Ohio Forestry Association v. Sierra Club: The United States Supreme Court Reexamines Ripeness in the Context of Judicial Review of Agency Action

I. OVERVIEW 249
II. BACKGROUND 251
III. THE COURT'S DECISION 256
IV. ANALYSIS 259
V. CONCLUSION 263

I. OVERVIEW

In August 1986, the United States Forest Service first published their proposed Land and Resource Management Plan (the Plan) for the Wayne National Forest in Ohio.[1] The Plan was developed pursuant to the National Forest Management Act of 1976 (NFMA),[2] which instructs the Forest Service to develop long-term land and resource management plans for national forests.[3] This extensive planning process was "designed to curtail agency discretion and to ensure forest preservation and productivity," as Congress feared an unrestrained Forest Service might exploit the national forests for timber production.[4] Before the Forest Service can actually implement any logging proposed by a plan, NFMA requires that the Service:

> (a) propose a specific area in which logging will take place and the harvesting methods to be used . . .(b) ensure that the project is consistent with the Plan . . .(c) provide those affected by proposed logging notice and an opportunity to be heard . . .(d) conduct an environmental analysis to evaluate the effects of the specific project and to contemplate alternatives

1. *See* Sierra Club v. Robertson, 845 F. Supp. 485, 489 (S.D. Ohio 1994).
2. 16 U.S.C. §§ 1600-1614 (1997).
3. *See Robertson*, 845 F. Supp. at 489.
4. Sierra Club v. Thomas, 105 F.3d 248, 250 (6th Cir. 1997). The NFMA imposes strict stipulations on timber harvesting, specifically that "even-aged" management techniques will only be used when consistent with the protection of the forest environment and the "regeneration of the timber resource." 16 U.S.C. § 1604(g)(3)(F)(v). Among "even-aged" techniques is the practice of "clearcutting," which "involves the removal of all trees within areas ranging in size from fifteen to thirty acres." *Thomas*, 105 F.3d at 249. As timber production has always been of great importance to the Forest Service, Congress became concerned with the effects of Service clearcutting activities. *See id.*

> . . .and (e) take a final decision to permit logging, which affected persons may challenge in an administrative appeals process and in court.[5]

Therefore, there are two stages for every plan: a programmatic stage involving the general forest plan and an implementation stage where separate site-specific projects are designed and evaluated.[6]

Following its publication, the proposed Plan for the Wayne National Forest and its accompanying draft environmental impact statement were distributed to the public for a comment period.[7] Over 1,500 written comments were received.[8] Among those participating heavily in the comment period were the Sierra Club and the Citizens Council on Conservation and Environmental Control (hereinafter collectively referred to as Sierra Club).[9] After examining the comments and performing further review, the Forest Service adopted the final Plan in January 1988, which included a Record of Decision and a Final Environmental Impact Statement as required by NFMA and the National Environmental Policy Act (NEPA).[10]

The Plan for the Wayne Forest allowed logging to occur on 126,107 acres of the forest and projected that logging would occur on about 8,000 acres during the ten-year life of the Plan.[11] Furthermore, logging on approximately 5,000 acres would involve "even-aged" tree harvesting, which is primarily clearcutting.[12]

The Sierra Club appealed the decision to adopt the Plan to the Chief of the Forest Service, but in both November 1990 and January 1992, the Chief denied Sierra Club's appeal.[13] On March 18, 1992, the Sierra Club filed an action in the District Court for the Southern District of Ohio, alleging that the Plan, by allowing too much logging and clearcutting, violated several laws including NFMA and NEPA.[14]

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5. 16 U.S.C. § 1604; *see also* Ohio Forestry Ass'n v. Sierra Club, 118 S. Ct. 1665, 1668-69 (1998).

6. *See Robertson*, 845 F. Supp. at 491. The Plan for the Wayne was a "general" plan. No specific projects had yet been designated or contemplated. *See Ohio Forestry Ass'n*, 118 S. Ct. at 1665.

7. *See Robertson*, 845 F. Supp. at 489.

8. *See id.*

9. *See id.* Sierra Club actively participated throughout the entire planning process for the Wayne, which began in 1981. *See id.*

10. *See id.*

11. *See Ohio Forestry Ass'n*, 118 S. Ct. at 1668.

12. *See id.* "The Plan provide[d] for even-aged management on 80% of the suitable forest land and for uneven-aged management on the remaining 20% . . . . [T]he Plan project[ed] . . .[that] 5,075 acres [could] be harvested under even-aged management . . . . The predominant even-aged management harvest method [wa]s clearcutting." *Robertson*, 845 F. Supp. at 490.

13. *See Robertson*, 845 F. Supp. at 489. The Chief's denial thereby affirmed the Plan. *See id.*

14. *See id.* at 488.

The action was brought under the Administrative Procedure Act (APA), which provides for judicial review of final agency actions under NFMA and NEPA.[15] The district court held that the Plan did not violate either Act and granted summary judgment to the Forest Service.[16] The Sixth Circuit Court of Appeals reversed, first addressing the issue of justiciability that the Forest Service raised on appeal.[17] The court held that the Sierra Club not only had standing, but that its challenge was sufficiently ripe.[18] The Forest Service argued that the dispute over the Plan was not ripe for review until it undertook site-specific action under the implementation stage of the Plan.[19] However, the court disagreed, stating that Sierra Club did not have to wait to challenge a particular project or action, because its complaint was against the Plan as a whole.[20] The United States Supreme Court granted *certiorari* and held that the controversy was not yet ripe for judicial review because: (1) withholding consideration imposed no hardship on Sierra Club, (2) judicial intervention would interfere with subsequent agency action, (3) the courts would merit from additional development of the issues, and (4) Congress never provided for pre-implementation judicial review of forest plans. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 118 S. Ct. 1665 (1998).[21]

II. BACKGROUND

The doctrine of ripeness, which directly evolves from the United States Constitution, Article III "case or controversy" requirement,[22] poses the query of "whether the harm asserted has matured sufficiently to warrant judicial intervention."[23] Generally, ripeness in the context of the judicial review of administrative agency actions "is

15. *See id.* The APA provides for review of "final agency action" and allows actions to be set aside that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §§ 704, 706 (1997).

16. *See Robertson*, 845 F. Supp. at 503. There was no justiciability dispute at the district court level.

17. *See* Sierra Club v. Thomas, 105 F.3d 248, 252 (6th Cir. 1997). After finding the Sierra Club's claim justiciable, the court held that the Plan favored clearcutting and that this action failed to comply with the "protective spirit" of NFMA. *See id.* at 250.

18. *See id.*

19. *See id.*

20. *See id.*

21. The Court vacated the Sixth Circuit's opinion and remanded the case with instructions to dismiss. *See id.*

22. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 313, at 60 (2d ed. 1988).

23. Sierra Club v. Marita, 46 F.3d 606, 611 (7th Cir. 1995) (quoting Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 155, 172-73 (1987)).

a requirement not of the administrative action to be reviewed but of the judicial controversy between the plaintiff and the agency."[24] The Supreme Court has held that the ripeness doctrine's rationale is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[25]

Section 10(c) of the APA provides for judicial review of "final agency action" regarding suits brought under NFMA and NEPA.[26] The ripeness of a claim under NFMA and NEPA revolves around the question of the "finality" of the agency's decision.[27] Factors to be considered in assessing this finality may include whether the specific issue is suitable for court consideration, or how the parties might be affected by judicial interference.[28] Administrative Law scholar Louis L. Jaffe has advocated a "balancing" approach to ripeness involving weighing the case-specific factors for or against the appropriation of jurisdiction, instead of relying on a more rigid formula.[29] He additionally has promoted the opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, which stated: "'[w]hether 'justiciability' exists . . . has most often turned on evaluating both the appropriateness of the issues for decision by courts and the hardship of denying judicial relief.'"[30] This general proposition has continually been referred to by the United States Supreme Court in its prospective examinations of ripeness.[31]

The Supreme Court has historically taken a fairly flexible view of finality when applying the ripeness doctrine to agency decisionmaking.[32] In *Columbia Broadcasting System v. United States*

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24. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 395 (1965).

25. Abbott Lab. v. Garner, 387 U.S. 136, 148-49 (1967).

26. *See id.* at 149 (citing 5 U.S.C § 704(1997)). "An 'agency action' includes any 'rule,' defined by the Act as 'an agency statement of general or particular applicability and future effect designed to implement, interpret, or proscribe law or policy.'" *Id.* (quoting 5 U.S.C. §§ 551(4), 551(13)).

27. *See id.*

28. *See id.*

29. *See* JAFFE, *supra* note 24.

30. *Id.* at 423 (quoting 341 U.S. 123, 156 (1951)). In *McGrath*, the Agency's finding certain organizations to be "communist" had "sufficient interest to secure review." *McGrath*, 341 U.S. at 123.

31. *See, e.g.*, *Abbott Lab.*, 387 U.S. at 149.

32. *See* Columbia Broad. Sys. v. United States, 316 U.S. 407 (1942); Frozen Food Express v. United States, 351 U.S. 40 (1956); United States v. Storer Broad. Co., 351 U.S. 192 (1956). *But see* United States v. Los Angeles & Salt Lake R.R. Co., 273 U.S. 209 (1927) (issuing fairly strict criteria for review of "orders" under the Urgent Deficiencies Act).

(*CBS*), the Court held ripe for review a Federal Communications Commission (FCC) regulation which pronounced that the FCC would not license local stations that maintained certain contracts with the chain broadcasting networks.[33] The Court stated that although the rule was only a statement of intentions and that no license had yet been denied or revoked, that type of regulation had the effect of law both before and after its sanctions were enforced.[34] The regulation could be challenged because the "expected conformity" to the rule caused an injury that a court could recognize.[35]

Fourteen years later, in *Frozen Food Express v. United States*, the Court both reaffirmed its holding in *CBS* and extended its prior opinions on ripeness.[36] In *Frozen Food*, an order of the Interstate Commerce Commission (ICC) exempting vehicles that carried certain commodities from ICC licensing regulations was held reviewable.[37] The Court held that the order was a "final agency action" under the APA.[38] Commentators have noted that *Frozen Food* holds that "where there has been formal action, as the adoption of a regulation . . . presumptively the action is reviewable."[39]

The Court continued to advocate its past analyses of ripeness in *United States v. Storer Broadcasting Co.*, where it again found a regulation to be a final agency action under the APA.[40] *Storer* involved a regulation denying television licenses to certain applicants, and the Court found that this rule was ripe for review even though no specific license application was before the FCC.[41]

In *Abbott Laboratories v. Gardner*, the Supreme Court observed that "[t]he cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way,"[42] and concluded that there was no reason to deviate from those precedents.[43] In that case, regulations published by the Commissioner of Food and Drugs were found to be a "final agency action" and thus subject to judicial review under the APA and the Declaratory Judgment Act.[44]

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33. *See Columbia Broad. Sys.*, 316 U.S. at 408.
34. *See id.* at 418-19.
35. *Id.*
36. *See* 351 U.S. 40, 44-45 (1956).
37. *See id.* at 41.
38. *Id.* at 43.
39. JAFFE, *supra* note 24, at 407.
40. 351 U.S. 192, 198 (1956).
41. *See id.*
42. 387 U.S. 136, 149 (1967) (referring to its prior decisions in *Columbia Broadcasting*, *Frozen Food*, and *Storer*).
43. *See id.* at 151.
44. *See id.* at 142, 148.

The Court stated that the regulations were definite, formal, and not tentative.[45] Furthermore, the impact of the regulations upon publication had a direct and immediate effect on all prescription drug companies, because the companies' failure to observe the rules could have exposed them to sanctions.[46] The Government argued that Congress did not intend for pre-enforcement review of such a regulation and that the claim was not ripe for review because of several other factors.[47] However, the Court did not find the Government's position convincing.[48] In arriving at its conclusions regarding ripeness, the Court evaluated the appropriateness of the issues for adjudication and the hardship on the parties if judicial consideration was denied.[49] This two-pronged analysis became the basic formulation for the subsequent examination of ripeness in cases involving judicial review of agency actions.[50]

Several years later, the Court in *Federal Trade Commission v. Standard Oil Co. of California* applied the *Abbott Laboratories* ripeness analysis to reach a very different result.[51] In *Standard Oil*, the Federal Trade Commission (FTC) issued a complaint against several oil companies stating that it had reason to believe that they were violating the Federal Trade Commission Act.[52] The companies brought suit to have the complaint deemed unlawful while administrative adjudication was still pending.[53] The Court held that the complaint was not a final agency action under the APA, and thus not subject to judicial review.[54] The Court distinguished *Abbott Laboratories*, stating that the two cases were factually distinct as the complaint had no legal force or effect upon the companies' businesses, and the oil companies had not thoroughly pursued their

45. *See id.* at 151.
46. *See id.* at 152-54.
47. *See id.* at 151-56. Among the Government's arguments were that the threat of sanctions for an untested regulation was unrealistic, and that judicial review would postpone effective enforcement of the Food, Drug, and Cosmetic Act. *See id.*
48. *See id.* at 139-56.
49. *See id.* at 148-49. The Court elaborated on this basic analysis by addressing important related factors, including whether the issue was a legal one, the effect of the regulations on the drug companies, and whether the regulations were a "final agency action" within the meaning of the APA. *See id.* The Court discussed this last factor in detail, reviewing its past decisions regarding "finality." *See id.* at 149-51.
50. *See* Federal Trade Comm'n v. Standard Oil Co. of Cal., 449 U.S. 232, 239-40 (1980); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 890-91 (1990); Ohio Forestry Ass'n v. Sierra Club, 118 S. Ct. 1665, 1670 (1998); Sierra Club v. Marita, 46 F.3d 606, 614 (7th Cir. 1995).
51. 449 U.S. at 232, 238-46 (1980).
52. *See id.* at 234.
53. *See id.* at 234-35
54. *See id.* at 238.

administrative remedies.[55] Unlike *Abbott Laboratories*, the effect of judicial review in *Standard Oil* would be "interference with the proper functioning of an agency and a burden for the courts" because the FTC would not be able to "correct its own mistakes and to apply its expertise."[56]

In *Lujan v. National Wildlife Federation*, the National Wildlife Federation (NWF) challenged the Bureau of Land Management's (BLM) "land withdrawal review program" under the judicial review provisions of the APA.[57] The Court held that there was no identifiable final agency action by the BLM because the program

> [did] not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It [was] simply . . . the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classification of public lands and developing land use plans.[58]

Accordingly, the program was not ripe for judicial consideration because the scope of the controversy was too broad and unmanageable.[59] The facts surrounding the dispute needed to be further solidified by an action involving the regulation that caused the plaintiff hardship or threatened him with harm.[60]

At least two circuit courts have recently espoused a new premise concerning ripeness and agency actions.[61] A Seventh Circuit Court of Appeals case five years after *Lujan* involved the specific issue of ripeness in the review of an agency action by the Forest Service under NFMA.[62] In *Sierra Club v. Marita*, the Sierra Club claimed that the Forest Service violated NFMA and NEPA in its land and resource management plans for the Nicolet and Chequamegon forests in Wisconsin.[63] Both proposed plans were drafted and published, followed by a period of public comment, and after further review and

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55. *See id.* at 242-23.
56. *Id.* at 242.
57. 497 U.S. 871, 875 (1990).
58. *Id.* at 890.
59. *See id.* at 891.
60. *See id.*
61. *See* Sierra Club v. Marita, 46 F.3d 606 (7th Cir. 1995); Resources Ltd. v. Robertson, 35 F.3d 1300 (9th Cir. 1994); Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 703 (9th Cir. 1993). The Sixth Circuit in *Sierra Club v. Thomas*, 105 F.3d 248 (6th Cir. 1997) (the lower court opinion for the noted case) concurred with the Seventh and Ninth Circuits, but its opinion was vacated by the noted case. *See* Ohio Forestry Ass'n v. Sierra Club, 118 S. Ct. 1665 (1998).
62. *See Marita*, 46 F.3d at 610-11. This case was almost factually identical to the noted case. *See id.* at 609-11.
63. *See id.* at 609.

changes, published in final form by the Regional Forester.[64] The Sierra Club challenged the plans in administrative proceedings which were affirmed in part and remanded in part.[65] The Sierra Club then brought suit in district court over the plans under the appropriate provisions of the APA.[66] In addressing the ripeness of the claim, the court briefly discussed the rationale of the ripeness doctrine as advocated by the Supreme Court in *Abbott Laboratories*.[67] The court then held that the Forest Service's plans were final agency actions under the APA, stating that the Sierra Club was "appealing the issuance of a final management plan which will, unless amended, direct [Forest] Service management activities in [the Wisconsin forests]."[68] The court went on to find the case dissimilar to *Lujan*, because the Service "issued a final plan that [was] appealable."[69] Thus, the court held the Sierra Club's claims justiciable. Consistent with other recent Ninth Circuit cases, the court forwarded the seemingly current ripeness premise that a group "need not wait to challenge a specific project when their grievance is with an overall plan."[70]

III. THE COURT'S DECISION

In the noted case, a unanimous Supreme Court relied upon the basic premises of the ripeness doctrine as espoused by *Abbott Laboratories* to come to the conclusion that the Sierra Club's challenge to the Forest Service's land and resource management plan for the Wayne Forest was not yet ripe for judicial review.[71]

The Court initially summarized the background of the noted case, and reviewed the purposes of NFMA and the fundamental provisions of the Plan.[72] The Court noted that, although the Plan set logging goals and made projections regarding logging, the Plan did

64. *See id.*
65. *See id.*
66. *See id.* at 610 (citing 5 U.S.C. §§ 701-706 (1997)).
67. *See id.* at 614.
68. *Id.*
69. *Id.* The BLM program in *Lujan* involved the totality of BLM operations, including its review of multiple land use plans as well as other activities. *See* Lujan v. Nat'l Wildlife Fed., 497 U.S. 871, 890 (1997).
70. Resources Ltd. v. Robertson, 35 F.3d 1300, 1304 (9th Cir. 1994) (quoting Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 703 (9th Cir. 1993)); *see also* Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993); Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir. 1992).
71. *See* Ohio Forestry Ass'n v. Sierra Club, 118 S. Ct. 1665 (1998).
72. *See id.* at 1668-70.

not permit any specific timber harvesting program to proceed.[73] The Court went on to discuss NFMA's regulations which guide the implementation stage of the Plan, clarifying that no logging would occur until a further analysis of specific sites by the Forest Service was complete.[74] Concluding its examination of the pertinent background information, the Court explained the general dispositions of both the district court and the Court of Appeals for the Sixth Circuit.[75]

Beginning its evaluation of the justiciability of the Sierra Club's claims, Justice Stephen Breyer, writing for the Court, reviewed the basic rationale of the ripeness doctrine as presented in *Abbott Laboratories*.[76] The Court then expanded *Abbott Laboratories'* general twofold ripeness analysis to encompass three factors: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented."[77] This amended analysis guided the Court in its evaluation of whether the Forest Service's Plan was able to be given judicial consideration.[78]

Starting with the first factor, the Court concluded that withholding its consideration of the claims at the present time would not cause Sierra Club any "significant hardship."[79] The Plan did not establish any legal rights and therefore could not create any "effects of a strictly legal kind . . . that traditionally would have qualified as harm," unlike the regulation in *Abbott Laboratories*.[80] The Court also found that the Plan imposed no "practical harm" upon Sierra Club, namely because it saw NFMA as providing multiple opportunities for Plan amendment and review during the implementation stage.[81] Thus, the Court rationalized that the Sierra Club would have many chances at a later date to bring suit, when harm was "more imminent and more certain."[82] The Court continued to distinguish the noted case and *Abbott Laboratories*, remarking that the Plan was not forcing Sierra

73. *See id.*
74. *See id.* at 1669.
75. *See id.* at 1669-70.
76. *See id.* at 1670.
77. *Id.*
78. *See id.*
79. *Id.* at 1670-71.
80. *Id.* at 1670; Abbott Lab. v. Garner, 387 U.S. 136, 149 (1967) (citing United States v. Los Angeles & Salt Lake R.R., 273 U.S. 299, 309-10 (1927)).
81. *See* Ohio Forestry Ass'n, 118 S. Ct. at 1670.
82. *Id.*

Club to alter its behavior in any manner.[83] Finally, the Court struck down Sierra Club's remaining argument that it would incur harm because it would be subject to enormous litigation expenses if compelled to bring multiple suits against site-specific logging decisions at later dates.[84] The Court dismissed this argument, stating that such "cost-saving" was outweighed by the "disadvantages of premature review."[85]

The Court also found that present judicial review would interfere with the Forest Service's ability to amend its Plan, specifically in the implementation stage when the Service might have to review the Plan before any individual project would be launched.[86] The site-specific proposals themselves would be exposed to extensive consideration before initiated.[87] Thus, adjudication of the claims at present would interfere with the NFMA program as set forth by Congress.[88]

Third, the Court felt that the Plan in its present state was too abstract and present consideration "would require time-consuming judicial consideration of the details of an elaborate, technically based plan."[89] The Court cited *Standard Oil* as enforcing the principle that review at present may be unnecessary because of future revisions and further crystallization of the issues.[90] The Plan and the controversy surrounding it needed to be reduced to controllable dimensions before judicial review, like the BLM's program in *Lujan*, so that the Court could better resolve the conflict.[91]

The Court made one additional argument against the present review of the Sierra Club's claims, noting that Congress had never provided for pre-implementation review of forest plans.[92] The Court found the Plan to be unlike any agency rule that Congress had deemed subject to review pre-enforcement, and consequently held that the Plan was not ripe for review due to this factor.[93]

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83. *See id.* at 1671. The rule in *Abbott Laboratories* altered behavior through threat of sanctions, and the rule in *CBS* did so through potential loss of license. *See* Abbott Lab. v. Garner, 387 U.S. 136, 152-53 (1967); Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 417-19 (1942).

84. *See Ohio Forestry Ass'n*, 118 S. Ct. at 1671.

85. *Id.*

86. *See id.*

87. *See id.*

88. *See id.*

89. *Id.* at 1671.

90. *See id.* at 1672.

91. *See id.* (citing Duke Power Co. v. Carolina Env't Study Group, Inc., 438 U.S. 59, 82 (1978)).

92. *See id.*

93. *See id.*

The Court took the time to address the Sierra Club's final argument, which it could not consider because it was not raised in the complaint, but was only first made in the briefs before the Supreme Court.[94] The Sierra Club stated that it would suffer imminent harm because certain aspects of the Plan, such as allowing motorcycles on trails, using massive machinery, and not promoting recreation in planned logging sites, were not subject to any reconsideration.[95] The Court agreed with the Sierra Club that claims such as these would have been justiciable at present.[96]

In coming to its conclusion that the Sierra Club's claims were not ripe for judicial review, the Court primarily relied upon its analysis of the three factors it extracted from the twofold ripeness test of *Abbott Laboratories*.[97] The Court considered each factor separately and continuously rejected the Sierra Club's contentions that the Forest Service's Plan for the Wayne Forest should be presently subject to judicial consideration.[98] Therefore, because the Sierra Club's claims were not ripe for adjudication, the Court did not consider whether the Plan conformed to the requirements of NFMA and its regulations.[99] The Court accordingly vacated the judgment of the Court of Appeals and remanded the case, instructing that it be dismissed.[100]

IV. ANALYSIS

In the noted case, the Supreme Court made several omissions, including eliminating any reference to the "final agency action" status of the Forest Service's Plan, misapplied its previous opinions to ripeness, and failed to discuss an important recent line of ripeness cases. Consequently, the Court's holding in the noted case is highly questionable, and its omissions and misconstructions may have led it to come to an incorrect conclusion that the Sierra Club's claims were not ripe for review.

Initially, although the Court relied upon the basic twofold aspect of ripeness evaluation as put forth by *Abbott Laboratories* to formulate its own factors for analysis, it eliminated from its discussion any reference to whether the Plan qualified as a "final

94. *See id.* at 1672-73.
95. *See id.* at 1672.
96. *See id.* at 1673.
97. *See id.* at 1670-72.
98. *See id.*
99. *See id.* at 1670.
100. *See id.* at 1673.

agency action" under the Administrative Procedure Act.[101] Since the Sierra Club brought its claims under the provisions of the APA, it is questionable why the Court chose to exclude a discussion of this highly important factor.[102] Although the Court's test did involve factors relevant to the question of the Plan's "finality," such as whether judicial review would interfere with future agency action or whether the Plan was too abstract in its present state for review, the Court failed to tie the "finality" inquiry to its factors.[103] *Abbott Laboratories*, the case upon which the Court strongly relied, debated at length the issue of "final agency action" with respect to the Food and Drug regulations being reviewed.[104] Other important precedential cases in the area of ripeness and agency action review under the APA, such as *Frozen Food, Storer,* and *Standard Oil*, all devoted portions of their opinions to address "final agency action," for the basis for deciding whether an agency action can be reviewed by a court under the APA is whether or not the action was *final*.[105] The Court's failure to include any references to the general topic of the finality of agency actions, and consequently whether the Plan qualified as such an action, weakened the structure of its analysis.

The Court's analysis incorrectly applied precedential holdings and made a critical omission. With regard to the Court's first analysis factor, the Court's use of *Los Angeles & Salt Lake R.R. Co.* to show that no legal harm had been inflicted upon Sierra Club was questionable.[106] Commentators have warned that, as this is an older opinion, it should be considered carefully and its pronouncements should be tempered by more recent decisions.[107] Furthermore, the passage to which the Court referred was directed at an order, and it should not exclude the prospect of equity jurisdiction, since not every administrative action having legal outcomes is an order.[108] Thus, the Court's use of this case to support its propositions is controversial.

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101. 5 U.S.C. § 704 (1997).

102. *See Ohio Forestry Ass'n*, 118 S. Ct. at 1669.

103. *See id.* at 1671-72.

104. *See* Abbott Lab. v. Garner, 387 U.S. 136, 148-56 (1967).

105. *See* Frozen Food Express v. United States, 351 U.S. 40 (1956); United States v. Storer, 351 U.S. 192 (1956); Federal Comm'n v. Standard Oil Co. of Cal., 449 U.S. 232 (1980). The Court did not mention *Frozen Food* or *Storer* in its opinion of the noted case.

106. *See Ohio Forestry Ass'n*, 118 S. Ct. at 1670.

107. *See* JAFFE, *supra* note 24, at 398. "Its [*Los Angeles & Salt Lake R.R. Co.'s*] pronouncements, taken I would suggest out of context, have occasionally been misused by some judges." *Id.*

108. *See id.* at 400. Also, the order in *Los Angeles & Salt Lake R.R. Co.* was brought under the Urgent Deficiencies Act, not the Administrative Procedure Act. *See id.* The APA was not even adopted until almost twenty years after *Los Angeles & Salt Lake R.R. Co.* was decided.

The Court failed to mention "hardship" or "harm" to the Sierra Club in the context of whether the Plan was a final agency action. This was a potentially serious omission because the Plan set forth a concrete plan of action which could potentially cause injury to Sierra Club.[109] Finally, the Court's use of *Abbott Laboratories* and *CBS* to infer the premise that sanctions (a threat of immediate harm) in regulations could possibly be a requirement of reviewability was inappropriate.[110] *CBS* explicitly rejected this notion,[111] and *Abbott Laboratories* made no mention of such a requirement.[112]

The Court also misapplied its previous holdings in *Standard Oil* and *Lujan* by dismissing the Plan because it was too abstract and unmanageable.[113] Both *Standard Oil* and *Lujan* were factually dissimilar to the present case. In *Standard Oil* the only rule at issue was an agency complaint,[114] while in *Lujan* the BLM's plans were seemingly boundless and constantly changing.[115] At the very least, under *Lujan*'s analysis, the Plan would have been a complete universe of regulations, as the Plan was in a final form and not in a state where it was subject to constant alteration.[116] Thus, the Court's application of these cases was misleading.

The Court ignored a line of ripeness cases in the circuit courts that was similar to the noted case and could have supplemented the Court's analysis. First, the Court's discussion with respect to its second factor failed to take into consideration any of the recent holdings concerning the ripeness doctrine in the context of agency action, like *Marita* and *Resources Ltd*. The Court focused on the Plan's implementation stage, where site-specific projects would be subject to extensive review and revision, to conclude that judicial action would interfere with the agency's future project planning.[117] However, the Sierra Club's grievance was with the Final Land and Resource Management Plan for the Wayne National Forest, not any potential individual logging project which may have arisen at a future date.[118] The Seventh Circuit in *Marita*, the Ninth Circuit in *Resources*

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109. *See* Sierra Club v. Thomas, 105 F.3d 248, 250 (6th Cir. 1997); *see also* Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

110. *See Ohio Forestry Ass'n*, 118 S. Ct. at 1671.

111. *See* Columbia Broad. Sys. v. United States 316 U.S. 407, 425 (1942).

112. *See* Abbott Lab. v. Garner, 837 U.S. 136 (1967).

113. *See* Federal Trade Comm'n v. Standard Oil Co. of Cal., 449 U.S. 232 (1980); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990).

114. *See Federal Trade Comm'n.*, 449 U.S. at 234.

115. *See Lujan*, 497 U.S. at 890.

116. *See id.*

117. *See* Ohio Forestry Ass'n v. Sierra Club, 118 S. Ct. 1665, 1671 (1998).

118. *See id.* at 1668-69.

Ltd. and *Seattle Audubon*, and even the Sixth Circuit in *Thomas* (though vacated by the noted case) have all held that plaintiffs "need not wait to challenge a specific project when their grievance is with an overall plan."[119] The Court's failure to address this premise raises doubt as to whether this portion of its opinion is complete.

Additionally, the Court's failure to refer to *Marita* at all is noticeable. Although it was not a Supreme Court case, *Marita* is decidedly on point as it involved an identical factual scenario involving the Sierra Club, the Forest Service, and the review of a final land and resource management plan.[120] Since *Sierra Club v. Thomas* relied in part upon *Marita,* the court should have taken the opportunity to discuss *Marita* in the noted case. References to *Marita* and similar circuit court cases could have presented a fuller picture of the modern view on ripeness and agency actions.[121] But the Supreme Court, in refusing to utilize those opinions, cast a questionable shadow over its holding.

Finally, the Court's reliance on the proposition that Congress had not provided for pre-implementation review of forest plans is unsupported. The Court in *Abbott Laboratories* devoted a notable portion of its opinion to the discussion of this particular issue.[122] Since the Court in the noted case relied on *Abbott Laboratories* to support its premises, it is interesting that the Court failed to cite *Abbott Laboratories'* lengthy debate on the subject. The Government's argument that only certain enumerated regulations were subject to pre-enforcement review and that others that were not so enumerated were not reviewable, was unconvincing to the *Abbott Laboratories* Court.[123] The Court established that the right to review was "too important to be excluded on such slender and indeterminate evidence of legislative intent."[124] Here, the Court's analysis is once again shown to be incomplete.

The Court's omissions, misapplications, and failure to address recent and relevant decisions renders its holding perfunctory and potentially incorrect. As the Court seemingly manipulated its analysis

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119. Resources Ltd. v. Robertson, 35 F.3d 1300, 1304 (9th Cir. 1994) (quoting Seattle Audubon Soc'y v. Esby, 998 F.2d 699, 703 (9th Cir. 1993)).

120. *See id.* The Sixth Circuit discussed *Marita* in its opinion. *See* Sierra Club v. Thomas, 105 F.3d 248, 250-52 (6th Cir. 1997).

121. *See Resources Ltd.*, 35 F.3d at 1304; *Seattle Audubon*, 998 F.2d at 703; Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993); Idaho Conservation League v. Mumma, 956 F.2d 1508, 1518 (9th Cir. 1992).

122. *See* Abbott Lab. v. Garner, 387 U.S. 136, 139-48 (1967).

123. *See id.* at 141.

124. *Id.* (quoting JAFFE, *supra* note 24, at 357).

of its previous decisions to reach its desired end and also made no attempt whatsoever to address the current ripeness premises being forwarded in other courts, it is questionable how this decision should be employed in future cases involving ripeness in the context of judicial review of agency actions.

V. CONCLUSION

The ripeness doctrine with respect to the review of agency actions should be applied to controversies taking into account both the opinions of important precedent as well as the recent sentiments of the courts today. The Supreme Court's analysis in the noted case was flawed as use of its prior decisions was misleading and because it ignored potentially important modern authorities on ripeness. It is surprising that the entirety of the Court would issue an opinion that is potentially inaccurate. The Court, in rejecting the Sierra Club's claims as justiciable, not only may have hindered the chances of future environmental groups to gain review of agency actions, but encumbered any future plaintiff seeking judicial consideration of an agency regulation, order or pronouncement. The holding of the noted case confuses what the past holdings of the Court have been, making their utilization in future cases uncertain. The future application of the authority ignored by the Court is similarly unclear. Instead of providing a definite, concise, and overarching ruling on the application of the ripeness doctrine in cases involving agency action review, the Court issued a judgment that is clearly disputable.

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