
WHAT IS LEFT OF LISTENER STANDING? THE D.C. CIRCUIT'S CONTINUING FLIRTATION WITH A DYING DOCTRINE

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I. INTRODUCTION

The most fundamental obligation of all entities and individuals licensed by the Federal Communications Commission (“FCC” or “Commission”) is to serve the “public interest.”¹ While this term is ill-defined, when dealing with broadcast licensees, the Commission has traditionally placed a heavy emphasis on the pursuit of “localism”—the notion that broadcasters have a special responsibility to their particular communities of license (i.e., the station’s potential listeners).² Because broadcasters have a strong obligation to their local communities, one might argue that (1) local residents are uniquely benefited or harmed by the behavior of broadcasters and the Commission’s regulation of that behavior; and (2) local residents have special incentives to prosecute the rights of the larger “public” in order to secure the unique advantages or avoid the unique harms to which they are subject.

Beginning in the 1960s, the U.S. Court of Appeals for the District of Co-

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¹ The Federal Communications Commission largely enforces a broadcast station’s obligations to its community of license through the use of its public interest standard. For the Commission to grant, transfer, modify, or renew a broadcast license, it must establish that the “public interest, convenience, or necessity will be served thereby.” 47 U.S.C. §§ 307(a), 309(k)(1)(A), 310(d) (2000).

² See, e.g., *In re Broadcast Localism, Notice of Inquiry*, 19 F.C.C.R. 12,425 (July 7, 2004).

lumbia Circuit (“D.C. Circuit” or “court”) used these two arguments to establish the doctrine of listener standing. As originally fashioned, this doctrine conferred automatic judicial standing on the residents of a station’s community of license to appeal Commission decisions concerning that station’s license. The D.C. Circuit’s seminal 1966 decision in *United Church of Christ v. FCC*³ announced that broad listener standing is necessary “[i]n order to safeguard the public interest in broadcasting.”⁴ Twenty-two years later in *Llerandi v. FCC*,⁵ the D.C. Circuit reaffirmed this public interest rationale for listener standing, declaring that “[l]isteners are, by definition, ‘injured’ when licenses are issued in contravention” of Commission policy.⁶

United Church of Christ and *Llerandi* appeared to firmly establish listener standing as a distinct creature of constitutional law, peculiar to challenges to FCC broadcast decisions. However, the Supreme Court’s 1992 decision in *Lujan v. Defenders of Wildlife*⁷ provided substantial reason to doubt the continued viability of the doctrine. In *Lujan*, the Court explicitly rejected the public interest rationale for Article III standing. The Court established that before standing could be conferred on any given party, that party would be required to establish that (1) it had suffered injury in fact; (2) the injury in fact had been caused by the party and practice at issue in the case; and (3) the injury in fact was redressable by judicial action.⁸

Without the public interest rationale upon which both *United Church of Christ* and *Llerandi* were premised, one might expect that listener standing would promptly disappear. Nevertheless, even after *Lujan*, the D.C. Circuit has demonstrated a lingering allegiance to the doctrine, and has continued to cite both *United Church of Christ* and *Llerandi* as good law. At the same time, the D.C. Circuit has continuously distinguished *United Church of Christ* and *Llerandi* on their facts, thereby rendering the listener standing doctrine inapplicable in an ever-widening variety of contexts. Thus, while *Lujan* did not eliminate listener standing, it did transform listener standing into an almost unrecognizable form.

Listener standing is not only a substantively interesting doctrine in its own right, but it also provides a particularly vivid illustration of the efforts to which a court may go to avoid overturning its own precedent. The D.C. Circuit is reputed to have a deeply institutionalized reverence for its own precedent, particularly in its areas of expertise, such as administrative law. The court’s treatment of listener standing may well be an example of this deep-seated jurispru-

³ 359 F.2d 994, 1005 (D.C. Cir. 1966).

⁴ *Id.*

⁵ 863 F.2d 79, 85 (D.C. Cir. 1988).

⁶ *Id.*

⁷ 504 U.S. 555 (1992).

⁸ *Id.* at 560–61.

dential tendency.

In this article, we argue that the retention of the listener standing doctrine cannot be justified under *Lujan*. As a result, the D.C. Circuit's inexplicable refusal to explicitly overturn *United Church of Christ* and *Llerandi* is misguided. Even if one believes that the recognition of listener standing is good policy, it is indisputable that the courts lack the constitutional authority to effect that policy. The D.C. Circuit's refusal to overturn its precedent in light of *Lujan* delays the inevitable while undermining the integrity of the court's jurisprudence.

II. EARLY CONCEPTIONS OF LISTENER STANDING: *UNITED CHURCH OF CHRIST* AND ITS PROGENY

Article III of the U.S. Constitution limits both the substantive scope of the cases that federal courts may hear as well as the specific litigants that may bring those cases.⁹ Critically, the judicial power extends only to cases and controversies.¹⁰ This limitation on the courts' jurisdiction cabins the judiciary's ability to render advisory opinions or to otherwise assume the policymaking functions of the legislative and executive branches.¹¹ The courts themselves have repeatedly acted to limit the scope of their jurisdiction; beginning with *Marbury v. Madison*,¹² the courts have used Article III to avoid a number of cases that would have embroiled the judiciary in thorny political debates. The use of such "passive virtues,"¹³ as they have been named by constitutional scholar Alexander Bickel, have helped to maintain the legitimacy, and thus efficacy, of the courts.¹⁴

One of the most frequently used "passive virtues" is the doctrine of standing, which defines and limits the particular litigants that may bring a given issue before the courts.¹⁵ The standing doctrine ensures that litigating parties have a sufficiently particularized stake in the issues to be litigated such that

⁹ U.S. CONST. art. III, § 2, cl. 1.

¹⁰ *Id.*

¹¹ The legislative and executive branches are more accountable to the public and thus the more "democratic" loci of the policymaking function. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 85 (4th ed. 2001) ("By limiting the occasions for judicial intervention into legislative or executive processes, the case or controversy requirement reduces the friction between the branches produced by judicial review. This rationale is often tied to a concern with the countermajoritarian difficulty.").

¹² 5 U.S. 137 (1803) (cementing the judiciary's power of judicial review by refusing to exercise that power for lack of jurisdiction).

¹³ ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 111-98 (2d ed. 1986).

¹⁴ *Id.*

¹⁵ *Id.* at 116-27. Standing is distinct from the limitations imposed through subject matter jurisdiction, which limits the types of claims parties may bring generally before the courts.

judicial consideration of those issues does not infringe upon the policymaking functions of the legislative or executive branches.¹⁶ Through standing, the courts have acted to preserve the separation of powers among the three federal branches.¹⁷

The applicability of Article III to administrative agencies is less certain, if only because the constitutional classification of administrative agencies has always been less than clear. Agencies are strange hybrids of legislative, judicial, and executive functions; they promulgate rules, settle disputes, and enforce regulations.¹⁸ Notwithstanding, in the early history of the administrative state, courts tended to focus on the quasi-judicial functions of the administrative agency, and thus treated agency standing and judicial standing as coterminous concepts.¹⁹ Consequently, the range of parties who could initiate a dispute before an agency was limited.

The FCC was no exception to this rule. Prior to 1966, the Commission accorded standing in non-rulemaking proceedings to an extremely narrow class of entities and individuals. Only those parties that had suffered direct economic injury or electrical interference were permitted to intervene in ongoing FCC proceedings.²⁰ As a result, the Commission's administrative process was "closed" and markedly different from the relatively "open" administrative mechanisms used today.

Only against this backdrop can one appreciate the full impact of the D.C. Circuit's decision in *United Church of Christ*.²¹ Despite its later influence on the judicial standing doctrine, *United Church of Christ* actually centered on the scope of entities and individuals that could properly claim administrative standing before the FCC.²² WLBT, a television station located in Jackson, Mississippi, had filed an application to renew its license before the FCC. A number of local residents and organizations, including the United Church of Christ, filed petitions to deny WLBT's application. In its petition, the United Church of Christ established a substantial record of malfeasance on the part of the licensee, including a long history of discriminatory conduct.²³

¹⁶ See *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940).

¹⁷ *Id.* at 131–32.

¹⁸ This is particularly true for independent agencies. See STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 38 (5th ed. 2002).

¹⁹ See *Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122 (1995).

²⁰ See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) (dealing with economic injury); *Nat'l Broad. Co. v. FCC*, 132 F.2d 545 (D.C. Cir. 1942) (dealing with electrical interference).

²¹ 359 F.2d 994 (D.C. Cir. 1966).

²² The court and the parties apparently assumed, with little note, that agency standing and judicial standing were coextensive concepts. See *id.* at 1000 n.8.

²³ *Id.* at 998.

The United Church of Christ asserted standing because two of its members lived within WLBT's broadcast area. The Church argued that these members (1) were directly harmed by WLBT's failure to fulfill its obligations under the then-effective Fairness Doctrine by affording these members the opportunity to respond to on-air discriminatory statements; (2) represented the interests of other members of the sizable minority community, which also had been denied a voice by WLBT's actions; and (3) represented the entire audience, which had been denied balanced reporting and programming by WLBT's actions.²⁴ Notwithstanding these claims, the Commission dismissed the United Church of Christ's petition for lack of standing, finding that petitioners could "assert no greater interest or claim of injury than members of the general public."²⁵

On appeal, the D.C. Circuit rejected the Commission's narrow reading of administrative standing requirements. Noting that "neither administrative nor judicial concepts of standing have been static[,]""²⁶ the court effected a fundamental shift in focus from the private interests of the petitioners to their ability to effectuate the public interest. The court focused less on the direct harm suffered by the petitioners than on the "representational" role these petitioners served in filing their petition to deny, stating that "standing is accorded not for the protection of [petitioners'] private interest but only to vindicate the public interest."²⁷ The court further opined that

[t]he Commission's rigid adherence to a requirement of direct economic injury in the commercial sense . . . denies standing to spokesmen for the listeners, who are most directly concerned with and intimately affected by the performance of a licensee. Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience.²⁸

The court also noted that denying standing to members of the public would render many of the Commission's rules toothless: "unless the listeners—the broadcast consumers—can be heard, there may be no one to bring programming deficiencies or offensive overcommercialization to the attention of the Commission in an effective manner."²⁹ Thus, for practical reasons, standing *had* to be expanded to include listeners, lest judicial review become ineffective. In reaching this conclusion, the court relied heavily on its precedent in other consumer contexts, noting that it had previously allowed consumers to oppose administrative actions affecting products as varied as coal and oleo-margarine.³⁰ Broadcasting was just another product and listeners were just an-

²⁴ *Id.* at 998–99.

²⁵ *Id.* at 999.

²⁶ *Id.* at 1000.

²⁷ *Id.* at 1001.

²⁸ *Id.* at 1002.

²⁹ *Id.* at 1004–05.

³⁰ *Id.* at 1002.

other class of consumers.³¹

Thus, *United Church of Christ* broadened the scope of parties that could claim standing before both the FCC and the courts. However, the court did not require the Commission to confer standing on *every* member of the listening public. Instead, the court found that “[t]he Commission should be accorded broad discretion in establishing and applying rules for such public participation . . . , [while t]he usefulness of any particular petitioner for intervention must be judged in relation to other petitioners and the nature of the claims it asserts as [a] basis for standing.”³² In other words, even within the broader sweep of the opinion, the court endorsed an unspecified limiting principle that would confer standing only on particular members of the listening public.

While *United Church of Christ* represented a turning point in the broadcast context, it was only one of a number of standing cases that transformed the doctrine in the 1960s. In various contexts, the courts conferred broad standing on members of the public, often grounding such standing in prudential considerations.³³ By refusing to adopt rigid standing rules based on constitutional considerations during this period, the Supreme Court afforded itself, and the lower federal courts, flexibility to deal with standing on a case-by-case basis where compelling policy reasons existed.³⁴ This flexibility allowed the courts to confer standing, for example, upon displaced urban residents,³⁵ environmental advocates,³⁶ and, of course, broadcast listeners.

III. LISTENER STANDING MATURES

A. The Development of Injury in Fact and the Rejection of Prudential Standing

Although courts conferred broad standing in a variety of contexts throughout the 1960s, by 1970, the Supreme Court had begun to narrow the scope of standing by grounding the doctrine more directly in Article III.³⁷ Instead of its previously loose interpretation of the standing doctrine, the Court began to establish fixed criteria by which the adequacy of a party’s standing could be as-

³¹ *Id.*

³² *Id.* at 1005–06.

³³ See, e.g., *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920, 932–37 (2d Cir. 1968); *Scenic Hudson Pres. Conf. v. Fed. Power Comm’n*, 354 F.2d 608, 615–17 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

³⁴ Some scholars have suggested that courts were eager to expand standing to appeal administrative decisions because of concerns about agency inaction and agency “capture” by business interests. See Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 183–84 (1992).

³⁵ *Norwalk CORE*, 395 F.2d at 936.

³⁶ *Scenic Hudson Pres. Conf.*, 354 F.2d at 616–17.

³⁷ See *supra* Part II.

essed for constitutional purposes. This process began in earnest in *Ass'n of Data Processing Service Organizations v. Camp*,³⁸ (“*Data Processing*”) in which the Court clarified that standing required a showing of injury in fact.

In *Data Processing*, the petitioners, who provided business typing services, challenged a ruling by the Comptroller General allowing national banks to compete in the data entry market.³⁹ The petitioners’ standing to appeal that ruling was challenged. Although the Court held that the petitioners had standing, it also found that in determining whether a dispute constitutes a case or controversy sufficient to satisfy Article III, “[t]he first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.”⁴⁰ In other words, plaintiffs could not claim standing to sue merely because they disliked a particular policy or could hypothesize some uncertain harm that might occur as a result of that policy in the future. Ultimately, the Court found that the petitioners satisfied the injury in fact requirement because of the likelihood that they would lose future profits if national banks were allowed to provide data processing services.⁴¹ Regardless, the Court had taken a decisive step in reinterpreting the meaning and role of standing in the constitutional scheme.

The Court elaborated on the injury in fact requirement in *Sierra Club v. Morton*.⁴² *Sierra Club* arose after the U.S. Forest Service approved a proposal by the Walt Disney Company for the construction of a \$35 million dollar resort complex in the Mineral King Valley.⁴³ The Sierra Club—one of the nation’s leading environmental protection groups—sued claiming that the proposed development would violate several statutes and irreparably harm the environment.⁴⁴ The district court granted a preliminary injunction to halt construction. The Ninth Circuit reversed, finding that the Sierra Club had no standing to sue.⁴⁵

On certiorari, the Supreme Court affirmed the Ninth Circuit’s holding that the Sierra Club could not demonstrate that it would suffer any direct harm.

³⁸ 397 U.S. 150 (1970).

³⁹ *Id.* at 151.

⁴⁰ *Id.* at 152.

⁴¹ *Id.* *Data Processing* also contains a second portion of the standing analysis—the “zone of interests” test. This second test asks whether the zone of the applicable statute encompasses the action complained of by the petitioner. In *Data Processing*, this second “zone of interests” test leaned “toward [the] enlargement of the class of people who may protest administrative action.” *Id.* at 154. However, *Data Processing* had the net effect of narrowing the standing doctrine through its holding that injury in fact was necessary.

⁴² 405 U.S. 727 (1972).

⁴³ Mineral King Valley is adjacent to the Sequoia National Park and has been a part of the National Forest since 1926. The opinion states that the valley “is an area of great natural beauty nestled in the Sierra Nevada Mountains.” *Id.* at 728.

⁴⁴ *Id.* at 729–30.

⁴⁵ *Id.* at 731.

Whereas *Data Processing* established that injury in fact required actual injury, the Court in *Sierra Club* clarified an additional requirement: that actual injury must be specific to the plaintiff. The Court held that “[t]he injury in fact test requires more than an injury to a cognizable interest. It requires that the party seeking review to be himself among the injured.”⁴⁶ The Court concluded that the Sierra Club failed to allege that any of its members would be affected in their “activities or pastimes” by the Disney development especially considering that the group did not even allege that any of its members had ever used Mineral King Valley.⁴⁷ Thus, while the Court recognized the growing non-economic forms of harm, such as ecological harm, the Court ruled that “broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.”⁴⁸

In both *Data Processing* and *Sierra Club*, the Court implicitly grounded the injury in fact requirement in the broader Article III case or controversy requirement, which limits the courts’ jurisdiction to actual disputes between litigating parties. The Court established this link more directly in *Valley Forge Christian College v. Americans United for Separation of Church and State*.⁴⁹ In *Valley Forge*, the Court explicitly refused to transform the judiciary into a debate society for the public at large, finding that

[w]ere the federal courts merely publicly funded forums for the ventilation of public grievances for the refinement of jurisprudential understanding, the concept of “standing” would be quite unnecessary. But the “cases and controversies” language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums. . . . The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is therefore restricted to the litigants who can show “injury in fact” resulting from the action which they seek to have the court adjudicate.⁵⁰

By the 1980s, the contours of the constitutional injury in fact requirement were, if not fully specified, present in at least their broad outline: *Data Processing* established the need for actual or imminent injury, *Sierra Club* established the need for particularized injury, and *Valley Forge* grounded the basis for these qualifications firmly in Article III.⁵¹ Cumulatively, these cases appeared to defeat the public enforcement model upon which the listener standing doctrine had been premised in *United Church of Christ*.⁵² However, listener

⁴⁶ *Id.* at 734–35.

⁴⁷ *Id.* at 735.

⁴⁸ *Id.* at 738. *Cf.* *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973) (“Here, by contrast, the appellees claimed that the specific and allegedly illegal action of the Commission would directly harm them in their use of the natural resources of the Washington Metropolitan Area.”).

⁴⁹ 454 U.S. 464 (1982).

⁵⁰ *Id.* at 473.

⁵¹ *See* discussion *supra* Part II.

⁵² *See* discussion *supra* Part II.

standing would prove strangely resilient throughout the 1980s.⁵³

B. The D.C. Circuit Reaffirms the Viability of Listener Standing

Despite the Supreme Court's efforts to limit the scope of those parties who might properly be afforded standing under Article III by requiring a showing of injury in fact, the doctrine of listener standing persisted. Thus, courts continued to allow members of the public to challenge the actions of the FCC under the doctrine of listener standing. These courts did not seek to reform the listener standing doctrine in light of the Supreme Court's decisions in *Data Processing*, *Sierra Club*, and *Valley Forge*. Rather, the courts apparently embraced a theory of broadcast exceptionalism, placing listeners beyond the realm of ordinary Article III standing requirements. In practice, the courts conferred broad listener standing to permit members of the public to allege violations of the Commission's Fairness Doctrine,⁵⁴ political rules,⁵⁵ obscenity and indecency rules,⁵⁶ and to involve the courts in virtually every other situation involving broadcast programming regulation.

For example, *Maier v. FCC* arose after WTMJ-AM, a Milwaukee radio station, aired a station editorial criticizing Maier, the city's mayor, and then refused to grant Maier's demand for a half-hour of response time. Maier petitioned the FCC to order WTMJ-AM to provide this time, but was denied.⁵⁷ Maier then petitioned the Seventh Circuit to reverse this denial. Although the Seventh Circuit ultimately affirmed the Commission's denial, the court conferred standing on Maier, using prudential reasoning that largely mirrored earlier public enforcement conceptions of standing.⁵⁸

The Seventh Circuit noted that if "Congress meant for the Commission's enforcement of the fairness doctrine to be subject to judicial review, it follows that someone must have standing to bring an appeal in a particular case in which the Commission refuses to find a fairness doctrine violation."⁵⁹ The court further noted that "it seems well established that conventional principles of standing are inappropriate in the unique context of broadcast regulation."⁶⁰ Thus, the Seventh Circuit explicitly embraced a theory of FCC exceptionalism. As the court concluded, "the concept of standing in the context of broadcast regulation is different from that applied in other contexts, because it is the in-

⁵³ See discussion *supra* Part II.

⁵⁴ *Maier v. FCC*, 735 F.2d 220, 229 (7th Cir. 1984).

⁵⁵ *Id.* at 229.

⁵⁶ See, e.g., *Ill. Citizens Comm. for Broad. v. FCC*, 515 F.2d 397 (D.C. Cir. 1975).

⁵⁷ *Maier*, 735 F.2d at 232 n.17.

⁵⁸ *Id.* at 229-30.

⁵⁹ *Id.* at 227.

⁶⁰ *Id.* at 228.

terests of an amorphous, disorganized group called ‘the listening public’ that are at stake.”⁶¹ As a result, “a direct, concrete, particularized injury is unnecessary for a party to have standing as a representative of the public interest.”⁶²

In *Llerandi v. FCC*,⁶³ the D.C. Circuit appeared to embrace the Seventh Circuit’s view, but in a manner that more directly accounted (at least rhetorically) for the Supreme Court’s assertion of Article III’s injury in fact requirement. *Llerandi* arose after the Llerandis, a married couple, defaulted on an agreement to purchase an AM radio station in Puerto Rico.⁶⁴ The station licensee subsequently sought FCC approval to assign the station’s license to a third party.⁶⁵ The Llerandis, still hoping to acquire the station themselves, filed a petition to deny the assignment on the grounds that it would violate the Commission’s local radio ownership rules.⁶⁶ Notwithstanding, the FCC’s Audio Services Division approved the assignment.⁶⁷

The petitioners then appealed to the D.C. Circuit. The FCC argued that the petitioners lacked standing as they had not alleged any particularized injury to their interests as required by the Article III case or controversy requirement.⁶⁸ The petitioners maintained that they were injured in their capacities as listeners.⁶⁹ The court agreed, and held that the petitioners had standing as listeners to challenge the FCC’s determinations under the local radio ownership rules.⁷⁰ The court reasoned that the petitioners’ uncontested status as listeners “*ex proprio vigore* [of its own accord] establishes the requisite injury necessary to satisfy the strictures of Article III.”⁷¹ The court concluded that “[l]isteners are, by definition, ‘injured’ when licenses are issued in contravention of the policies undergirding the duopoly rule.”⁷²

Both *Maier* and *Llerandi* appeared to differentiate listener standing from other forms of standing under Article III, albeit under different theories. *Maier*

⁶¹ *Id.* at 229.

⁶² *Id.*

⁶³ 863 F.2d 79 (D.C. Cir. 1988).

⁶⁴ *Id.* at 81.

⁶⁵ *Id.*

⁶⁶ *Id.* at 83.

⁶⁷ *Id.* at 84–85.

⁶⁸ *Id.* at 85. The FCC argued that, at the agency level, the Llerandis had alleged injury only in their capacity as former station owners and, therefore, could not allege standing as listeners before the court. *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 85–86.

⁷¹ *Id.* at 85. The affidavit of Pablo Llerandi stated that he resided within the listening area of the radio station. *Id.* at 83 n.2. The FCC did not dispute that Llerandi lived in the area but argued that he could not use the listener standing argument and that even if he used the argument, it should fail. *Id.* at 84–86.

⁷² *Id.* at 85. It is important to note that the opinion used quotes around the word “injury,” apparently acknowledging that the injury was somewhat artificial.

embraced a theory of “broadcast exceptionalism,” finding that the “public enforcement model” was both particularly suited and necessary in the broadcasting context. In contrast, the D.C. Circuit in *Llerandi* recognized automatic standing for listeners after finding that listeners were automatically injured by the illicit actions of broadcasters. *Llerandi* posited that a violation of the Commission’s rules necessarily resulted in injury, thereby acknowledging that injury was a prerequisite to a party’s standing. Thus, *Llerandi* was, at least formally, responsive to the Supreme Court’s analysis in *Data Processing* and *Sierra Club*, while at the same time permitting the D.C. Circuit to retain listener standing as a viable doctrine in the context of the Article III injury requirement.

C. Listener Standing and the *Lujan* Revolution

Data Processing, *Sierra Club*, and *Valley Forge* indicated a definite trend in the Supreme Court’s standing jurisprudence. Cumulatively, these cases sharply limited broad “public enforcement” justifications for standing. The true deathblow to the “public enforcement” model, however, was the 1992 case *Lujan v. Defenders of Wildlife*.⁷³ *Lujan* arose when the Defenders of Wildlife (“Defenders”) and several other environmental groups challenged regulations promulgated by the Department of the Interior, which loosened the environmental responsibilities of government agencies undertaking overseas projects.⁷⁴ The Supreme Court granted certiorari to determine whether the Defenders, as a third party interested in the preservation of endangered animals overseas, could establish standing under Article III.⁷⁵

The Defenders argued that they had suffered injury in fact because their members traveled overseas to areas affected by the new regulations and planned to travel to those areas in the future.⁷⁶ The Court squarely rejected this logic, finding that the Defenders had failed to assert a sufficiently imminent injury in fact to establish Article III standing. While this result was hardly surprising given the Court’s earlier cases, the Court’s delineation of Article III standing requirements fundamentally reshaped judicial conceptions of Article

⁷³ 504 U.S. 555 (1992).

⁷⁴ *Id.* at 555. The new rule provided that government agencies would only be required to consult with the Department of the Interior, pursuant to the Endangered Species Act, when engaged in projects in the United States and on the high seas. Effectively, then, the rule provided government agencies with greater flexibility to engage in projects overseas. *Id.* (citing 16 U.S.C. § 1536(a)(2) (1988)). The Defenders sought a declaratory judgment that the new rule incorrectly interpreted the geographic scope of the relevant section of the Act. *Id.* at 559.

⁷⁵ *Id.* at 559–67.

⁷⁶ *Id.* at 563.

III standing and its constitutionally-dictated requirements. Specifically, the Court explained that the “irreducible constitutional minimum” of the case or controversy standing requirement has three essential elements: injury in fact, causation, and redressibility.⁷⁷

The Court further explained that in order to establish an injury in fact—or “invasion of a legally protected interest”—a plaintiff must suffer a “concrete and particularized” and “actual or imminent” injury. Mere “conjectural or hypothetical” injuries would not suffice.⁷⁸ To be particularized, “the injury must affect the plaintiff in a personal and individual way.”⁷⁹ Of critical importance was the Court’s explanation that “[i]ndividual rights within the meaning of this passage, do *not* mean public rights that have been legislatively pronounced to belong to each individual who forms a part of the public.”⁸⁰

The Court also noted that the burden to establish an injury in fact is markedly higher when the injury arises from a third party challenging the government’s regulation of “*someone else*”—as opposed to the government’s direct regulation of a party.⁸¹ “[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.”⁸² The Court concluded that the Defenders had not asserted a valid injury in fact because they had failed to show that members would suffer particularized or imminent injury.⁸³ In the Court’s estimation, the members’ plans to travel overseas were far too speculative and conjectural to satisfy the injury in fact requirement regardless of whether they had visited overseas in the past.⁸⁴

The Court also refused to rest standing on the “citizen suit” provision of the Endangered Species Act, finding that while Congress can create a cause of action, it cannot delegate to individuals broad power to vindicate public rights, or

⁷⁷ *Id.* at 560–61.

⁷⁸ *Id.* at 560.

⁷⁹ *Id.* at 560 n.1. “[T]he injury in fact test requires more than an injury to a cognizable interest. It requires the party seeking review be himself among the injured.” *Id.* at 563.

⁸⁰ *Id.* at 578 (emphasis added); see also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983). (“[S]tanding roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of the majority itself.”).

⁸¹ *Lujan*, 504 U.S. at 561–62.

⁸² *Id.* at 562.

⁸³ *Id.* at 562–67. Justice Scalia noted but rejected the members’ argument that their particular interest in wildlife preservation granted them standing. *Id.* at 563–64.

⁸⁴ *Id.* at 563–64 (“[S]ome day intentions [to travel]—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”).

define by statute conduct sufficient to create a cognizable injury.⁸⁵ Similarly, Congress cannot authorize administrative agencies to manufacture injury. In so concluding, the Court emphasized the separation of powers, noting that the vindication of the generalized public interest is the province of the legislative and executive branches, not the courts.⁸⁶ Thus, *Lujan* once again explicitly rejected the “public enforcement” model of standing in which listener standing had been based. The Court also, in effect, concluded that Congress cannot establish any particular industries for exceptional treatment, disposing of *Maier*’s premise.

D. Listener Standing Clings to Life

The D.C. Circuit had its first post-*Lujan* opportunity to analyze listener standing in the context of a broadcast indecency complaint. In *Branton v. FCC*,⁸⁷ a listener petitioned the court to review a Commission ruling in which the agency refused to take action against National Public Radio (“NPR”) for allegedly broadcasting “obscene, indecent, or profane language in violation of 18 U.S.C. § 1464.”⁸⁸ The petitioner, Peter Branton, had listened to a broadcast containing language that he found offensive and filed a complaint with the Mass Media Bureau seeking sanctions against NPR.⁸⁹ The Bureau rejected the complaint after concluding that the broadcast was “not actionably indecent” under the provisions of the statute. Branton appealed to the full Commission, which issued a brief letter affirming the Mass Media Bureau’s decision. The Commission explained that the broadcast was an essential part of a bona fide news story and expressed its “longstanding reluctance to intervene in the edito-

⁸⁵ *Id.* at 573–74. It is ironic that the Court relied on Article III standing doctrine, initially intended to insulate congressional initiatives from judicial interference, to curtail the power of Congress to expand the jurisdiction of the courts through “citizen suit” provisions. *Id.* at 571–73. Some scholars have criticized *Lujan* and its progeny on this basis. *Id.* at 572; see also RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.4 (4th ed. 2002).

⁸⁶ *Lujan*, 504 U.S. at 572; see also *Common Cause v. Fed. Election Comm’n*, 108 F.3d 413 (D.C. Cir. 1997) (holding that a civil suit provision did not create an automatic injury in all citizens, because Article III required parties to establish particular discrete injury). In *Common Cause*, the D.C. Circuit dismissed the challenge of a Federal Election Commission ruling that rejected allegations of violations of federal election law by a political action group. *Id.* at 415. The court reasoned that “Congress cannot, consistent with Article III, create standing by conferring ‘upon all persons . . . an abstract, self-contained, noninstrumental right to have the Executive observe the procedures required by law’ . . .” *Id.* at 418 (quoting *Lujan*, 504 U.S. at 573).

⁸⁷ 993 F.2d 906 (D.C. Cir. 1993).

⁸⁸ The allegedly indecent language occurred in an early evening broadcast of the show “All Things Considered.” The show ran a report on John Gotti, the alleged leader of an organized crime syndicate, which featured a tape recording of a wiretapped phone conversation during which Gotti used “variations of the f ___ word” ten times. *Id.* at 908.

⁸⁹ *Id.*

rial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners.”⁹⁰ Branton then petitioned the D.C. Circuit for review of the agency’s decision.⁹¹

The D.C. Circuit held that the petitioner lacked standing to seek review of the Commission’s ruling because he had failed to establish sufficient injury in fact that was “fairly traceable” to the Commission’s conduct and redressable by the relief requested.⁹²

The court noted that the allegedly indecent broadcast had already occurred, and as such, injunctive relief could neither prevent nor repair any harm done. Thus, the court implicitly found that a case or controversy had not arisen because the judicial power could not redress the injury claimed; a non-redressable injury was no injury at all, at least for standing purposes. As the court reasoned:

While an offense to one’s sensibilities may indeed constitute an injury . . . a discrete, past injury cannot establish the standing of a complainant, such as Branton, who seeks neither damages nor other relief for that harm, but instead requests the imposition of a sanction in the hope of influencing another’s future behavior.⁹³

The court further found that any claim of ongoing or imminent injury stemming from the decreased deterrent value of the Commission’s rules does not provide sufficient grounds for Article III standing due to its marginal and speculative nature.

Interestingly, however, the D.C. Circuit did not directly confront whether listener standing met the Article III threshold. Rather, the court rejected the petitioner’s reliance on listener standing in this specific context because he could not establish an ongoing or imminent injury in fact that would justify the injunctive relief he sought.⁹⁴ The D.C. Circuit did not question the continuing validity of *United Church of Christ*, but instead attempted to distinguish it from *Branton* on two grounds. First, the court again noted that the *Branton* petitioner had not asserted “a continuing pattern of inappropriate . . . broadcasting, which the FCC . . . had in effect extended,” as was the case in *United Church of Christ*.⁹⁵ Second, the court noted the Supreme Court’s consistent reliance on the “immediacy” element of the injury in fact requirement since *United Church of Christ* and suggested that “[*United Church of Christ*] must be understood as a creature of the context from which it arose, viz. a license renewal proceeding, which is inherently future oriented.”⁹⁶ The D.C. Circuit

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 908–12; see also *Allen v. Wright*, 468 U.S. 737, 751 (1984).

⁹³ *Branton*, 993 F.2d at 909.

⁹⁴ *Id.*

⁹⁵ *Id.* at 910.

⁹⁶ *Id.*

thus limited the holding of *United Church of Christ*, but the case remained good law.

Five years later in *Jaramillo v. FCC*,⁹⁷ the D.C. Circuit again rejected a standing claim premised on a theory of listener standing, without rejecting the theory itself. This time, the court focused on the “redressability” prong of the *Lujan* test. In *Jaramillo*, Press Broadcasting Company (“Press”) filed an application to assign its license for WTKS-FM to Paxson Broadcasting of Orlando, L.P. The petitioners urged the Commission to deny this application, alleging that Press had deceived the Commission in a previous transaction and therefore the assignment should be delayed until the Commission could resolve this claim under the Commission’s “Jefferson Radio” policy.⁹⁸ The Audio Services Division dismissed the petition to deny and granted Press’s transfer application and the Commission denied review. Petitioners appealed to the D.C. Circuit, asserting standing as listeners of WTKS-FM.⁹⁹

The court began its analysis by assuming “arguendo that petitioners may have suffered a cognizable injury from being within listening range of a radio station held by a licensee that acquired the station in violation of the FCC’s standards of candor.”¹⁰⁰ However, the court then found this past injury insufficient to support the standing of petitioners, who did not seek damages for their injuries. Citing *Branton*, the court concluded that “[i]f a petitioner cannot obtain compensation to himself for a past injury, he has failed to show its redressability,” and thus failed to satisfy *Lujan*’s three-prong standing threshold.¹⁰¹

The D.C. Circuit again maintained that *United Church of Christ* and *Llerandi* were still good law, albeit distinguishable law. This time, the court focused on the types of harm at issue, noting that in *United Church of Christ* and *Llerandi* the court had recognized “listener standing to object to Commission decisions that would create or extend some arguably program-impairing circumstance, such as a duopoly . . . or a renewal of a license for a firm guilty of

⁹⁷ 162 F.3d 675 (D.C. Cir. 1998).

⁹⁸ *Id.*; see *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964) (“It is the recognized policy of the Commission that assignment of a broadcast authorization will not be considered until the Commission has determined that the assignor has not forfeited the authorization.”). The FCC describes the “Jefferson Radio” policy as a “long-held Commission policy” under which “a transfer or assignment application cannot be granted when there are ‘unresolved issues’ concerning the seller’s basic qualifications.” The policy “applies to issues that, if proved, could result in the loss of operating authority or denial of a pending application.” *In re Application of Mark R. Nalbhone, Receiver (Assigner) for Assignment of License of Television Station KFNB (Channel 20), Casper, Wyoming, Memorandum Opinion and Order*, 6 F.C.C.R. 7529 ¶ 7 (Dec. 12, 1991).

⁹⁹ *Jaramillo*, 162 F.3d at 676–77.

¹⁰⁰ *Id.* at 677.

¹⁰¹ *Id.*

broadcast policy violations.”¹⁰² The court noted that no such circumstance was present in *Jaramillo* as the alleged misconduct involved a broadcaster that no longer held its license and “the outcome—transfer of the license to another—is exactly the same as would eventuate if the Commission held up the assignment. The court found that Press was not qualified and took away its license.”¹⁰³ The court also rejected any claim that future injury would result from the marginal weakening of the deterrent effects of the Commission’s rules, concluding that “if such a weak and indirect effect were enough, listeners *anywhere* could challenge *any* underenforcement of the policy.”¹⁰⁴

In *Huddy v. FCC*,¹⁰⁵ the D.C. Circuit reached a similar conclusion, this time focusing on the causation prong of the *Lujan* test. Petitioner John D. Huddy was the former licensee of TV station KADY. KADY was involuntarily transferred to a bankruptcy trustee, who in turn auctioned the station.¹⁰⁶ John Cobb emerged as the highest bidder for KADY and the trustee agreed to assign the station license to Cobb.¹⁰⁷ Cobb assigned his purchase rights to Biltmore Broadcasting Corporation, of which he was the controlling principal, and Biltmore applied for Commission approval of the license assignment.¹⁰⁸ Huddy, embroiled in a dispute with his bankruptcy trustee, filed a petition to deny arguing that Cobb was unfit to serve as a Commission licensee. Specifically, Huddy alleged that Cobb misrepresented his qualifications to the Commission and argued that he was not financially qualified to serve as a licensee.¹⁰⁹ After considering responses from both Cobb and the trustee, the Commission approved the purchase without a hearing. Huddy appealed to the D.C. Circuit, seeking review of the Commission’s determination.¹¹⁰

The court began by reviewing the three prongs of the *Lujan* test and quickly concluded that “[a]s a resident of the service area and a viewer of the station, Huddy can assert a possible injury to a legally protected interest.”¹¹¹ However, the court then found that Huddy’s viewer standing theory could not satisfy the causation requirement for Article III standing because Huddy had not linked his allegations concerning Cobb’s financial improprieties with “plausible pre-

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ 236 F.3d 720 (D.C. Cir. 2001).

¹⁰⁶ *Id.* at 721–22. John Huddy was the sole shareholder in Riklis Broadcasting Corporation. Riklis entered into involuntary bankruptcy and a trustee was appointed to manage the corporation’s estate. The FCC consented to the involuntary transfer of the license to the trustee who then auctioned the station.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 722.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

dictions about Cobb's likely programming decisions."¹¹² While conceding that the Commission had presumably adopted its financial regulations because of their favorable long-run effects on broadcasting, the court concluded that "the authority of the Commission to apply such sanctions doesn't ipso facto support an inference that FCC underenforcement of financial integrity policies is likely to cause the sort of 'material impairment of [a viewer's] hopes or expectations' that is needed to support standing."¹¹³ In other words, even if the Commission's financial regulations had an actual net-positive effect on programming-related conduct by FCC licensees, it did not necessarily follow that the violation of those regulations would cause harm that was sufficient to qualify as an Article III injury in fact.

The court further suggested that the causation threshold was unlikely to be met where the regulations at issue were not directly targeted at achieving quality or diversity of programming content.¹¹⁴ Again, the D.C. Circuit distinguished *United Church of Christ and Llerandi*. This time, the court focused on the precise nature of the regulations at issue, drawing a finer distinction between regulations targeted at programming-related conduct and those merely affecting such conduct. Specifically, the court noted that *United Church of Christ and Llerandi* involved regulations designed to "give a fair and balanced presentation of controversial issues"¹¹⁵ and enhance "diversification of viewpoints"—both directly related to programming activity.¹¹⁶ Thus, while the D.C. Circuit continued to maintain that *United Church of Christ and Llerandi* were good law, the court also demonstrated that they were of limited utility as precedent for widely-applicable listener standing.

In sum, regardless of whether the D.C. Circuit intended or recognized the result, *Branton*, *Jaramillo*, and *Huddy* sharply limited the applicability of the listener standing doctrine. Those cases leveraged the three parts of the *Lujan* test for Article III standing—*injury in fact*, *causation*, and *redressability*—and found listener standing wanting with respect to each dimension as applied to the specific facts at issue. While the D.C. Circuit did not directly challenge the holdings in *United Church of Christ* or *Llerandi*, the court did substantially limit the implications of these decisions. No longer could any listener invoke *United Church of Christ* or *Llerandi* to support any petition for review. *Branton* eliminated previous injury as a basis for listener standing and firmly established that future injuries would need to be both likely and imminent in order to support standing. *Jaramillo* confirmed *Branton* and further required that the

¹¹² *Id.*

¹¹³ *Id.* at 722–23 (quoting *Jaramillo v. FCC*, 162 F.3d 675, 677 (D.C. Cir. 1998)).

¹¹⁴ *Id.* at 723.

¹¹⁵ *Id.* at 723 (quoting *United Church of Christ v. FCC*, 359 F.2d 994, 998 (D.C. Cir. 1966)).

¹¹⁶ *Llerandi v. FCC*, 863 F.2d 79, 85 (D.C. Cir. 1988).

ongoing or future injury be a “program-related impairment” redressable by judicial action. *Huddy* further narrowed the scope of cases in which a listener standing theory would be viable by requiring not only that the claimed injury be programming-related, but also that the substantive regulations at issue be aimed directly at the improvement of programming.

In short, these cases demonstrate *Lujan*’s dramatic impact on listener standing doctrine, which was clear, yet unacknowledged by the D.C. Circuit. Listener standing, grounded as it was in *United Church of Christ and Llerandi*, survived. However, the listener standing doctrine was a mere shell of what it had once been.

IV. *SIERRA CLUB V. EPA*: PROCEDURAL REQUIREMENTS TO ESTABLISH STANDING

The D.C. Circuit’s 2002 decision in *Sierra Club v. EPA*¹¹⁷ complicated a party’s ability to establish standing—listener standing or otherwise. *Sierra Club* arose in the context of environmental regulation after the Environmental Protection Agency (“EPA”) enacted a new rule defining hazardous wastewater conditions pursuant to the Resource Conservation Recovery Act.¹¹⁸ The Sierra Club petitioned the D.C. Circuit to review the new rule and attempted to establish standing by arguing that some of the Sierra Club’s members lived, worked, and participated in recreational activities in communities that would be adversely affected by the EPA’s new rule.¹¹⁹ The Sierra Club supported its claim with an expert declaration, maps, and mailing addresses of the affected members who had decided to forgo recreational activities in waters near sludge producing plants “due to their concern over exposure.”¹²⁰

The court seized the opportunity to explicitly detail the relevant burdens and standards of proof implicated by the petitioner’s attempt to establish standing. After reiterating the three-pronged *Lujan* test for standing, the court examined the sufficiency of the Sierra Club’s evidentiary showing on the standing issue. The court started with the premise that a party’s burden of production in establishing standing should vary according to the procedural context of the case, and should track the burdens attached to the underlying substantive claims.¹²¹ The court then observed that

a petitioner seeking review in the court of appeals does not ask the court merely to assess the sufficiency of its legal theory. Rather, like a plaintiff moving the district court for summary judgment, the petitioner is asking the court of appeals for a final judgment in the

¹¹⁷ 292 F.3d 895 (D.C. Cir. 2002).

¹¹⁸ *Id.* at 896–97; see 42 U.S.C. § 6903 (2000); 40 C.F.R. §§ 261.11(a)(1)–(3) (2005).

¹¹⁹ *Sierra Club*, 292 F.3d at 898.

¹²⁰ *Id.* at 901–02 (internal quotations omitted).

¹²¹ *Id.* at 898.

merits, based upon the application of its legal theory to facts established by evidence in the record . . . [T]he petitioner must either identify in that record evidence sufficient to support its standing to seek review or, if there is none because standing was not an issue before the agency, submit additional evidence to the court of appeals.¹²²

The court further determined that a petitioner's burden of proof with respect to standing should be roughly equivalent to that of the plaintiff attempting to survive a motion for summary judgment. Thus, a petitioner must show a "substantial probability" of injury.¹²³

The court recognized that, in practice, a petitioner's standing to seek review would often be self-evident or provable by the record alone, particularly when the petitioner is a party to the underlying administrative proceeding.¹²⁴ However, in other cases, the underlying record would fail to demonstrate judicial standing on its face, especially given the relatively lax requirements for administrative standing before many agencies. In such instances, the court found that a petitioner must "supplement the record to the extent necessary to explain and substantiate its entitlement to judicial review."¹²⁵

This procedural mechanism limits the types of third-party petitioners who may claim standing to challenge administrative action before the courts. As third parties rarely take center stage in the underlying proceeding, the administrative record often does not demonstrate these parties' judicial standing. Consequently, these parties are normally forced to establish standing *de novo*, according to the rigorous procedural and evidentiary requirements of *Sierra Club*. Faced with such barriers, third-party petitioners often fail. Such was the fate of the Sierra Club; the court ultimately concluded that the documents submitted by the club failed to establish a "substantial probability" of injury to a single member of the organization and dismissed the action accordingly.¹²⁶

V. RECENT TREATMENT OF LISTENER STANDING

The D.C. Circuit had its first opportunity to apply *Sierra Club* to listener standing in *Rainbow/PUSH Coalition v. FCC* ("*Rainbow/PUSH I*").¹²⁷ In *Rainbow/PUSH I*, the court addressed the required evidentiary showing to establish that "listener standing" could be appropriately conferred on a given party. In doing so, the court flatly rejected any notion of automatic listener standing. But *Rainbow/PUSH I* and subsequent cases have done little to clarify

¹²² *Id.* at 899.

¹²³ *Id.*

¹²⁴ *Id.* at 899–900.

¹²⁵ *Id.* at 900.

¹²⁶ *Id.* at 902. The lists of addresses were legally insignificant because the Sierra Club failed to establish that any of the members would actually be affected in the future by the new rule. *Id.* at 901–02.

¹²⁷ 330 F.3d 539 (D.C. Cir. 2003).

the status of the doctrine. Indeed, if anything, these cases have succeeded only in increasing confusion.

Rainbow/PUSH I arose after Sullivan Broadcast Holdings applied for approval to transfer control of several television stations to Sinclair Broadcasting Group, Inc. (“Sinclair”) and Glencairn, Ltd. (“Glencairn”). In response, the Rainbow/PUSH Coalition (“Rainbow”) filed a petition to deny, claiming that Sinclair and Glencairn were commonly controlled and the proposed transfer would violate the Commission’s then-existing duopoly rule. The Commission credited certain of Rainbow’s claims but found that the parties had acted in good faith and therefore granted the transfer application subject to certain revisions in the associated transfer agreements. Rainbow appealed to the D.C. Circuit.¹²⁸

Rainbow claimed judicial standing based on a theory of “automatic audience standing,” interpreting *United Church of Christ* and *Llerandi* to support the proposition that “[w]hen the FCC permits the transfer of a license to a party that will not operate in the public interest, the FCC causes injury to the station’s audience sufficient to create standing.”¹²⁹ Predictably, the D.C. Circuit rejected this interpretation, citing *Lujan*’s three-pronged test and *Sierra Club*’s pleading requirements to demonstrate that, under Article III, standing was anything but automatic.¹³⁰ The court, relying heavily on *Sierra Club*, dismissed the claim for lack of standing after finding that Rainbow had failed to establish sufficient injury in fact.¹³¹ The court further suggested that “[i]f there were no more to standing than [being a member of the general listening public] . . . then the ‘irreducible constitutional minimum’ [required by *Lujan*] would be irreducible only because it could not be any smaller and still be said to exist.”¹³²

The court appeared to deal a deathblow to traditional interpretations of both *United Church of Christ* and *Llerandi*. However, the D.C. Circuit decided not to overturn either case, choosing instead to distinguish them on their facts. The court stressed that in *United Church of Christ*, the petitioners had established a strong, documented pattern of abuse and harm that was concrete and particularized, such that “[i]t was perfectly clear that the appellants would be injured, and substantially so, by the grant of the renewal license.”¹³³ Presumably, this evidence would have easily satisfied the petitioners’ burden under *Sierra Club* and *Lujan*. On the other hand, the court found that Rainbow had made only broad and conclusory accusations, such that its burden remained unfulfilled.¹³⁴

¹²⁸ *Id.* at 540–42.

¹²⁹ *Id.* at 542 (quoting *Rainbow/PUSH Coalition* Reply Brief).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 543.

¹³⁴ *Id.*

The court's requirement that listeners meet the specified burdens of production and proof at once eliminated any notion that listener standing was automatic as suggested by *Llerandi*. The court reinterpreted *United Church of Christ* to stand not for the proposition that listeners would always have standing to challenge Commission decisions that impacted the quality of programming, but simply that listeners could potentially have standing to do so. The court claimed that *United Church of Christ* did not "purport to apply a more relaxed standard to audience members than to other litigants seeking to demonstrate standing under Article III."¹³⁵ In effect, the court reduced listener standing to a descriptive concept denoting a class of litigants who could have standing if actually injured, rather than an enlargement of Article III standing doctrine.

The court's attempt to distinguish *Llerandi* proved even more revisionist. The court first noted that "*Llerandi* was a case in which the petitioners were 'invok[ing] and press[ing] the duopoly rule' itself."¹³⁶ Thus, in the court's estimation, the critical feature of *Llerandi* was that the petitioners challenged Commission action that they claimed had *actually* resulted in an ongoing violation of the Commission's rules. The court noted *Llerandi*'s pronouncement that "[l]isteners are, by definition, 'injured' when licenses are issued in contravention of the policies undergirding the duopoly rule."¹³⁷ But the court distinguished *Rainbow/PUSH I* because the relevant duopoly rule had since been rescinded. As such, the Commission's decision to grant the applications at issue did not violate current Commission rules.¹³⁸

This reading of *Llerandi* is tenuous at best; the standing principle enunciated in the case simply cannot be reconciled with the standing rules set forth in *Lujan*. *Llerandi* explicitly states that the FCC's duopoly rule creates a legally cognizable interest in all listeners such that when the rule is violated there is injury by definition.¹³⁹ That is exactly what *Lujan* says Congress (and thus administrative agencies) cannot do: define by statute an injury that can be vindicated by a member of the public without any showing that he himself was injured in a personal and concrete way. *Llerandi* does not merely say that the FCC's former duopoly rule made the de facto harm resulting from excessive media concentration into a legally cognizable injury. It says that every person in the affected market is automatically deemed to suffer that injury in a personal and concrete manner when the rule is violated. By abandoning the requirement that a plaintiff prove that he suffered a discrete personal injury,

¹³⁵ *Id.*

¹³⁶ *Id.* at 545; *see also* *Llerandi v. FCC*, 863 F.2d 79, 85 (D.C. Cir. 1988).

¹³⁷ *Llerandi*, 863 F.2d at 85.

¹³⁸ *Rainbow/Push I*, 330 F.3d at 541.

¹³⁹ *Id.*

Llerandi's standing principle violates *Lujan's* important restrictions on the power of Congress and Executive Branch agencies to create standing to challenge administrative action.¹⁴⁰

Two recent cases have provided further evidence of the court's reluctance to overturn its precedent even at the expense of jurisprudential integrity. *KERM, Inc. v. FCC* arose after KERM, an operator of several radio stations in Arkansas, filed a formal complaint with the Commission claiming that KAYH-FM, another Arkansas station, had impermissibly aired eleven underwriting announcements during a football game in violation of the Commission's commercial advertising rules.¹⁴¹ The FCC's Enforcement Bureau found that ten of the eleven disputed announcements did not violate the Act. The FCC further determined that no enforcement action was warranted for the remaining violation because it was an "isolated occurrence."¹⁴² KERM appealed to the Commission, but the Commission upheld the Bureau's decision.¹⁴³ KERM subsequently filed a petition for review before the D.C. Circuit.¹⁴⁴

Relying heavily on its previous listener standing decisions, the court held that KERM lacked standing to challenge the Commission's order.¹⁴⁵ After first noting the station's failure to properly plead standing in its opening brief,¹⁴⁶ the court concluded that "KERM cannot prevail on a theory of listener standing because it challenges only a discrete, past injury and alleges no continuing violations."¹⁴⁷ Citing *Branton* and *Jaramillo*, the court simply noted that KERM had alleged no continuing injury as required by Article III and as such had no standing to petition the courts for review.¹⁴⁸ Again, the court distinguished *United Church of Christ* on the basis of its facts, firmly situating *United Church of Christ* and listener standing within general Article III standing requirements.¹⁴⁹

¹⁴⁰ See *Am. Legal Found. v. FCC*, 808 F.2d 84, 89 (D.C. Cir. 1987) ("Congress cannot statutorily [sic] remove or diminish the constitutional limits on which standing is based.").

¹⁴¹ 353 F.3d 57, 59 (D.C. Cir. 2004). The Communications Act of 1934 prohibits non-commercial educational broadcast stations from broadcasting "advertisements." 47 U.S.C. § 399b(b)(2) (2000). The Act defines advertisements as program material that is broadcast "in exchange for any remuneration . . . intended to promote any service, facility, or product" of for profit entities. *Id.* § 399b(a)(1).

¹⁴² *KERM*, 353 F.3d at 59.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 59–60.

¹⁴⁶ *Id.* "Where no motion to dismiss has been made, the petitioner's first opportunity will be its opening brief, not its reply brief." *Id.* (citing *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002)). KERM missed its opportunity to assert evidence of standing. *Id.* at 60.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See also *Nat'l Hispanic Policy Inst. v. FCC*, No. 03-1358, 2004 U.S. App. LEXIS 16393 (D.C. Cir. Aug. 9, 2004) (per curiam) (dismissing appellant's petition after appellant's failure to submit timely evidence of standing).

While the court avoided a head-on confrontation with *United Church of Christ*, it did suggest that *United Church of Christ* might be entirely inapplicable to the Article III context. In *Rainbow/PUSH I*, the court stated that it would treat *United Church of Christ* as applicable to the judicial context even though the decision technically concerned the listeners/petitioners' standing to appear before the Commission under § 309(d) of the Communications Act. The *KERM* court, however, prefaced its analysis of *United Church of Christ* as follows: "Even assuming that [*United Church of Christ*] is applicable to our analysis of *KERM*'s constitutional standing[.]" This strongly implies that the court was leaning toward the opposite interpretation—that *United Church of Christ* did not apply to the judicial context.¹⁵⁰ While the court has not clarified the correct application of *United Church of Christ*, the wholesale removal of the decision from the Article III context would seem to largely settle any questions about the viability of listener standing.

The court's most recent "last word" on listener standing arose in *Rainbow/PUSH Coalition v. FCC* ("*Rainbow/PUSH II*")¹⁵¹ in early 2005. *Rainbow/PUSH II* involved a renewal application filed by the University of Missouri, licensee of noncommercial educational FM station KWMU, which was granted by the Commission despite allegations of discrimination raised by Rainbow. Again, Rainbow claimed standing on the basis of listener standing, and again, the court soundly rejected this independent theory of standing under Article III. While hardly revolutionary, *Rainbow/PUSH II* did solidify the court's benign indifference to the listener standing doctrine. So long as the doctrine remains ineffective, the court appears to be in no rush to explicitly eliminate it.

VI. WHAT IS LEFT OF LISTENER STANDING?

This article has tracked the evolution of the D.C. Circuit's listener standing doctrine over the past forty years. The D.C. Circuit has performed wonders of textual manipulation, gradually and sometimes stealthily eroding the original doctrine of listener standing while still maintaining that *United Church of Christ* and *Llerandi* are "good law" (albeit law that seems inapplicable in most circumstances and entirely redundant). By and large, this erosion has gone unnoticed; indeed, practitioners still cite *United Church of Christ* without reference to the court's subsequent case law oblivious to the last forty years of standing jurisprudence.

¹⁵⁰ *Id.*

¹⁵¹ *Rainbow/PUSH Coalition v. FCC* (*Rainbow/PUSH II*), 396 F.3d 1235 (D.C. Cir. 2005).

A cynic might see a perverse genius in the court's sleight of hand. A more forgiving observer might question whether the court's actions reveal a lingering allegiance to a doctrine that it sees as necessary to the public interest. Perhaps the D.C. Circuit is simply unwilling to eliminate listener standing because the court believes the doctrine to be good policy, albeit policy that is contrary to *Lujan* and beyond the power of the courts to impose or enforce in light of Supreme Court precedence. Alternately, the court's treatment of listener standing may simply be a manifestation of its deep institutional tendency to respect its own precedent.

The nature of the broadcast medium poses a great challenge to any listener seeking to plead the requisite injury to establish standing in an Article III court. To challenge a license renewal, grant, modification, assignment or transfer, or the underenforcement of rules such as those involving indecency, a petitioner must show that the FCC's action will result in actual, ongoing harm. Showing that one is harmed by a television or radio program would be difficult itself; but showing that the FCC's failure to sanction or its decision to license is likely to cause actual future harm is even more difficult. The question of whether the D.C. Circuit will adhere to its decision in *Llerandi* thus takes on added importance: listeners will not be able to establish standing in almost any case unless the court continues to credit some sort of presumed injury from rule violations as it did in *Llerandi*.

The *Llerandi* principle of presumed injury is no longer tenable. Ultimately, the court's hand is forced by *Lujan*. The inescapable fact is that the D.C. Circuit's opinion is, of necessity, subordinated to that of the Supreme Court. Under such circumstances, the court's continuing claims that *United Church of Christ* and *Lujan* are good law serve only to confuse standing jurisprudence and undermine judicial integrity without any corresponding benefit to the public. Accordingly, the court would do well to accept the argument that listener standing is effectively a dead doctrine and explicitly state as much.