing. The victim in *Lyons* sought an injunction against a police *practice*, as opposed to a federal agency's compliance with *statutory mandates* through its official regulations.[98] The fact that the Court in the noted case had before it a congressional mandate[99] to compare against the Forest Service's regulations speaks to the concreteness of the harm alleged; Lyons, on the other hand, had no such official order to support his complaint against the practice.

Furthermore, Lyons' failure to allege the imminence of future harm is clearly distinguishable from the noted case. The Supreme Court in *Lyons* emphasized the "reality of the threat of repeated injury," holding that the victim needed to show that he would certainly have another encounter with the police and that either all officers choke citizens or that the city ordered them to do so.[100] Earth Island in the noted case alleged an injury that would meet this sort of inquiry. Not only would the Forest Service deprive individuals of their right to notice and comment in the future, but the agency specifically mandated that *all* timber salvage sales below a certain size would cause such a deprivation. As the dissent argued, Earth Island seemed to have satisfied the "realistic threat" standard used in *Lyons* in light of the near certainty that the procedural harm would occur in the future.[101] Nonetheless, the majority found a "weaker likelihood" of future injury to Earth Island's members than the "conjectural" injuries alleged in *Lyons*, despite both Bensman's assertion that he would certainly visit more national forests and the Forest Service's admission that it would conduct thousands of exempted timber sales in the future.[102]

The only precedent that the Court substantively applied in the reasoning of the noted case is *Defenders of Wildlife*. That opinion, also authored by Justice Scalia, rejected a procedural injury as it affected the

98. City of Los Angeles v. Lyons, 461 U.S. 95, 98 (1983).
99. 16 U.S.C. § 1612 (2006).
100. *Lyons*, 461 U.S. at 105-07 n.8.
101. *Summers*, 129 S. Ct. at 1155-56 (Breyer, J., dissenting).
102. *Id.* at 1150 (majority opinion).

plaintiff's potential enjoyment of wildlife at a site in Sri Lanka.[103] Despite the geographic specificity of the alleged injury, the *Defenders* Court held that it did not suffice for standing because the plaintiffs did not have discrete plans to return to the affected location in the future.[104] The Court thus required of plaintiffs nothing short of a plane ticket to return to the location, despite the fact that there was a civil war taking place in the country.[105] The facts of the noted case fit nicely into the *Defenders* mold; Marderosian and Bensman certainly did not allege future plans to visit affected sites with plane-ticket specificity.

At the same time, the overseas travel required to visit the site in *Defenders* would involve significantly more time, money, and planning than does a trip to an American national forest for a person who has visited such forests on hundreds of occasions. In this sense, the injury alleged in the noted case probably fits better with that in *Laidlaw*, where the Court granted standing to plaintiffs who lived near but could not enjoy a polluted river.[106] In that case, the plaintiffs certainly did not have concrete plans to use the river, but Justice Ginsburg found that their hopes of use exceeded *Defenders*' "someday intentions."[107] Nevertheless, the Court in the noted case mostly ignored *Laidlaw* in its opinion, preferring *Defenders*' specificity over *Laidlaw*'s permissiveness.

The result of the Supreme Court's application of *Lyons* and *Defenders* in the noted case is that courts will not consider the likelihood of future harm in a challenge to agency regulations, no matter how certain that likelihood may be, absent highly specific allegations of personal stake in a case. Plaintiffs cannot recover unless they can prove that they would be at the site to witness the harm caused by such failures or the harm's aftermath. As a result, environmental plaintiffs will likely lose on standing grounds if they do not sufficiently allege the location of imminent future harm and that a member will be there, even where an agency admits that it will repeat the challenged activity thousands of times across the nation.

V. CONCLUSION

The Supreme Court's holding in the noted case adds yet another chapter to the increasingly complex standing saga in which two antagonistic camps of Justices fundamentally disagree on the meaning of

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103. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992).
104. *Id.* at 564.
105. *Id.* (quoting the affidavit of the plaintiff).
106. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 167-68 (2000).
107. *Id.* at 184.

the constitutional limiting principle of "Case" or "Controversy." The debate plays out in this case over the proper injury standard when challenging an agency's regulations based on a showing of both past harm and likely future harm caused by unlawful agency action. Although the Court did not alter the customary elements of injury in fact, it selectively applied past holdings to achieve an outcome desired by the conservative members of the Court. The result is that a plaintiff's location in space and time will become the determining factor in similar standing cases, such that an individual must have defined plans to be in a location affected by the future agency action in order for a court to hear the merits of her case.

The other effect of the noted case's holding is practical in nature. Parties must now consider the risks and benefits of settlement in a case involving a procedural challenge; agencies wishing to protect their regulations from judicial scrutiny have a greater incentive to settle while individuals challenging those regulations do not. Ultimately, the noted case demonstrates that the Supreme Court has not settled the debate over those simple words in Article III that will continue to animate challenges brought in environmental law for years to come—"Case" or "Controversy."

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