# *SUMMERS V. EARTH ISLAND INSTITUTE*

*Maria Banda**

## I. INTRODUCTION: ENVIRONMENTAL LITIGATION, CITIZEN SUITS, AND STANDING JURISPRUDENCE AFTER *SUMMERS*

Immediately after the decision in *Summers v. Earth Island Institute* was announced on March 3, 2009,[1] numerous commentators quickly concluded that the Supreme Court had created additional jurisdictional obstacles for environmental plaintiffs to prove standing in cases involving procedural injuries.[2] If this assessment proves correct, more restricted court access could drastically weaken the federal system of environmental protection. For over three decades, the enforcement of federal environmental statutes and regulations has depended critically on the ability of citizens to bring lawsuits — which Congress has recognized, and enabled, by creating "citizen-suit" provisions in a large number of environmental statutes.[3] If the Supreme Court

* J.D. Candidate, Harvard Law School, Class of 2010, and Trudeau Scholar.

[1] Summers v. Earth Island Inst., 129 S. Ct. 1142 (2009).

[2] For commentary from law firms, see, for example, Beveridge & Diamond, *Supreme Court Toughens Standing Requirements for Environmental Plaintiffs*, Mar. 5, 2009, http://www.bdlaw.com/news-510.html (on file with the Harvard Law School Library); Bingham McCutchen, *Supreme Court Tightens Standing Requirement*, Mar. 9, 2009, http://www.bingham.com/Media.aspx?MediaID=8329 (on file with the Harvard Law School Library); Dustin Till, Marten Law Group, *U.S. Supreme Court Limits Rights of Environmental Groups to Challenge Federal Agency Decisions*, Mar. 5, 2009, http://www.martenlaw.com/news/?20090305-env-groups-rights-limited (on file with the Harvard Law School Library). For other commentators, see, for example, Robert C. Cook, *Supreme Court Invokes Procedural Rules to Restrict Environmental Group Lawsuits*, Daily Env't Rep. (BNA) No. 40, at A-12 (Mar. 4, 2009); Daniel Jack Chasan, *The Bush Court Sets Back Environmental Litigation*, CROSSCUT, Mar. 9, 2009, http://crosscut.com/2009/03/09/science-environment/18897 (on file with the Harvard Law School Library); National Senior Citizens Law Center, *Supreme Court Narrows Standing in 5–4 Environmental Ruling*, http://www.nsclc.org/areas/federal-rights/area_folder.2006-05-26.6012943467/supreme-court-narrows-standing-in-5-4-environmental-ruling (last visited Dec. 23, 2009) (on file with the Harvard Law School Library). For a less pessimistic view, see Press Release, W. Envtl. Law Ctr., Supreme Court's Narrow Ruling Keeps Citizen's Right to Challenge Unlawful Government Regulations (Mar. 3, 2009), *available at* http://www.westernlaw.org/pressroom/press-releases/supreme-court2019s-narrow-ruling-keeps-citizen2019s-right-to-challenge-unlawful-government-regulations.

[3] The first such statute was the Clean Air Act of 1970. *See* 42 U.S.C. § 7604(a) (2006) (stating that "any person may commence a civil action on his own behalf" against a private or public polluter, or against the EPA for failing to perform a non-discretionary duty); Harold Feld, *Saving the Citizen Suit: The Effect of* Lujan v. Defenders of Wildlife *and the Role of Citizen Suits in Environmental Enforcement*, 19 COLUM. J. ENVTL. L. 141, 146 (1994). For a discussion of citizen suits, see *id.* at 143–48 (discussing express statutory provisions creating citizen suits, and cases where these were implied by courts); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV 1033 (1968) (anticipating, and welcoming, the expansion of citizen participation in the enforcement of statutes); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 164–93 (1992); *id.* at 165 (noting Congress used citizen suits "as a mechanism for controlling unlawfully inadequate enforcement of the law" by the agencies and to counteract agency capture). *See also* JOHN D. ECHEVERRIA & JON T. ZEIDLER, ENVTL. POLICY PROJECT, GEORGETOWN UNIV. LAW CTR., BARELY STANDING: THE EROSION OF CITIZEN "STANDING" TO SUE TO ENFORCE FEDERAL ENVIRONMENTAL LAW

in *Summers* has in fact made the standing inquiry more onerous for citizen plaintiffs, this decision could deliver a blow to the citizen suit device from which environmental litigation might not recover easily.

This is not the first time that a Supreme Court ruling has created concerns that courts might obstruct citizen suits by reading impossibly high standing requirements into federal environmental statutes. Fortunately, the worst predictions in the past have largely failed to materialize because judicial resistance to environmental standing in some cases has been tempered by judicial openness in others.[4] This Comment provides an early analysis of the potential impact of the *Summers* decision on future environmental litigation. After laying out the basic factual background in *Summers*, it examines how this case fits into the Supreme Court's recent standing jurisprudence since the 1980s, focusing specifically on the injury-in-fact requirement — one of the three prongs of the Court's constitutional standing inquiry that was at issue in *Summers*. The Comment then discusses the standing criteria for procedural injury claims, as well as the related Article III limitations on Congress's ability to confer standing in citizen suits. Finally, it considers the decision's immediate and broader impact on both environmental protection and potential litigation strategies and suggests that *Summers*'s effect is likely to be more limited than it first appears.

## II. THE CLAIM

In 2003, the U.S. Forest Service ("USFS") published regulations implementing the 1992 Forest Service Decisionmaking and Appeals Reform Act ("ARA"),[5] but it exempted certain projects from the Act's notice, comment, and appeal requirements, including post-fire timber salvage sales of 250 acres or less.[6] Several environmental groups challenged the exemptions both facially and as applied to the Burnt Ridge Project, a salvage sale in Sequoia National Forest.[7] The parties settled their dispute over Burnt Ridge, with the USFS agreeing to issue an Environmental Impact Statement and

(1999), *available at* http://www.law.georgetown.edu/gelpi/research_archive/standing/Barely Standing.pdf; William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL'Y F. 247, 249 (2001); James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 14–15 (2003). For an argument challenging the conventional view of citizen suits, see Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39 (2001) (arguing that an extension of property rights in environmental resources, rather than more citizen suits, will produce greater environmental protection).

[4] For a history of environmental citizen suits since the 1970s and a discussion of the ebb and flow of judicial resistance, see Cassandra Stubbs, *Is the Environmental Citizen Suit Dead? An Examination of the Erosion of Standards of Justiciability for Environmental Citizen Suits*, 26 N.Y.U. REV. L. & SOC. CHANGE 77, 104 (2000).

[5] 16 U.S.C. § 1612 note (2006).

[6] *See Summers*, 129 S. Ct. at 1147–48; *see also* Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities, 68 Fed. Reg. 33,582 (June 4, 2003).

[7] *See Summers*, 129 S. Ct. at 1148.

initiate administrative procedures, while plaintiffs dropped their as-applied claims.[8] The district court consequently enjoined the USFS from applying the exemptions across the United States.[9] On appeal, the Ninth Circuit rejected the government's argument that plaintiffs lacked standing, found that the regulations conflicted with the plain language of the Act, and upheld the nationwide injunction.[10] The Supreme Court granted certiorari on four questions.[11] Answering only the standing question in the final ruling, Justice Scalia held that the plaintiffs lacked standing to facially challenge the USFS regulations after voluntarily settling their claims regarding Burnt Ridge.[12] Justice Breyer dissented, joined by Justices Ginsburg, Souter, and Stevens.[13]

## III. THE STANDING INQUIRY

*Summers* continued the scattering of the Court's standing jurisprudence. Justice Scalia's majority opinion virtually ignored the Court's two most recent decisions — *Friends of the Earth v. Laidlaw*[14] and *Massachusetts v. EPA*[15] (where he lost the doctrinal contest over standing) — and reached back to his opinion in *Lujan v. Defenders of Wildlife* written seventeen years earlier.[16] One commentator at the time had described *Lujan*, which invalidated a variety of federal statutes containing a citizen suit mechanism, as

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[8] *See id.*

[9] Earth Island Inst. v. Ruthenbeck, No. CIV F-03-6386 JKS, 2005 WL 5280466 (E.D. Cal. Sept. 20, 2005).

[10] Earth Island Inst. v. Ruthenbeck, 490 F. 3d 687, 696 (9th Cir. 2007) (amended opinion).

[11] The four questions were:

1. Whether the Forest Service's promulgation of 36 C.F.R. 215.4(a) and 215.12(f), as distinct from the particular site-specific project to which those regulations were applied in this case, was a proper subject of judicial review.
2. Whether respondents established standing to bring this suit.
3. Whether respondents' challenge to 36 C.F.R. 215.4(a) and 215.12(f) remained ripe and was otherwise judicially cognizable after the timber sale to which the regulations had been applied was withdrawn, and respondents' challenges to that sale had been voluntarily dismissed with prejudice, pursuant to a settlement between the parties.
4. Whether the court of appeals erred in affirming the nationwide injunction issued by the district court.

Petition for Writ of Certiorari, *Summers*, 129 S. Ct. 1142 (No. 07-463).

[12] *Summers*, 129 S. Ct. at 1147–53.

[13] *Id.* at 1153–58.

[14] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000).

[15] Massachusetts v. EPA, 549 U.S. 497 (2007).

[16] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). The Supreme Court's growing emphasis on democracy and separation-of-powers concerns underlying the Article III standing requirement can be traced from *Warth v. Seldin*, 422 U.S. 490 (1975), through *Allen v. Wright*, 468 U.S. 737 (1984), to *Lujan*. *Compare Warth*, 422 U.S. at 498 (noting standing is "founded in concern about the proper — and properly limited — role of the courts in a democratic society"), *with Allen*, 468 U.S. at 752 ("[T]he law of Art. III standing is built on a single basic idea — the idea of separation of powers."). *But see* Flast v. Cohen, 392 U.S. 83, 100 (1968) ("The question whether a particular person is a proper party to maintain [an] action does not, by its own force, raise separation of powers problems . . . .").

"one of the most important standing cases since World War II."[17] Thus, by anchoring *Summers*'s reasoning in *Lujan* rather than in more recent (and more progressive) jurisprudence, Justice Scalia signalled his continued commitment to a more restrictive theory of standing for non-regulated plaintiffs (such as environmental groups) than for regulated plaintiffs (industries), which he had first articulated in a 1983 law review article.[18]

In *Summers*, the majority summarized the standing requirement as follows:

> To seek injunctive relief, a plaintiff must show he is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.[19]

Interestingly, that definition was the majority's sole reference to *Laidlaw* — a case that had embraced an expansive view of the injury-in-fact requirement.[20] Though *Laidlaw* stood for a functionalist standard (i.e., a reasonableness inquiry),[21] Justice Scalia tried to fit *Summers* into the *Lujan* framework, with a strict injury-in-fact standard — defined as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'"[22] By reintroduc-

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[17] Sunstein, *supra* note 3, at 165. *See also Lujan*, 504 U.S. at 606 (Blackmun, J., dissenting) (describing the majority opinion as "a slash-and-burn expedition through the law of environmental standing"); ECHEVERRIA & ZEIDLER, *supra* note 3; Feld, *supra* note 3, at 183 (noting *Lujan* "deprived environmentalists of their most potent weapon in defense of the environment"); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1142 (1993); Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife: *Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993).

[18] *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 895–97 (1983); *Summers*, 129 S. Ct. at 1149 ("The regulations under challenge here neither require nor forbid any action on the part of respondents. . . . '[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.'") (quoting *Lujan*, 504 U.S at 562) (internal quotation marks omitted). For a counterargument, see Sunstein, *supra* note 3, at 166–67 (criticizing the courts' tolerance for bureaucratic subversion of legislative objectives), and see generally Nichol, *supra* note 17.

[19] *Summers*, 129 S. Ct. at 1149 (citing *Laidlaw*, 528 U.S. at 180–81).

[20] *See Laidlaw*, 528 U.S. at 181 (establishing that "the relevant showing for Article III standing . . . is not injury to the environment but injury to the plaintiff" in order to not "raise the standing hurdle higher than . . . necessary"); *id.* at 183 ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity.") (quoting Sierra Club v. Morton, 405 U.S. 727, 735).

[21] For example, the Court noted that "the affidavits and testimony presented by [the plaintiffs] in this case *assert* that Laidlaw's discharges, and the affiant members' *reasonable concerns* about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests." *Id.* at 183–84 (emphasis added). For a general discussion of the required showing under Article III, see *id.* at 180–85.

[22] *Lujan*, 504 U.S. at 560 (citations omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)) (internal quotation marks omitted).

ing these two elements of "injury in fact," the majority brought the Court's jurisprudence no closer to clarity or resolution.

First, the particularized injury requirement was, and remains, controversial. In *Lujan*, Justice Scalia had to drop his reference to particularized injury in order to secure Justices Kennedy and Souter's concurrence;[23] consequently, he included only a single mention of particularized injury, plus a clarifying footnote, in the opinion: "By particularized, we mean that the injury must affect the plaintiff in a personal and individual way."[24] This definition reflected Justice Kennedy's position that the plaintiff "must show that the action injures him in a concrete and *personal* way."[25] Removing the reference gave Justice Scalia enough votes in *Lujan* to form a majority on the general issue, but not on the "concrete and particularized" requirement. In *Summers*, however, the three references to "concrete and particularized" passed without any express objections from Justice Kennedy. Justice Souter, however, migrated to the dissent. Given the similarity of the questions presented in *Lujan* and *Summers*, it is too soon to speculate what may have motivated Justice Kennedy's silence on this point seventeen years later.[26] The dissent, for its part, practically ignored Justice Scalia's attempts to reframe the Court's precedent and instead tried to recharacterize the majority's test by citing back to *Laidlaw*.[27] Justice Breyer's overall approach was to build his argument on two precedents — *Laidlaw* and *Massachusetts v. EPA* — with a passing (and a distancing) reference to *Lujan*,[28] signalling that those progressive cases were still very much valid.

The second element of injury in fact, the imminence requirement, was equally contested and not any clearer. The majority never defined this term for standing purposes, though the opinion seemed to equate it with absolute certainty that some identified harm would happen — soon. For instance, the Court rejected the plaintiffs' second affidavit on *Lujan* grounds (of "some

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[23] *See* Memorandum from "Jeff" (Geoffrey M. Klineberg) to Justice Blackmun (June 2, 1992) (on file with author); Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers*, 35 Envtl. L. Rep. (Envtl. Law Inst.) 10,637, 10,658–59 (2005). Justice Souter subsequently joined Justice Kennedy's concurrence. *See Lujan*, 504 U.S. at 579. Justice Stevens concurred in the judgment of reversal for different reasons, and sided with the dissent on standing. *See id.* at 581–85.

[24] *Lujan*, 504 U.S. at 560 n.1.

[25] *Id.* at 581 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added).

[26] It is possible that this omission is not significant given Justice Kennedy's position in *Massachusetts v. EPA*; that case, however, did emphasize the role of the state plaintiff, which leaves some uncertainty as to Justice Kennedy's conception of standing. *See* Massachusetts v. EPA, 549 U.S. 497, 518–21 (2007).

[27] *See, e.g.*, Summers v. Earth Island Inst., 129 U.S. 1142, 1155 (2009) (Breyer, J., dissenting) ("[T]he majority . . . recognizes, as this Court has held, that a plaintiff has constitutional standing if [he] demonstrates (1) an 'injury in fact,' (2) that is 'fairly traceable' to the defendant's 'challenged action,' and which (3) a 'favorable judicial decision' will likely prevent or redress.") (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000)) (internal quotation marks and brackets omitted).

[28] *See id.*

day" intentions[29]) because the affiant failed to assert "any firm intention" to visit the (specifically identified) sites subject to the challenged regulations.[30] Justice Breyer, in contrast, defined "imminent" in probabilistic terms (inevitable or highly likely) that would open greater access to federal courts.[31] In cases involving past harm, the imminence standard should require the showing of a "'realistic threat' of injury to plaintiffs brought about by reoccurrence of the challenged conduct."[32] Justice Breyer's argument reflects a belief that environmental plaintiffs — though under no threat to their economic interests or bodily integrity — are entitled to the same kind of imminence standard as plaintiffs alleging property or tort violations.[33] The fact that the majority mustered a weak counterargument on factual rather than doctrinal grounds[34] suggests that the dissent's standard may hold considerable theoretical force in future litigation.

## IV. Procedural Injuries

Beyond the general definition of injury in fact, a central issue in *Summers* concerned standing in procedural injury claims. All Justices agreed that "deprivation of a procedural right without some concrete interest that is affected by the deprivation — a procedural right *in vacuo* — is insufficient to create Article III standing,"[35] but they diverged on the requisite eviden-

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[29] *Lujan*, 504 U.S. at 564.

[30] *Summers*, 129 S. Ct. at 1150. Presumably a "firm intention" could have been evidenced with airline or train tickets. *See Lujan*, 504 U.S. at 563–64 (discussing required evidence of intended travel); *id.* at 579 (Kennedy, J., concurring in part and concurring in the judgment) (commenting on the majority's burden of proof); *see also id.* at 592 (Blackmun J., dissenting) ("[T]he Court . . . demands what is likely an empty formality. No substantial barriers prevent [the affiants] from simply purchasing plane tickets to return to the [area in question].").

[31] *Summers*, 129 S.Ct. at 1155–57 (Breyer, J., dissenting) (criticizing the majority's imminence standard).

[32] *Id.* at 1158 (Breyer, J., dissenting) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 106 n.7 (1983)). *See also id.* at 1155–56 (noting that where the plaintiff has already been subject to the injury he wishes to challenge, he can prove standing if he can show "'a *realistic* threat' that reoccurrence of the challenged activity would cause him harm 'in the reasonably near future'") (quoting *Lyons*, 461 U.S. at 106 n.7, 108) (emphasis in original).

[33] *See id.* at 1156 (listing hypothetical plaintiffs).

[34] The majority retorted that "the seeming expansiveness of the test" in *Lyons* had "made not a bit of difference" in that case and would fail here too because the plaintiffs' timely affidavits had failed to establish that they "will *ever* visit one of the small parcels at issue." *Id.* at 1153 (emphasis in original). However, the dissent's supposedly "unheard-of test" (described as "statistical probability"), *id.* at 1151, was arguably the basis of the *Laidlaw* and *Massachusetts v. EPA* decisions. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000); Massachusetts v. EPA, 549 U.S. 497 (2007). What is more, the majority recognized that "it is certainly possible — perhaps even likely — that one individual will meet all of these criteria." *Summers*, 129 S. Ct. at 1152. *See also id.* ("Standing . . . is not an ingenious academic exercise in the conceivable . . . but requires . . . a factual showing of perceptible harm.") (quoting *Lujan*, 504 U.S. at 566) (internal quotation marks and brackets omitted).

[35] *Summers*, 129 S. Ct. at 1151; *id.* at 1153 (Kennedy, J., concurring). *Cf. id.* at 1155 (Breyer, J., dissenting).

tiary standard. The majority set forth a demanding two-step inquiry, requiring the plaintiff not only to identify an area subject to unlawful regulations, but also to prove the resulting harm.[36] The difficulty for environmental plaintiffs is that procedural injuries are often so bound up with substantive harms that a neat analytical separation — and, hence, judicial access — becomes impossible.[37] Here, having concluded that the plaintiffs had failed to prove harm to their concrete (substantive) interests, Justice Scalia easily dismissed their procedural injury claim.

Justice Breyer, in contrast, was dismayed by the Court's unwillingness to recognize the connection between the plaintiffs' procedural rights under the statute and the substantive interests that the citizen-suit provision was designed to protect: "How can the majority credibly claim that salvage-timber sales . . . are unlikely to harm the asserted interests of the members of these environmental groups?"[38] It may have been obvious that, in this case, a procedural violation (denial of the right to notice, comment, and appeal resulting in a sale) would inevitably injure plaintiffs' interests (recreational, aesthetic, or environmental enjoyment of the forest). Yet this common-sense approach also betrayed Justice Breyer's view on the merits because he assumed the existence of procedural irregularities.[39] In contrast, the majority described the regulations as "allegedly unlawful"[40] and found the alleged harms to be too speculative.[41] It seems that the final decision on standing was influenced in no small part by the Justices' views on the merits.[42]

As a related question, *Summers* highlighted the continuing jurisprudential debate between the Court's liberal and conservative wings over the extent of Article III limitations on Congress's ability to confer standing in citizen suits. According to Justice Scalia, "It makes no difference that the procedural right has been accorded by Congress."[43] While Congress "can loosen the strictures of the redressability prong of our standing inquiry,"

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[36] "[W]e are asked to assume not only that [the affiant] will stumble across a project tract unlawfully subject to the regulations, *but also* that the tract is about to be developed . . . in a way that harms his recreational interests, *and* that he would have commented . . . but for the regulation." *Id.* at 1150 (majority opinion) (emphasis added).

[37] *See, e.g.*, *Lujan*, 504 U.S. at 605 (Blackmun, J., dissenting) ("[S]ome classes of procedural duties are so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty.").

[38] *Summers*, 129 S. Ct. at 1155 (Breyer, J., dissenting); *accord id.* at 1157 ("To know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where it is bound to arrive. The law of standing does not require the latter kind of specificity. How could it?").

[39] *See id.* at 1155 ("[T]hese *unlawful* Forest Service procedures will lead to substantive actions . . . that might not take place if the proper procedures were followed.") (emphasis added).

[40] *Id.* at 1151 (majority opinion).

[41] *See id.* at 1150–51 (discussing the rejection of one of the plaintiffs' affidavits).

[42] For a discussion of how the Justices' political leanings influence their decisions on standing across different issue areas, including the environment, see Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999).

[43] *Summers*, 129 S. Ct. at 1151.

Justice Scalia saw "the requirement of injury in fact [as] a hard floor of Article III jurisdiction that cannot be removed by statute."[44] Yet the text of Article III addresses neither redressability nor injury in fact, and Justice Scalia's categorical conclusion overlooks the fact that the standing test itself is a judicial invention.[45] The dissent did not engage head-on with Justice Scalia's argument, presumably because it felt that *Laidlaw* — reflecting "a more limited and deferential" judicial attitude to statutory standing[46] — and *Massachusetts v. EPA* — establishing that Congressional authorization "is of *critical importance* to the standing inquiry"[47] — should have settled the issue. The Court's standing inquiry thus reveals an interesting split over the separation-of-powers question in environmental cases: whereas the liberal Justices are more likely to defend legislative supremacy and judicial restraint,[48] the conservative Justices are more likely to undercut citizen suits — one of Congress's chosen means to further legislative ends.[49]

Justice Kennedy broke the tie in *Summers* on this specific issue by reaffirming his *Lujan* concurrence[50] that Congress must retain enough flexibility to define new injuries in response to changing circumstances.[51] The irony is that Justice Scalia had deliberately cited Justice Kennedy's *Lujan* opinion, presumably to win a fifth vote for his narrow interpretation of standing. But,

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[44] *Id.*

[45] "[T]he Court's standing cases . . . are very obviously and forthrightly incorporating a *political* . . . philosophy about the function of federal courts. There is no way that the origin of the increasingly tough three-pronged standing test . . . can be traced to [Article III]." Patricia M. Wald, *The Cinematic Supreme Court: 1991–92 Term*, 7 ADMIN. L.J. AM. U. 238, 239 (1993) (emphasis in original).

[46] Buzbee, *supra* note 3, at 249.

[47] Massachusetts v. EPA, 549 U.S. 497, 516 (2007) (emphasis added).

[48] For the argument that broad environmental standing post-*Laidlaw* "illustrates at heart the importance of judicial restraint," see *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 163–64 (4th Cir. 2000) (en banc). The court noted that "[c]ourts are not at liberty to write their own rules of evidence for environmental standing," and found that to deny standing would "thwart congressional intent" and "throw federal legislative efforts . . . into a time warp by judicially reinstating the previous statutory regime in the form of escalated standing requirements." *Id.* at 163.

[49] *See* Buzbee, *supra* note 3 (arguing for legislative supremacy in the courts' standing jurisprudence and criticizing judicial overreach in *Lujan*); David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37, 69–70 (1984) (arguing for deference to Congress's grant of standing to "any person" who meets the minimum Article III content and whose injury is "colorably contemplated by the remedial legislation"); Pierce, *supra* note 17, at 1200; Sunstein, *supra* note 3, at 165–66; *see also, e.g.*, *Massachusetts v. EPA*, 549 U.S. at 535 (Roberts, C.J., dissenting).

[50] "As [regulation] become[s] more complex and farreaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. . . . Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view." Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in judgment).

[51] Summers v. Earth Island Inst., 129 U.S. 1142, 1153 (2009) (Kennedy, J., concurring) ("This case would present different considerations if Congress had sought to provide redress for a concrete injury 'giving rise to a case or controversy where none existed before.'") (quoting *Lujan*, 504 U.S. at 580) (internal brackets omitted).

because Justice Scalia had ignored the essence of Justice Kennedy's argument, *Summers* saw a replay of *Lujan's* dynamics. In *Summers,* Justice Scalia asserted a blanket rule for statutory standing while Justice Kennedy inserted a limiting principle — that the specific statute did not evince congressional intent to create standing. As in *Lujan*, Justice Kennedy's disagreement with Justice Scalia's understanding of Article III limitations on standing effectively turned that part of Justice Scalia's opinion into a plurality.

## V. THE IMPACT

The immediate impact of *Summers* on the health of the national forests is troubling. Despite the majority's attempts to downplay the magnitude of environmental damage (and the resulting harm to plaintiffs' interests), the aggregate impact of the salvage-timber sales is significant and irreversible. The 2003 regulations effectively created a loophole allowing the USFS to disaggregate burnt forestland into thousands of small parcels (less than 250 acres) to escape review. The denial of court access in this case is especially alarming given the Ninth Circuit's concerns about agency capture in a previous case.[52] Had the plaintiffs been allowed to proceed, a likely finding on the merits would have been that the USFS — by refusing to provide notice, comment, and appeal procedures in thousands of instances — had violated the spirit of the ARA. After all, Congress could hardly have contemplated that the USFS would be able to sell off thousands of acres of forest without any procedures or public oversight by exploiting a loophole that the Court had refused to close. Moreover, the "difficulty of verifying the facts upon which [the plaintiffs'] probabilistic standing depends"[53] argues in favor of finding broad citizen standing, which Congress may have conferred precisely for that reason (as broad citizen standing partly dispenses with the need for a detailed, independent judicial inquiry into the facts). Given the conservative Justices' positions on statutory interpretation and the role of the courts, however, such purposivist arguments alone are unlikely to win in today's court.

Perhaps even more troubling is *Summers*'s limiting impact on environmental litigation. To the extent that *Massachusetts v. EPA* had failed to resolve the circuit split over environmental standing (because of the unclear importance of a state plaintiff), *Summers* may turn out to have significant precedential value. By reviving *Lujan*, this decision could tilt the interpretive balance away from the Ninth Circuit's expansive test for standing in

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[52] *See* Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1178 (9th Cir. 2006) ("It has not escaped our notice that the USFS has a substantial financial interest in the harvesting of timber . . . . [T]he USFS appears to have been more interested in harvesting timber than in complying with our environmental laws.").

[53] *Summers*, 129 S. Ct. at 1152.

cases involving alleged procedural injuries[54] in favor of the D.C. Circuit's restrictive approach,[55] just like the pre-*Laidlaw* cases had led to a harmful expansion of *Lujan*.[56]

For instance, both the particularity and imminence elements could have far-reaching implications for environmental plaintiffs seeking to prevent future harms or risks that are non-temporally or non-geographically specific. While a broader conception of imminence can open the door to environmental litigation, a narrow standard could do the opposite by requiring an impossible degree of specificity or proximity. Thus, *Summers* could make it more difficult for environmental groups to challenge a regulatory agency's violation of a federal statute by placing a heightened burden on plaintiffs to substantiate a procedural violation, for example, in climate change challenges.[57] The same is true of other consumer and environmental protection cases involving likely but non-specific harms, like food and drug safety or atmospheric pollution. This potential outcome is unsettling because the ability of private citizens to assert procedural claims under federal environmental legislation is often central to their faithful implementation and enforcement.[58]

Not surprisingly, the dissent in *Summers* worried that the majority's approach could prevent legitimate claims from reaching the Court: "[A] threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates."[59] In *Massachusetts v. EPA*, Justice Stevens argued that Massachusetts had standing to challenge EPA's procedural failure to regulate climate change — a harm likely to occur, but perhaps not for decades.[60] One difficulty with his argument, however, was the pres-

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[54] *See, e.g.*, Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 969–75 (9th Cir. 2003) (discussing *Laidlaw*-like standing factors and focusing on "the reasonable probability" of the alleged threat); *see also* Comm. to Save the Rio Hondo v. Lucero, 102 F.3d 445 (10th Cir. 1996).

[55] *See, e.g.*, Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 665–66 (D.C. Cir. 1996) (en banc) (emphasizing the "particularized injury" requirement in *Lujan* and acknowledging that some disputes will not receive judicial review); *id.* at 675 (Rogers, J., dissenting) (stating the majority "imposes so heavy an evidentiary burden on appellants to establish standing that it will be virtually impossible to bring a NEPA challenge to rulemakings with diffuse impacts," placing "this circuit in conflict with the Ninth Circuit, which has frequently found standing in cases similar to this one").

[56] *See* Buzbee, *supra* note 3, at 267–71 (criticizing decisions in the Third and Fourth Circuits for demanding particularized "touch and feel" evidence despite contrary congressional objectives); Stubbs, *supra* note 4, at 101–02 (discussing these and similar post-*Lujan* cases).

[57] An example of a climate change challenge that might be affected by the Court's narrower interpretation of standing in *Summers* is *Center for Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105 (N.D. Cal. 2007), where the court found environmental plaintiffs had standing for a procedural injury claim under the Global Change Research Act, based on the government's failure to allow consultation and comment on climate research activities.

[58] *See* ECHEVERRIA & ZEIDLER, *supra* note 3, at 1.

[59] Summers v. Earth Island Inst., 129 U.S. 1142, 1156 (2009) (Breyer, J., dissenting).

[60] *See* Massachusetts v. EPA, 549 U.S. 497, 526 (2007) ("The risk of catastrophic harm, though remote, is nevertheless real.").

ence of a *state* plaintiff in that case.[61] In fact, some lower courts have already distinguished *Massachusetts v. EPA* on that basis in order to deny environmental plaintiffs standing,[62] and Justice Scalia's silence on that precedent may be telling (in so far as he may have ignored the case as irrelevant to citizen suits). Thus, to the extent that *Massachusetts v. EPA* emphasized the plaintiff state's special status, the relevance of the Court's broader imminence test in that case may be limited or inapplicable to citizen suits.

Despite such concerns, *Summers* may actually turn out to be less constraining than initial reactions suggest. Though much depends on the Court's composition, there are several reasons for optimism. First, *Laidlaw* and *Massachusetts v. EPA* are still good law, which gives plaintiffs a solid foundation to sidestep the *Lujan/Summers* standing doctrine. Second, thanks to Justice Kennedy's limiting principle that removed the majority's "hard floor" standard,[63] Congress can still create citizen standing for procedural injuries (which could be essential for enforcing new climate legislation).[64] By concurring in judgment based on a legal theory directly challenging the majority, Justice Kennedy ensured that the loss for the environmental activism was not nearly as great as it otherwise could have been. Third, plaintiffs still have the ability to emphasize the magnitude of the alleged harm, which seemed to matter in the majority's analysis.[65]

Finally, and most important, *Summers* is a narrow ruling addressing a narrow question presented. Though the Supreme Court granted certiorari on *four* questions, it answered only one — "whether respondents have standing to challenge the regulations in the absence of a live dispute over a concrete application of those regulations."[66] It was especially significant that the Court did not address the question of ripeness (i.e., whether environmental plaintiffs could facially challenge the regulations), which could have barred plaintiffs from challenging regulations even where they could prove a likely future injury. Combined with a narrow standing requirement, a tougher ripeness standard would have likely barred the bringing of environmental challenges to *prevent* some impending harm. Also, it is worth remembering that

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[61] *Id.* at 518 ("We stress . . . the special position and interest of Massachusetts. It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.").

[62] *See, e.g.*, Coal. for a Sustainable Delta v. Carlson, No. 1:08-CV-00397 OWW GSA, 2008 WL 2899725, at *6–7 (E.D. Cal. July 24, 2008) (denying standing and describing *Massachusetts v. EPA* as being "of limited relevance" to suits brought by private citizens).

[63] *See Summers*, 129 U.S. at 1151 ("Unlike redressability, . . . the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.").

[64] *See supra* text accompanying note 50.

[65] *See Summers*, 129 S. Ct. at 1151–52 (describing the "principal difference" between the instant case and *Sierra Club v. Morton*, 405 U.S. 727 (1972), as being that "the challenged project [in *Morton*] was truly massive, involving the construction of [buildings and infrastructure]"). Admittedly, the plaintiffs in *Morton* were denied standing. However, *Morton* stands for the proposition that aesthetic and ecological harm may amount to injury in fact so long as the party seeking review is among those injured. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183 (2000).

[66] *Summers*, 129 S. Ct. at 1147. *See supra* note 11.

plaintiffs did initially have standing, which they lost upon settling their Burnt Ridge claims. Though the settlement made their procedural challenge *in vacuo* by removing the underlying harm,[67] both the government and the majority conceded that one of the affidavits could have established Article III standing with respect to Burnt Ridge — *but for* the settlement.[68] The third set of affidavits was as factually compelling, but the majority dismissed it as untimely (without citing any precedents or engaging with the dissent's argument).[69]

Since the majority's rejection of the plaintiffs' substantive injury claims partly turned on the plaintiffs' (supposedly) inadequate or untimely affidavits, this suggests that a different fact pattern, or a different litigation strategy, could pass the Court's scrutiny. Admittedly, it is not certain that more detailed, or more timely, affidavits could satisfy a conservative Court, as Justice Scalia never actually clarified the evidentiary burden on environmental plaintiffs to prove injury in fact. Similarly, even though the Court's discussion of the Burnt Ridge settlement in *Summers* suggests that environmental groups risk losing certain as-applied claims by settling out of court, refusing to settle on a specific claim in order to preserve their facial challenge might not always be a desirable strategy for parties seeking to reach urgent resolution of discrete problems. Moreover, the difficulty for many environmental plaintiffs, as the dissent recognized, is that greater specificity is often unachievable. Here, by bypassing the notice and comment procedure, the USFS could auction off salvage-timber parcels in relative secrecy. This auction process could, in turn, make it impossible for plaintiffs to bring sufficiently specific lawsuits because "the precise location of each may not yet be known."[70] This partially accounts for why the second affidavit failed the majority's particularized/imminent standard.[71]

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[67] "We know of no precedent [where the] plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, [yet] retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests. Such a holding would fly in the face of Article III's injury-in-fact requirement." *Summers*, 129 S. Ct. at 1149–50.

[68] *See id.* at 1149; *see also id.* at 1157 (Breyer, J., dissenting).

[69] *Id.* at 1150 n. (majority opinion). In fact, the majority's rejection of post-judgment affidavits stands on extremely weak ground. As the dissent noted, there is no statutory or constitutional bar to the filing of post-judgment affidavits to prove standing, especially where plaintiffs' standing was challenged for the first time *after* the judgment. *Id.* at 1157–58 (Breyer, J., dissenting). The allegedly untimely affidavits cited plans to visit specific sites affected by the USFS regulations, thus meeting the majority's heightened standing requirements. *Id.* at 1158.

[70] *Id.* at 1157.

[71] *Id.* at 1150 (majority opinion) ("Accepting an intention to visit 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.").

## VI. CONCLUSION

Whether the more optimistic or pessimistic scenario will play out for environmental plaintiffs largely depends on how lower courts interpret *Summers*, and how soon the Supreme Court decides to hear another standing case. After *Lujan*, few lower courts followed the Supreme Court's "aggressive" dismantling of environmental citizen suit standing,[72] but enough did to sound the alarm about the difficulty for environmental plaintiffs to access justice under the new standing requirements.[73] Some of these fears had died down in the aftermath of *Laidlaw*, in which the Court rejected *Lujan*'s logic a mere eight years later.[74] As one commentator presciently observed at the time, "as with *Lujan*, one is hard pressed to predict whether *Laidlaw* represents a final and stable solution to the difficult questions that statutory standing cases have posed in recent years."[75] The same can be said of *Summers*. If federal judges, however, start drifting further away from the permissive *Laidlaw/Massachusetts v. EPA* line of cases toward the restrictive interpretation of standing in *Lujan*, the onus will increasingly fall on environmental plaintiffs to identify, in a concrete and particularized way, how the challenged regulations would cause imminent harm to their members. By piling on additional requirements to the heavy evidentiary burden that citizen plaintiffs are already forced to carry, courts risk letting the goals of environmental protection languish, and ultimately perish, in the vast hallways of the federal bureaucracy.[76]

This is problematic. Congress had envisaged the broad statutory citizen-suit provisions as a corrective for the problem of under-regulation; by making standing "substantially more difficult"[77] for citizen plaintiffs, the Court perpetuates the asymmetry between regulated parties and the intended beneficiaries of environmental laws.[78] The modern system of statutory envi-

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[72] Stubbs, *supra* note 4, at 133.

[73] *See* sources cited *supra* notes 3, 17. For an argument that the tightened standing requirement is actually positive, see Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 935 (1998) (favoring a "human-centered standing requirement").

[74] *See* Maxwell L. Stearns, *From* Lujan *to* Laidlaw*: A Preliminary Model of Environmental Standing*, 11 DUKE ENVTL. L. & POL'Y F. 321, 327 (2001) ("As much as *Lujan* has been vilified, *Laidlaw* appears poised to be commended as a restoration of sound principles of standing.").

[75] *Id.*

[76] *See* Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971) ("But it remains to be seen whether the promise of this legislation will become a reality. Therein lies the judicial role. . . . Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.").

[77] Summers v. Earth Island Inst., 129 U.S. 1142, 1149 (2009) (internal quotation marks omitted).

[78] *See, e.g.*, Patricia M. Wald, *The D.C. Circuit: Here and Now*, 55 GEO. WASH. L. REV. 718, 721 (1987) (noting that if standing criteria are too strict, the court "creates a one-way street for challenge, open to regulated industries only and closed to consumers, environmentalists, or other public interest groups").

ronmental protection, including its citizen suit mechanism, was built on the premise that individual citizens will assume the role of private attorneys general where the federal agencies fail to fulfill the role entrusted to them by Congress.[79] Importantly, this congressional scheme can succeed only to the extent that citizens find the doors of federal courthouses open to them to challenge improper or wanting enforcement of environmental laws. Yet if courts, presented with evidence of a "realistic threat" of environmental harm, show that they are "blind to what must be necessarily known to every intelligent person,"[80] then Congress should supply a more precise regulatory framework to empower citizens to make pre-enforcement challenges to environmental regulations despite, or because of, judicial resistance to liberalized standing criteria. As long as the effectiveness of environmental protection in the United States relies on active citizen participation,[81] Congress, if not the courts, needs to ensure that the citizen suit device remains a viable vehicle for the enforcement of environmental law.

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[79] For instance, the Senate Committee that adopted the first ever citizen suit provision, in the Clean Air Act in 1970, said that it was its "intent that enforcement of these control provisions be immediate, that citizens should be unconstrained to bring these actions, and that the courts should not hesitate to consider them." Stubbs, *supra* note 4, at 79 (quoting S. REP. NO. 91-1196, at 37 (1970)) (internal quotation marks removed).

[80] *Summers*, 129 S. Ct. at 1158 (Breyer, J., dissenting) (quoting In re Wo Lee, 26 F. 471, 475 (C.C.D. Cal. 1886)) (internal quotation marks removed).

[81] Citizens sent 4500 notices of intent to sue under environmental statutes between 1995 and 2003 — about 550 per year. The actual annual number has declined from 708 in 1995 to 397 in 2003. May, *supra* note 3, at 14–15.