

# LEAGUE OF CONSERVATION VOTERS V. TRUMP: A POTENTIAL BLUEPRINT TO CHALLENGING ENVIRONMENTAL POLICY ROLLBACKS

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## ABSTRACT

*This Comment examines the recently rejected motion to dismiss in League of Conservation Voters v. Trump and its potential to serve as a roadmap for environmental organizations seeking to challenge regulatory rollbacks by the Trump administration. In 2017, President Donald Trump issued an executive order reversing the designation of 128 million acres of ocean as protected from oil and gas leasing. The League of Conservation Voters, along with other environmental activists, sued to enjoin the rollback, and administration officials subsequently filed a motion to dismiss. This Comment focuses on the issue of Article III standing in the case, wherein the plaintiffs must allege (1) an injury in fact that is (2) fairly traceable to the challenged conduct and (3) that a favorable judicial decision will likely redress. Prior to League of Conservation Voters, case law had not established injury in fact on the basis of potential harm to public lands caused by government deregulation. Thus, the ruling that such an injury can be established – even over an area 128 million acres in size – reflects an opportunity for environmental activists attempting to stop rollbacks.*

## I. INTRODUCTION

Since the election of President Donald Trump, environmental organizations have often found themselves at odds with environmental regulators. In 2015 and 2016, using his authority under the Outer Continental Shelf Lands Act of 1953 (OCSLA), President Barack Obama withdrew 128 million acres of coastal parts of the Arctic and Atlantic

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Oceans from oil and gas leasing.<sup>1</sup> Shortly after his inauguration, President Trump issued Executive Order 13795, reversing President Obama's prior withdrawals.<sup>2</sup> One week later, on May 3, 2017, a group of environmental organizations, including the League of Conservation Voters, Natural Resources Defense Council (NRDC), Sierra Club, and The Wilderness Society, among others, jointly filed suit in the U.S. District Court in Alaska, alleging before Judge Sharon Gleason that OCSLA does not give the President authority to reverse prior withdrawals.<sup>3</sup>

The federal defendants and the intervenors filed motions to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on the basis of (1) sovereign immunity, (2) the lack of a private right of action, (3) the court's inability to issue declaratory relief against the President, and (4) the lack of Article III standing.<sup>4</sup> In *League of Conservation Voters v. Trump*, the district court dismissed each alleged basis for the defendants' motion to dismiss,<sup>5</sup> thereby permitting the litigation to proceed.

*League of Conservation Voters* creates a potential blueprint for environmental and other organizations to follow as they seek to take their fights against administration policies to the courtroom. The case is significant for its analysis of Article III standing—particularly for showing that litigants suing to protect public lands can satisfy the standing requirement for injury in fact—though the additional three hurdles the plaintiffs overcame are also important. This Comment will first go through the statutory and case history surrounding the withdrawal of federal lands from oil and gas leasing, followed by a closer look at the district court's ruling in the case. Subsequently, it will analyze the issue of standing in particular, as well as the broader applicability of this approach for environmental organizations challenging regulatory rollbacks. This Comment will establish that *League of Conservation Voters* acts as a green light for such organizations to move their conflicts with the present administration to the courts.

## II. REVERSING FEDERAL LANDS PROTECTIONS AND CHALLENGES BY ENVIRONMENTAL GROUPS

OCSLA gives the Secretary of the Interior responsibility for the mineral exploration and development of the Outer Continental Shelf

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1. *League of Conservation Voters v. Trump*, 303 F. Supp. 3d. 985, 990 (D. Alaska 2018).

2. *Id.*

3. *Id.* at 991.

4. *Id.* at 992-93.

5. *Id.* at 1004.

(OCS).<sup>6</sup> Under OCSLA, the President “may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.”<sup>7</sup> OCSLA has been amended several times since 1953; however, none of these changes have altered the ultimate mechanisms by which land is withdrawn from exploration.<sup>8</sup> The statute does not have an explicit mechanism for the President to rescind a withdrawal, and no previous President has ever attempted a withdrawal.<sup>9</sup> This presents two major questions with President Trump’s Executive Order: first, whether a subsequent President may rescind a Section 12(a) withdrawal; second, who has standing to challenge a rollback.<sup>10</sup> The present order only answers the second question.

In order to establish standing, plaintiffs must sufficiently allege (1) an injury in fact that is (2) fairly traceable to the challenged conduct and (3) that a favorable judicial decision will likely redress.<sup>11</sup> To prove an injury in fact, plaintiffs must show the harm is imminent, geographically specific, and particularized.<sup>12</sup> Courts have effectively recognized that injury in fact can be established even where the harm is contingent upon a series of future actions by third parties.<sup>13</sup> However, prior to *League of Conservation Voters*, case law had not established injury in fact on the basis of potential harm to public lands caused by government deregulation. While it is not novel for plaintiffs to be able to suggest a particularized injury, rather than just general harm, as a result of deregulation,<sup>14</sup> the case

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6. 43 U.S.C. § 1341 (2018). Under OCSLA, the outer continental shelf contains all submerged lands within three miles of shore that fall under U.S. jurisdiction. Bureau of Ocean Energy Mgmt., *OCS Lands Act History*, <https://www.boem.gov/OCS-Lands-Act-History/> (last accessed Jan. 30, 2019).

7. 43 U.S.C. § 1341(a) (2018).

8. Bureau of Ocean Energy Mgmt., *supra* note 6.

9. Carol J. Miller, *For a Lump of Coal & a Drop of Oil: An Environmentalist’s Critique of the Trump Administration’s First-Year Policies*, 36 VA. ENVTL. L.J. 185, 212–13 (2018).

10. Robert T. Anderson, *Protecting Offshore Drilling Areas from Oil and Gas Leasing: Presidential Authority under the Outer Continental Shelf Lands Act and Antiquities Act*, 44 ECOLOGY L.Q. 727, 763–64. Anderson goes on to argue that because the Section 12(a) revocation was issued “without expiration,” it is up to Congress alone to provide otherwise. *Id.* at 764.

11. *League of Conservation Voters v. Trump*, 303 F. Supp. 3d. 985, 995–96 (D. Alaska 2018).

12. *Id.*

13. See *Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982) (finding established injury in fact despite reliance on uncertain future third-party acts).

14. In *Alaska Wildlife All. v. Jensen*, the Ninth Circuit held that there is sufficient particular harm for standing when “noise, trash, and wakes of vessels” diminish plaintiffs’ enjoyment of the land. 108 F.3d 1065, 1068 (9th Cir. 1997).

ventures into new territory with respect to the geographic scope of the claimed injury – covering 128 million acres of ocean.<sup>15</sup>

The ruling in *League of Conservation Voters* has already served as a guide elsewhere in the world of environmental litigation. The NRDC relied on it as a basis for establishing injury in fact in its brief opposing the government’s motion to dismiss in *Hopi Tribe v. Trump*,<sup>16</sup> a suit challenging the Trump administration’s decision to make 1.15 million acres of Bears Ears National Monument available to mining interests.<sup>17</sup> *League of Conservation Voters v. Trump* also offers implications for standing in cases like a suit brought by Our Children’s Trust, filed on behalf of a group of children challenging government inaction in combatting climate change.<sup>18</sup> The ongoing litigation offers further opportunity to flesh out what these challenges to litigation may look like – as long as they can get over initial hurdles to dismiss.

### III. THE LEAGUE OF CONSERVATION VOTERS BRINGS SUIT

On April 28, 2017, President Trump issued Executive Order 13795, rescinding the previous withdrawal of 128 million acres of the continental shelf from offshore exploration.<sup>19</sup> The next day, the Secretary of the Interior issued an order, which called in part for the expedited consideration of seismic permitting applications.<sup>20</sup> These applications permitted the use of loud sound pulses to identify potential oil and gas deposits – pulses which several environmental organizations, including the League of Conservation Voters, claimed would harm and potentially kill various fish and marine mammals.<sup>21</sup> The environmental activists brought suit on May 3, 2017, alleging that the action both exceeded the President’s Article II powers<sup>22</sup> and was *ultra vires* as OCSLA does not

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15. Plaintiffs, in their brief opposing the motion to dismiss, cited *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 899 (1990), which offered a similar claim to protect a large tract of federal land, but even then it was on a much smaller scale, in the thousands of acres.

16. NRDC Plaintiffs’ Opposition to Federal Defendants’ Motion to Dismiss at 4, *Hopi Tribe v. Trump* (D.D.C. 2018) (Nos. 17-cv-2590 (TSC), 17-cv-2605 (TSC), 17-cv-2606 (TSC)), 2018 WL 6112218.

17. *Id.*

18. *Juliana v. United States*, 339 F. Supp. 3d 1062 (D. Or. 2018).

19. *League of Conservation Voters v. Trump*, 303 F. Supp. 3d 985, 990 (D. Alaska 2018).

20. *Id.* at 991.

21. *Id.*

22. *Id.* The complaint alleges that the action intrudes upon Congress’s non-delegated exclusive power under the Property Clause in violation of the separation of powers. *Id.*

authorize the President to reverse a prior withdrawal.<sup>23</sup> The suit named President Trump, then-Secretary of the Interior Ryan Zinke, and Secretary of Commerce Wilbur Ross as defendants, with the American Petroleum Institute and State of Alaska permitted to join as intervenors.<sup>24</sup>

In the present opinion, the district court considered dismissal on the basis of (1) sovereign immunity, (2) the lack of a private right of action, (3) the inability of the court to issue declaratory relief against the President, and (4) a lack of Article III standing.<sup>25</sup>

The court quickly dispensed with the first three arguments.<sup>26</sup> With respect to sovereign immunity, the court noted the present case fits neatly into the exception to the sovereign immunity doctrine where an officer makes an allegedly unconstitutional act in the sovereign's name.<sup>27</sup> It explained that a statutory grant of a private right of action is unnecessary because the plaintiffs are not suing to enforce federal law, but rather to challenge the President for allegedly exceeding his constitutional authority.<sup>28</sup> The court largely sidestepped the issue of declaratory judgment, noting that, should the plaintiffs win, an injunction against subordinate officials should be sufficient, thereby obviating the problems with issuing a declaratory judgment against the President.<sup>29</sup>

The court spent more time on Article III standing, which requires the plaintiffs to allege (1) an injury in fact that is (2) fairly traceable to the challenged conduct and (3) that a favorable judicial decision will likely redress.<sup>30</sup> To prove an injury in fact, plaintiffs must show the harm is imminent, geographically specific, and particularized.<sup>31</sup> For the purposes of a motion to dismiss on the ground of insufficient standing, as seen here, the issue is simply whether the general facts alleged are enough to support the claim, not whether the harm itself has actually occurred.<sup>32</sup> The

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23. *Id.*

24. *Id.* Zinke was named because the U.S. Department of the Interior administers OCSLA, while the U.S. Department of Commerce implements the Endangered Species Act and Marine Mammal Protection Act. *Id.*

25. *Id.* at 993. These were based on Fed. R. Civ. P. 12(b)(1) and 12(b)(6), arguing that the complaint is facially insufficient to invoke federal jurisdiction and placing an affirmative burden on the plaintiffs to establish Article III standing. Fed. R. Civ. P. 12(b)(1). The plaintiffs must also be able to show a claim to relief that is facially plausible, with more than the "sheer possibility that a defendant has acted unlawfully." Fed. R. Civ. P. 12(b)(6).

26. 303 F. Supp. 3d at 993–95.

27. *Id.* at 993. This is one of two exceptions the Court has laid out, in addition to when an officer acts beyond the scope of his statutorily limited powers. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689–91 (1994).

28. 303 F. Supp. 3d at 994.

29. *Id.* at 995.

30. *Id.* at 995–96.

31. *Id.*

32. *Id.*

court ultimately concluded that the plaintiffs could demonstrate injury in fact and so possessed Article III standing.<sup>33</sup>

First, the district court held that the plaintiffs could show sufficiently imminent harm.<sup>34</sup> The primary barrier to standing for a group like the present plaintiffs—suing to protect lands over which they have no claim of ownership—is that their actual harm is too causally attenuated to establish injury in fact.<sup>35</sup> Here, the district court found that the harm mirrored that of *In re Zappos.com, Inc.*<sup>36</sup> In that case, the Ninth Circuit found standing because though harm had not yet occurred, the risk of harm did not depend on a chain of speculative inferences; rather, the risk was imminent because the hackers who stole the data had the ability to harmfully misuse it.<sup>37</sup> From this, the district court concluded that the *League of Conservation Voters* plaintiffs had established sufficiently imminent harm through allegations that the Executive Order expedited energy production and that drilling had already begun in the previously withdrawn areas.<sup>38</sup>

Next, in determining whether the plaintiffs had alleged sufficient “geographic specificity,” the court focused on *Center for Biological Diversity v. Kempthorne*.<sup>39</sup> In *Kempthorne*, the Ninth Circuit held that “the degree of geographic specificity required depends on the size of the area that is impacted by the government’s action.”<sup>40</sup> Notably, the Ninth Circuit found that the plaintiff’s identification of the region as “the Beaufort Sea region” was sufficient.<sup>41</sup> Here, despite covering 128 million acres of ocean, the district court also found that the injury was sufficiently geographically specific.<sup>42</sup> The court explained that because the area in question is discrete and defined, the size of it does not ultimately present an issue.<sup>43</sup> It concluded that this was sufficient when coupled with the plaintiffs’ statements that they visit and use the Atlantic Ocean and adjacent areas.<sup>44</sup>

This left the court with the question of particularized harm. In order to satisfy this requirement, plaintiffs must show the injury affects them in

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33. *Id.* at 1001.

34. *Id.* at 999.

35. See *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 401 (2013) (finding insufficient standing for U.S. citizens to challenge the Foreign Intelligence Services Act because it required a “multi-link chain of inferences”).

36. 303 F. Supp. 3d at 997.

37. *Id.*

38. *Id.* at 997–98.

39. 303 F. Supp. 3d. at 1000 (citing 588 F.3d 701 (9th Cir. 2009)).

40. 588 F.3d 701 (9th Cir. 2009).

41. *Id.* at 707–08.

42. *League of Conservation Voters*, 303 F. Supp. 3d. at 1000.

43. *Id.*

44. *Id.*

a personalized, individual way—the injury must actually be to the individual, not just the environment.<sup>45</sup> The court determined that this threshold was also met, on the ground that the drilling would allegedly cause the animals pain and suffering, which would interfere with the plaintiffs’ “use and enjoyment of the areas and associated wildlife.”<sup>46</sup>

Taken collectively, the district court rejected the notion that the plaintiffs had failed to meet the requirements for Article III standing and the motions to dismiss were denied.<sup>47</sup>

Having overcome the motions to dismiss, the litigation remains ongoing and it is being followed closely by environmental activists.<sup>48</sup> Although the present ruling did not garner much attention outside these circles, the case as a whole will ultimately be of vital interest both inside and outside of the administration.

#### IV. THE IMPORTANCE OF HAVING ESTABLISHED STANDING

On March 29, 2019, the district court ruled in favor of the plaintiffs, holding that the executive order exceeded the president’s authority.<sup>49</sup> The administration is widely expected to appeal the decision to the Ninth Circuit.<sup>50</sup> Although the underlying suit in *League of Conservation Voters* has not yet been resolved and the full implications of the present ruling are as yet unclear, this decision may show other regulation challengers how to survive the crucial test of establishing injury in fact for Article III standing. In effect, it could provide a structural framework for environmental groups to generate suits challenging regulatory rollbacks. While it did not alter the test, it does show private parties how to satisfy the requirements that the injury be (1) sufficiently imminent, (2) geographically specific, and (3) particularized.<sup>51</sup>

To survive a motion to dismiss where standing is challenged, the party bringing the suit bears the burden of proof, as he would for any other essential element of his claims, including the three requirements for injury in fact.<sup>52</sup> General factual allegations of injury resulting from the

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45. *Id.*

46. *Id.* at 1001.

47. *Id.* at 1001, 1004.

48. *See, e.g., Miller, supra* note 9; *Anderson, supra* note 10.

49. *League of Conservation Voters v. Trump*, No. 3:17-cv-00101-SLG, 2019 WL 1431217 at \*13 (D. Alaska Mar. 29, 2019).

50. Kevin Bohn, *Judge rules Trump executive order allowing offshore drilling in Arctic Ocean unlawful*, CNN (Mar. 30, 2019, 7:16 PM), available at [www.cnn.com/2019/03/30/politics/trump-offshore-drilling-arctic/index.html](http://www.cnn.com/2019/03/30/politics/trump-offshore-drilling-arctic/index.html).

51. *League of Conservation Voters v. Trump*, 303 F. Supp. 3d. 985, 1004 (D. Alaska 2018).

52. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

defendant's conduct will suffice on a motion to dismiss because the court will presume that the general allegations contain the specific facts necessary to support the claim.<sup>53</sup> This puts the plaintiff at an advantage at the pleading stage.

While analyzing the "imminent harm" issue, the district court saw the facts of this case as sitting somewhere between *Zappos*,<sup>54</sup> where the court held that the plaintiffs had sufficient risk of future harm to sue defendants after alleging that hackers had stolen their personal information from them, and *Clapper v. Amnesty Int'l USA*,<sup>55</sup> where the Court held that the chance of the plaintiffs being incidentally surveilled was not enough to challenge an act authorizing surveillance of foreign persons.<sup>56</sup> In *League of Conservation Voters*, the court used the following evidence to find the complaint adequately alleged imminent harm: (1) the stated purpose of the President's Executive Order,<sup>57</sup> (2) the oil industry's interest in drilling in the previously withdrawn regions,<sup>58</sup> (3) the federal government's previous actions regarding oil and gas leases in the Arctic and Atlantic Oceans under OCSLA,<sup>59</sup> (4) the fact that seismic surveys precede oil and gas lease sales,<sup>60</sup> and (5) that seismic surveys harm wildlife.<sup>61</sup>

The court found that this evidence created a short enough causal chain to establish that the alleged harm from seismic surveying was sufficiently imminent for Article III standing.<sup>62</sup> In determining that the evidence was closer to *Zappos* than *Clapper*, the court may have widened the scope of what constitutes "imminent harm."<sup>63</sup> By likening the somewhat uncertain risk of harm from companies surveying for gas and oil when they do not yet have approval<sup>64</sup> to the more concrete risk of harm in *Zappos*, where wrongdoers actually had the plaintiff's personal data in

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53. 303 F. Supp. 3d. at 996 (quoting *Lujan*, 504 U.S. at 561 (1992)).

54. *In re Zappos.com, Inc.*, 884 F.3d 893 (9th Cir. 2018).

55. 568 U.S. 398 (2013) (holding that the plaintiff's speculative chain of possibilities did not establish an impending harm).

56. 303 F. Supp. 3d. at 997.

57. *Id.* at 997-98.

58. *Id.* at 998.

59. *Id.*

60. *Id.* at 999.

61. *Id.* at 998.

62. *Id.* at 999.

63. *Id.* at 997.

64. *Id.* at 998-99 ("[C]ompanies also have sought approval to conduct seismic surveys even when lease sales are more than four years away and [are] not included in an existing or proposed five-year program.") (quoting Complaint at 17-18, *League of Conservation Voters v. Trump*, No. 3:17CV00101 (D. Alaska Mar. 3, 2017)).

hand, the court moved the line for imminent harm further in favor of future plaintiffs.

Next, the court found that the plaintiffs had alleged sufficient “geographic specificity” even though the area of the alleged conduct was 128 million acres.<sup>65</sup> While the area of concern is larger than that in *Kempthorne*, the court noted that “it is discrete and defined.”<sup>66</sup> If this case proves an appropriate guide, future litigants should be very clear on the regions in question to survive a motion to dismiss. Notably, this is not the largest area of harm to survive a motion to dismiss or summary judgment. The plaintiffs in *Juliana* alleged global harm and survived.<sup>67</sup> *League of Conservation Voters* coupled with *Juliana* puts into question whether an area can ever be too large for standing purposes as long as it is defined with sufficient specificity.<sup>68</sup>

Finally, the court had to determine whether the plaintiffs experienced personal and particularized harm to an interest in the defined area rather than mere generalized harm to the environment.<sup>69</sup> Particularized harm “must affect the plaintiff in a personal and individual way.”<sup>70</sup> Such harm can be towards mere aesthetic and recreational values that are lessened by the challenged activity.<sup>71</sup>

Here, the plaintiffs alleged harm was to their “interest in visiting, using, inhabiting, studying, and recreating in—or viewing wildlife that depends on—areas affected by [the challenged activity].”<sup>72</sup> This was found to be sufficient to satisfy the requirement for “particularized harm.”<sup>73</sup> Of the three elements of injury in fact, the court’s interpretation of this third element changes the least, as it was already broad enough to include aesthetic or recreational interests.<sup>74</sup> The court did not take into account whether the afflicted area is actively in use, nor does the size of the area seem to do any work for whether the injury is “personal.” If this case stands, so long as environmental groups can show that they have enjoyed the aesthetics of an area in the past, they should be able to show particularized harm if it is affected by government action.

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65. *Id.*

66. *Id.* at 1000.

67. *Juliana v. United States*, 339 F. Supp. 3d 1062, 1089-90 (D. Or. 2018).

68. *See supra* note 15 and accompanying discussion.

69. *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701, 707, (9th Cir. 2009) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 582 (1992) (Stevens, J., concurring)).

70. 303 F. Supp. 3d. at 1000 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)).

71. *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000)).

72. *Id.*

73. *Id.*

74. *Lujan*, 504 U.S. at 562-63.

## V. CONCLUSION

*League of Conservation Voters* offers a potential roadmap for future challenges to regulatory rollbacks, at least in their initial stages. The early challenge for similar suits is to satisfy the elements of standing in order to survive a motion to dismiss. *League of Conservation Voters* provides a framework for overcoming that obstacle. Most notably, its understanding of “imminent harm” allows for a longer causal chain and “geographic specificity” imposes no limit on the size of an area in controversy, so long as that area is discrete and defined. Though helpful, this ruling’s value is limited for now, as the district court has yet to rule on the litigation’s substantive issues. Nonetheless, this case represents a critical step for groups hoping to enjoin deregulation of public lands. It will be increasingly vital as groups such as Our Children’s Trust<sup>75</sup> explore avenues to establish standing in suits challenging the federal government on climate change. Framing the issues in the same ways as the League of Conservation Voters provides such similar organizations with more tools to make sure they get their day in court.

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75. In 2015, a group of children filed suit in U.S. District Court, and the suit has moved throughout the courts in the pre-trial phase ever since, most recently with the Ninth Circuit issuing a temporary stay on trial proceedings. Order at 3, *Juliana v. United States*, No. 18-80176 (9th Cir. 2018), <https://static1.square-space.com/static/571d109b04426270152febe0/t/5c2432b140ec9a0be72fddc5/1545876145804/DktEntry+8-1+Order+granting+appeal.pdf>.