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Summers v. Earth Island Institute: Overhauling the Injury-in-Fact Test for Standing to Sue

*“To seek injunctive relief, a plaintiff must show that he is under threat of suffering ‘injury in fact’ that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical”*¹

*“To the contrary, a threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates.”*²

I. INTRODUCTION

Following the stringent standing test applied by the United States Supreme Court in *Summers v. Earth Island Institute*, environmental organizations will never meet the standing requirements necessary to challenge regulations that prevent public notice, comment, and appeal of United States Forest Service projects.³ Without an available plaintiff to challenge these projects, the Forest Service will continue to cut down trees throughout the national forests without the threat of public protest.⁴ The standing test applied by the *Summers* majority must be replaced with a new test that provides a potential plaintiff with an actual opportunity to establish standing to challenge the Forest Service’s ability to negatively impact the environment without public interference.

Alleging aesthetic and procedural injuries, the plaintiff organizations in *Summers* challenged a sale of timber from a national forest because the United States Forest Service refused to provide notice and an opportunity for public comment and appeal before the sale.⁵ The district court granted a preliminary injunction applicable nationwide, and the Court of Appeals for the Ninth Circuit affirmed.⁶ The Supreme Court of the United States,

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1. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)).

2. *Id.* at 1156 (Breyer, J., dissenting).

3. *Id.* at 1147 (majority opinion).

4. The United States Forest Service admits that it has planned “thousands” of projects exempted from notice, comment, and appeal for the future. *Id.* at 1157 (Breyer, J., dissenting).

5. *Id.* at 1147 (majority opinion).

6. *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 999 (E.D. Cal. 2005), *aff’d sub nom.* *Earth Island Inst. v. Ruthenbeck*, 459 F.3d 954 (9th Cir.

however, declined to rule on the merits.⁷ Instead, the Court held that the environmental organizations lacked standing to sue the Forest Service because the organizations failed to prove an “imminent” threat of injury.⁸

The Court reached the wrong result in *Summers*. This decision highlights an inconsistency in how the Supreme Court determines injury in fact in environmental standing cases. The demanding imminent-threat test applied by the *Summers* majority prevents environmental organizations like those in *Summers* from demonstrating the injury-in-fact aspect of standing under Article III of the United States Constitution.⁹ Although the dissent offers a more equitable test that requires a “realistic threat” of injury, this test demands too little from potential plaintiffs.¹⁰ *Summers* demonstrates the need to modify the analysis applied to the injury-in-fact prong of the three-part standing test for both aesthetic injuries and procedural injuries. New injury-in-fact tests will provide environmental organizations with broader opportunities to establish standing to challenge procedural regulations and proposed projects that negatively impact the environment.

This Note argues that courts should adopt new analyses for determining injury in fact, especially when the potential plaintiff alleges a procedural injury. Part II provides a background on Article III standing and United States Supreme Court jurisprudence that discusses standing in the context of environmental cases. Part III describes the *Summers* litigation in detail, including Justice Scalia’s majority opinion, Justice Kennedy’s concurrence, and Justice Breyer’s dissenting opinion. Part IV analyzes the factors that the majority and dissent used to determine whether a plaintiff has standing to sue. More specifically, Part IV focuses on the injury-in-fact requirement of standing because the majority and dissent employ conflicting tests when analyzing this factor. It also

2006), *aff’d in part, rev’d in part*, 490 F.3d 687 (9th Cir. 2007), *aff’d in part, rev’d in part sub nom.* *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009); *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 690–91 (9th Cir. 2007), *aff’d in part, rev’d in part sub nom.* *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009).

7. *Summers*, 129 S. Ct. at 1153.

8. *Id.* at 1151 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)).

9. *Id.* at 1149 (citing *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). Courts apply a three-part test in standing cases: injury in fact, causation, and redressability. *Id.* For a discussion of the three-part standing test, see *infra* Part II.A.

10. *Summers*, 129 S. Ct. at 1156 (Breyer, J., dissenting) (citing *Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982)).

emphasizes the problems with applying the same test to both aesthetic and procedural standing. In response to these problems, Part IV proposes several new tests to replace the current injury-in-fact test applied by the *Summers* majority. Part V of this Note concludes that courts should adopt a modified application of the injury-in-fact tests for aesthetic injuries and a due process-like analysis for procedural injuries. Part V further concludes that under these proposed tests, plaintiffs like those in *Summers* will have an actual opportunity to establish standing in order to challenge aesthetic and procedural injuries in environmental cases.

II. A HISTORY OF ARTICLE III STANDING AND ITS ROLE IN ENVIRONMENTAL JURISPRUDENCE

Litigation concerning standing of environmental groups did not originate with *Summers*.¹¹ In fact, environmental case law represents one of the only areas of law in which the courts question whether a plaintiff has standing to sue. In most cases, the courts never raise the issue of standing because the plaintiffs demonstrate obvious injuries.¹² The development of Article III standing and environmentally based jurisprudence preceding *Summers* set a foundation for evaluating the Court's analysis of standing in the case.

A. Article III and Standing

To establish standing to sue, a plaintiff must "allege[] such a personal stake in the outcome of the controversy" that a court has jurisdiction to afford the plaintiff a remedy.¹³ In other words, the plaintiff must have a cause of action or a legal right to bring a suit.¹⁴ When determining whether a plaintiff can establish standing and proceed with a suit, courts today consider three factors: (1) that

11. See *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Friends of the Earth*, 528 U.S. 167; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Defenders of Wildlife*, 504 U.S. 555; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972).

12. See Emily Longfellow, *Friends of the Earth v. Laidlaw Environmental Services: A New Look at Environmental Standing*, 24 ENVIRONS 3, 14 (2000). Financial and physical injuries are easily demonstrated injuries in fact. See *id.* at 15. Emotional and aesthetic injuries are more difficult to demonstrate. See *id.* For a discussion of the two types of injuries relevant to *Summers*—aesthetic and procedural injuries—see *infra* Part II.A.

13. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

14. Cass R. Sunstein, *What's Standing After Lujan? Of Citizens, "Injuries," and Article III*, 91 MICH. L. REV. 163, 170 (1992).

the plaintiff suffered an injury in fact, (2) that the defendant's actions caused the plaintiff's injury, and (3) that the court has the means to provide redress to the injured plaintiff.¹⁵ Although courts, including the Supreme Court in *Summers*, readily apply these three factors today, this test is relatively new. The Court first recognized injury in fact, causation, and redressability as requirements for standing to sue in the 1970s.¹⁶

The common law idea of standing originated in England under the tradition of the writ system.¹⁷ More specifically, the writ of *locus standi*¹⁸ in prohibition and certiorari provided "that 'a stranger' ha[d] standing, but relief in suits by strangers [was] discretionary."¹⁹ Under this broad writ system, "[a]nyone could bring the writ" of prohibition, and the "writ of certiorari was similarly available to citizens, and not just those with a concrete or personal interest."²⁰ This extensive grant of standing in the English writ system influenced the creation of the American injury-in-fact test.²¹

The constitutional law doctrine of standing originates in Article III, Section 2 of the United States Constitution, which states that "the judicial Power shall extend" to "Cases" and "Controversies."²²

15. *Id.* at 168; see *Defenders of Wildlife*, 504 U.S. at 560.

16. Sunstein, *supra* note 14, at 168.

17. *Id.* at 171. The writ system originated in the medieval English courts of Westminster. Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 819 (1969). Writs "were conceived as public proceedings brought in the King's name" and served as the means for people to bring their cases to the proper jurisdictions. Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1269 (1961); see Berger, *supra*, at 818.

18. "The principle of *locus standi* is that there is something in the bill which, if passed into law, would injure the parties petitioning." A.H.B. Constable, *Principles and Practice Affecting Locus Standi*, 9 JURID. REV. 47, 55 (1897).

19. Jaffe, *supra* note 17, at 1274.

20. Sunstein, *supra* note 14, at 171.

21. *Id.* at 172. In 1697, English courts allowed a "stranger," i.e., person without a "personal interest," to bring a writ of mandamus to "compel justices of the peace 'to make rates for the relief of the poor.'" Berger, *supra* note 17, at 824 (quoting *Lidleston v. Mayor of Exeter*, (1697) 90 Eng. Rep. 567 (K.B.)). For an example of the application of the writ system in American courts, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where Marbury filed a writ of mandamus with the Supreme Court asking the Court to command Madison to deliver Marbury's appointment as a justice of the peace.

22. U.S. CONST. art. III, § 2. The Court in *Muskrat v. United States* explained that a "case" is "a suit instituted according to the regular course of judicial procedure," and a "controvers[y]" . . . includes only suits of a civil nature." 219 U.S. 346, 356-57 (1911) (quoting *In re Pac. Ry. Comm'n*, 32 F. 241, 255 (C.C.N.D. Cal. 1887)) (internal quotation marks omitted). The Court

However, the word “standing” is not found in the Constitution—it is a judicial construct.²³ The Supreme Court looked to the writ system of common law England to create a vehicle to limit the jurisdiction of the Court as an extension of the separation of powers doctrine.²⁴ Before the 1920s, “there was no separate standing doctrine at all” because “[n]o one believed that the Constitution limited Congress’ power to confer a cause of action.”²⁵

The Supreme Court first acknowledged a standing requirement in the 1923 case of *Frothingham v. Mellon*, in which a unanimous Court refused to entertain an individual taxpayer’s alleged cause of action.²⁶ A Massachusetts taxpayer brought suit to challenge the Maternity Act of 1921 on the grounds that its enforcement would result in “taxation for illegal purposes.”²⁷ The Court explained that the taxpayer failed to show that she “sustained or [was] immediately in danger of sustaining some direct injury” from the enforcement of the Maternity Act.²⁸ Furthermore, the Court added that taxpayers in general could not bring a suit where they “suffer[ed] in some indefinite way in common with people generally.”²⁹ Despite the Court’s reference to the “cases and controversies” provision of Article III, Section 2, the decision in *Frothingham* “left uncertain whether ‘standing’ was a constitutional requirement or simply a ‘rule of self-restraint.’”³⁰

In the 1930s and 1940s, Justices Brandeis and Frankfurter began to “develop a range of devices designed to limit the occasions for judicial intervention into the democratic process” to protect “New Deal legislation from frequent judicial attack.”³¹ These devices became the foundation for the current interpretation of standing.³² When citizens tried to use the Constitution as a

interpreted this “case or controversy” requirement as a limit on judicial power. *Id.* at 356.

23. Berger, *supra* note 17, at 818.

24. *Id.*

25. Sunstein, *supra* note 14, at 170. This directly reflects the writ system of England where “strangers” could bring suit regardless of whether they had a personal stake in the claim.

26. 262 U.S. 447 (1923).

27. *Id.* at 487. The Maternity Act provided grants to states that enacted programs to help “reduce maternal and infant mortality and protect the health of mothers and infants.” *Id.* at 479.

28. *Id.* at 488.

29. *Id.*

30. *Id.* at 480; Berger, *supra* note 17, at 816 (quoting *Flast v. Cohen*, 392 U.S. 83, 92 (1968)).

31. Sunstein, *supra* note 14, at 179.

32. *Id.*

means of challenging New Deal legislation,³³ the Supreme Court “held that there was no personal stake for the invocation of judicial power.”³⁴ In 1946, Congress passed the Administrative Procedure Act, which stated that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”³⁵ These ideas of a “legal wrong” and a person “adversely affected or aggrieved” became the foundation of the injury-in-fact requirement for standing to sue.³⁶

The three elements of the standing test applied in *Summers*—injury in fact, causation, and redressability—first appeared in Supreme Court decisions during the 1970s. As an expansion of the traditional interpretation of a legal wrong,³⁷ the Court first applied an injury-in-fact test in the 1970 decision *Ass’n of Data Processing Organizations v. Camp*.³⁸ In this case, the Court rejected the idea that a plaintiff must show a “legal wrong” to establish standing; instead, the Court stated that an “aggrieved” party can suffer an injury in fact under the terms of the Administrative Procedure Act.³⁹ The Court held that the plaintiffs suffered economic injuries in fact but also stated that non-economic injuries may constitute an injury in fact in other cases.⁴⁰

Following *Ass’n of Data Processing Organizations*, the Court began to entertain cases involving other types of injuries. In the first environmental standing case, *Sierra Club v. Morton*,⁴¹ the Court recognized that aesthetic injuries, as well as economic, satisfy the injury-in-fact requirement.⁴² The Court explained that “[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by

33. See *Frothingham*, 262 U.S. 447 (examining taxpayers’ challenges of the enforcement of the Maternity Act).

34. Sunstein, *supra* note 14, at 180.

35. 5 U.S.C. § 702 (2006).

36. Sunstein, *supra* note 14, at 181–82.

37. The Court first applied this idea of a “legal wrong” in cases dealing with statutory standing where a plaintiff’s legal right was violated. *Id.* The Court later used the language of “or adversely affected or aggrieved” to expand the doctrine of standing to constitutionally based cases. *Id.* at 181–83.

38. 397 U.S. 150 (1970).

39. *Id.* at 152, 153. Plaintiffs in *Ass’n of Data Processing Organizations* alleged economic injuries when the Comptroller of the Currency allowed national banks to “make data processing services available to other banks and bank customers.” *Id.* at 151.

40. *Id.* at 152.

41. 405 U.S. 727 (1972); see *infra* Part II.B.

42. *Sierra Club*, 405 U.S. at 734.

the many . . . does not make them less deserving of legal protection through the judicial process.”⁴³ Also during the 1970s, the Court began to recognize procedural injuries in fact.⁴⁴ In administrative law, the Supreme Court often found that plaintiffs suffered procedural injuries in fact when an agency “refus[ed] to grant a petitioner a statutorily or constitutionally required procedure, e.g., a hearing.”⁴⁵ In these cases, the Court rarely mentioned standing to sue and accepted the plaintiff’s claim that the “contested fact . . . might plausibly be resolved differently after a hearing.”⁴⁶ Although the Court specifically recognized aesthetic injuries and procedural injuries as potential injuries in fact, the broad language in *Ass’n of Data Processing Organizations* leaves open the possibility for other categories of injuries in fact.

The Court added the second element of the three-part standing test—redressability—in the 1975 case *Warth v. Seldin*, stating that standing rests on whether the plaintiff “‘alleged such a personal stake in the outcome of the controversy’ as to . . . justify exercise of the court’s remedial powers on his behalf.”⁴⁷ In other words, the Court must have the ability to redress the injury in fact alleged by the plaintiff. If no remedy exists, the plaintiff has not alleged an actual Article III “case or controversy.”⁴⁸

In *Simon v. Eastern Kentucky Welfare Rights Organization*,⁴⁹ the Court presented the final element of the three-part standing test—causation. In this 1976 case, the Court explained that to establish standing, a plaintiff must demonstrate that the injury “can be traced to the challenged action of the defendant.”⁵⁰ In other words, the injury in fact cannot “result[] from the independent action of some third party not before the court.”⁵¹ In *Simon*, the Court revisited the requirements of injury in fact and redressability,

43. *Id.*

44. See Richard J. Pierce, Jr., *Making Sense of Procedural Injury*, 62 ADMIN. L. REV. 1, 2 (2010).

45. *Id.*

46. *Id.*

47. 422 U.S. 490, 498–99 (1975). *Warth* is an example of a case based on constitutional injury, not statutory injury. For a discussion of statutory injury, see *supra* note 37.

48. See *Warth*, 422 U.S. at 498–99.

49. 426 U.S. 26 (1976). The plaintiffs in this case, several indigent organizations, challenged an Internal Revenue Ruling that presented “favorable tax treatment” to nonprofit hospitals that only provided emergency room services, but no other hospital services, to indigents. *Id.* at 455. *Simon* is an example of a case based on constitutional injury, not statutory injury. See *supra* note 37.

50. *Simon*, 426 U.S. at 41.

51. *Id.* at 42.

thereby presenting the three elements that became the foundation for the Court's analysis of standing in the environmental cases that precede *Summers*.

B. Environmental Jurisprudence Leading Up to Summers

Despite the gradual development of constitutionally based standing to sue, standing remained a seldom-raised issue in the courts.⁵² However, one area of law in which the Court often analyzed standing was environmental law. *Summers* is the latest case in a wavering line of jurisprudence in which the Supreme Court has determined whether a plaintiff who opposes governmental action on environmental grounds has standing to sue. In some cases the Court held that the plaintiff lacked standing,⁵³ but in others, the Court found that the plaintiff met the requirements to establish standing to sue.⁵⁴ These cases illustrate the applicability of the three-part standing test to different factual situations.

In *Sierra Club*, the Supreme Court first recognized the possibility that an environmental organization could sue for aesthetic injuries.⁵⁵ Members of the Sierra Club filed suit against the United States Forest Service when the Forest Service granted Walt Disney Enterprises, Inc. (Disney) permission to develop a resort in the Mineral King Valley,⁵⁶ an "area of great natural beauty nestled in the Sierra Nevada Mountains" in California.⁵⁷ Members of the Sierra Club wanted the Mineral King Valley to remain a place for recreational activities.⁵⁸ At trial, the district court granted the Sierra Club a preliminary injunction against the Disney development.⁵⁹ However, in a three-to-four decision,⁶⁰ the

52. See Robin Kundis Craig, *Standing and Environmental Law: An Overview* (Fla. State Univ. Coll. of Law, Pub. Law Research Paper No. 425, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1536583.

53. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990); *Sierra Club v. Morton*, 405 U.S. 727 (1972).

54. See *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973).

55. 405 U.S. 727; see *supra* Part II.A.

56. The Mineral King Valley is part of the Sequoia National Forest, which is the location of the Burnt Ridge Project in *Summers*. *Sierra Club*, 405 U.S. at 728. Both *Sierra Club* and *Summers* involved challenges to United States Forest Service projects in the Sequoia National Forest. See *infra* Part III.A.

57. *Sierra Club*, 405 U.S. at 728–30.

58. *Id.* at 728–30, 734–35.

59. *Id.* at 728–31.

Court held that the Sierra Club failed to allege any injury in fact because the organization did not demonstrate that “it or its members would be affected in any of their activities or pastimes by the Disney development.”⁶¹ The Court explained that the injury-in-fact test “requires more than an injury to a cognizable interest”—the “party seeking review [must be] among the injured.”⁶²

The following year, the Supreme Court adopted its broadest grant of standing to sue in environmental jurisprudence in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.⁶³ In this case, environmental organizations challenged the Interstate Commerce Commission’s “failure to suspend” an increased tariff on railroad freight.⁶⁴ The plaintiffs alleged that the increased rate injured them economically, recreationally, and aesthetically because it “would discourage the use of ‘recyclable’ materials.”⁶⁵ A six-to-two majority⁶⁶ agreed with the environmental organizations, but the Court also noted that the “alleged injury to the environment [in *SCRAP*] [was] far less direct and perceptible” than that in *Sierra Club*.⁶⁷ Nonetheless, the Court still found that the plaintiffs had standing to sue because they “alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected.”⁶⁸

Following the broad interpretation of injury in fact in *SCRAP*, standing to sue was only a minor hurdle for plaintiffs in environmental cases until 17 years later in *Lujan v. National*

60. Justices Powell and Rehnquist did not take part in the consideration or decision of the case because the case was argued on November 17, 1971, and they did not join the Court until January 7, 1972. See *Members of the Supreme Court of the United States*, SUP. CT. U.S., <http://www.supremecourt.gov/about/members.aspx> (last visited Feb. 5, 2011).

61. *Sierra Club*, 405 U.S. at 735.

62. *Id.* at 734–35.

63. 412 U.S. 669 (1973).

64. *Id.* at 675.

65. *Id.* at 676. The plaintiffs alleged that the increased rate injured them economically because the group members were “forced to pay more for finished products.” *Id.* They also alleged that it injured them recreationally and aesthetically because “unnecessary destruction of timber and extraction of raw materials . . . and the accumulation of otherwise recyclable solid and liquid waste materials” prevented the organization members’ use of forests and streams. *Id.*

66. Justice Powell took no part in the case. *Id.* at 699.

67. *Id.* at 688.

68. *Id.* at 689–90.

Wildlife Federation.⁶⁹ In this case, the Court began to restrict the opportunities for environmental organizations to establish standing to sue.⁷⁰ The plaintiff organizations challenged the land-use designations made by the Bureau of Land Management (BLM), arguing that these designations injured them because “open[ing] the lands up to mining activities [would] destroy[] [the land’s] natural beauty.”⁷¹ Furthermore, two members of the plaintiff organization claimed to use land “in the vicinity” of the challenged actions.⁷²

In a five-to-four decision, the Court held that the plaintiffs did not establish standing to challenge the land-use programs.⁷³ Writing for the majority, Justice Scalia declared that the plaintiffs failed to “refer to a single BLM order or regulation” and instead generalized the “continuing (and thus constantly changing) operations of the BLM.”⁷⁴ The majority concluded that the plaintiffs failed to allege a specific or “identifiable” action that caused them injury.⁷⁵ Responding to this reasoning by the

69. 497 U.S. 871 (1990). There is another important environmental case where the petitioner is Manuel Lujan, Jr., the Secretary of the Interior: *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). To avoid confusion, these cases will be referred to by the names of the respondents.

70. During the interim between *SCRAP* and *National Wildlife Federation*, Justice Scalia joined the Court in 1986. See *Members of the Supreme Court of the United States*, *supra* note 60. Beginning in *National Wildlife Federation*, Justice Scalia led an effort to limit potential plaintiffs’ opportunities to establish standing. See *Nat’l Wildlife Fed’n*, 497 U.S. 871. This narrowing closely follows an approach to standing that then-Judge Scalia announced in a 1983 law review article that he wrote while on the United States Court of Appeals for the District of Columbia Circuit. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). Then-Judge Scalia explained that there are two types of cases. The first is “when an individual who is the very *object* of a law’s requirement or prohibition seeks to challenge it.” *Id.* at 894. In these cases, then-Judge Scalia stated that the plaintiff “always has standing.” *Id.* The second type of case arises when a “plaintiff is complaining of an agency’s unlawful *failure* to impose a requirement or prohibition upon *someone else*.” *Id.* Then-Judge Scalia argued that in this second type of case, the plaintiff must show that he was “harmed *more than the rest of us*” as a “prerequisite for judicial intervention.” *Id.* at 894–95. He explained that standing “is an essential means of restricting the courts.” *Id.* at 895. To limit the judiciary’s control over governmental action, then-Judge Scalia urged that “‘concrete injury’ . . . is the indispensable prerequisite of standing.” *Id.* He explained that this injury “separate[s] the plaintiff from all the rest of us.” *Id.*

71. *Nat’l Wildlife Fed’n*, 497 U.S. at 879.

72. *Id.* at 880.

73. *Id.* at 899.

74. *Id.* at 890.

75. *Id.* at 890 n.2. The Court not only found that the plaintiffs lacked standing, but it also noted that their case was not yet ripe for review. *Id.* at 891–92.

majority, the dissent argued that “[a]lthough the affidavits were not models of precision, . . . they were adequate at least to create a genuine issue of fact as to the organization’s injury.”⁷⁶

Two years after *National Wildlife Federation*, the Court further narrowed the requirements to establish Article III standing to sue in *Lujan v. Defenders of Wildlife*.⁷⁷ In this case, the Defenders of Wildlife argued that the Endangered Species Act should apply outside of the United States.⁷⁸ Some of the organization’s members asserted that they wanted to go overseas to see endangered animals and feared that, without the protection of the Endangered Species Act, there would be no animals to see.⁷⁹ A six-to-three majority held that the Defenders of Wildlife lacked standing because they failed to demonstrate injury in fact and redressability.⁸⁰

In this case, Justice Scalia again wrote the majority opinion.⁸¹ He emphasized that prior Supreme Court cases “established that the irreducible constitutional minimum of standing contains three elements.”⁸² First, the plaintiff must demonstrate that he “suffered an ‘injury in fact.’”⁸³ This injury in fact must be “concrete and particularized,”⁸⁴ and “actual or imminent,”⁸⁵ and must not be “conjectural” or “hypothetical.”⁸⁶ Second, the plaintiff must demonstrate a “causal connection between the injury and the conduct” of the defendant.⁸⁷ Third, the courts must be able to “redress” the injury “by a favorable decision.”⁸⁸

Applying the three-part test to the facts of the case, Justice Scalia explained that the organization’s members did not allege

76. *Id.* at 901 (Blackmun, J., dissenting).

77. 504 U.S. 555 (1992).

78. *Id.* at 557–58.

79. *Id.* at 557–58, 564.

80. *Id.* at 578.

81. Notably, Justice Scalia also wrote the majority opinion in *Summers*. See *infra* Part III.B. Furthermore, the year following *Defenders of Wildlife*, then-Principal Deputy Solicitor General John G. Roberts, Jr. wrote an article defending Justice Scalia’s opinion in *Defenders of Wildlife*. See John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993). Chief Justice Roberts also joined Justice Scalia’s majority opinion in *Summers*. See *infra* note 146.

82. *Defenders of Wildlife*, 504 U.S. at 560.

83. *Id.*

84. *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 756 (1984); *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740–41 n.16 (1972)).

85. *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

86. *Id.*

87. *Id.*

88. *Id.* at 557–58 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)).

facts that demonstrated that they were among the injured because they had not been “deprived of the opportunity to observe animals of the endangered species.”⁸⁹ Furthermore, the majority stated that the plaintiffs failed to present a “description of concrete plans” or “any specification of *when*” they planned to travel.⁹⁰ Justice Scalia added that the Court had “consistently held that a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy.”⁹¹

Falling in line with the *Lujan* cases, the Supreme Court once again applied a narrow view of standing in *Steel Co. v. Citizens for a Better Environment*.⁹² In this case, a group of citizens “interested in environmental protection” filed suit against a manufacturing company alleging that the company violated the Emergency Planning and Community Right-To-Know Act when it failed to file “requisite hazardous-chemical inventory and toxic-chemical release forms.”⁹³ A unanimous Court, in an opinion written by Justice Scalia, held that the plaintiffs had not established standing because the Court could not remedy any of the alleged injuries.⁹⁴ This case provides an example of where the Court focused on redressability instead of injury in fact when determining whether the plaintiff had standing to sue.

Departing from the trend of majority opinions written by Justice Scalia, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, Justice Ginsburg wrote the opinion for a seven-to-two Court.⁹⁵ The majority applied the *Defenders of Wildlife* standing test and held that Friends of the Earth established standing to bring suit on behalf of its members.⁹⁶ The plaintiffs in this case alleged that Laidlaw violated the Clean Water Act by discharging pollutants into the water.⁹⁷ The majority insisted that the plaintiffs properly demonstrated injury in fact through several detailed affidavits of Friends of the Earth members.⁹⁸ Justice Scalia disagreed; his dissent argued that the plaintiff organization failed to demonstrate a “concrete and

89. *Id.* at 564.

90. *Id.*

91. *Id.* at 573–74.

92. 523 U.S. 83 (1998).

93. *Id.* at 86, 88.

94. *Id.* at 105–06.

95. 528 U.S. 167 (2000).

96. *Id.* at 180–88.

97. *Id.* at 174–76.

98. *Id.* at 181–83. One affidavit detailed the experience of an organization member who could not picnic near a local river because the discharge from the Laidlaw facility polluted the water. *Id.* at 181–82.

particularized” injury in fact.⁹⁹ He argued that the plaintiffs only alleged “general” injuries instead of “specific facts” to support their claims.¹⁰⁰ With the jurisprudentially unique combination of the majority finding standing and Justice Scalia dissenting, *Friends of the Earth* suggested a shift away from the Court’s narrow application of the injury-in-fact test in environmental standing cases.

Most recently, in *Massachusetts v. EPA*, the Court examined whether the State of Massachusetts had standing to challenge actions by the Environmental Protection Agency (EPA).¹⁰¹ The EPA allegedly abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases.¹⁰² The State of Massachusetts argued that these emissions led to an elevation of the sea level, which then caused detrimental erosion to the state’s coastline.¹⁰³ The Court held, in a five-to-four decision, that Massachusetts had standing to sue the EPA.¹⁰⁴ The majority¹⁰⁵ found that the rise in sea levels caused by global warming had already harmed, and would continue to harm, the State of Massachusetts.¹⁰⁶ The Court noted that the “risk of catastrophic harm” due to the coastal erosion, “though remote, [was] nevertheless real.”¹⁰⁷

The dissent¹⁰⁸ argued that “[r]elaxing Article III standing requirements because asserted injuries are pressed by a State . . . has no basis in our jurisprudence.”¹⁰⁹ The dissenters stated that “the status of Massachusetts as a State cannot compensate for petitioners’ failure to demonstrate injury in fact, causation, and

99. *Id.* at 198 (Scalia, J., dissenting) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

100. *Id.* (quoting *Defenders of Wildlife*, 504 U.S. at 561).

101. 549 U.S. 497 (2007).

102. *Id.* at 505. The Court explained that “[r]espected” scientific research showed a causal connection between the increased levels on carbon dioxide in the atmosphere and a the “rise in global temperatures.” *Id.* at 504–05.

103. *Id.* at 523–24.

104. *Id.* at 526–27.

105. Justice Stevens wrote the majority opinion, joined by Justices Kennedy, Souter, Ginsburg, and Breyer. Notably, Justice Kennedy is the only justice to be in the majority in both *Massachusetts* and *Summers*. See *infra* note 108.

106. *Massachusetts*, 549 U.S. at 522–23.

107. *Id.* at 526.

108. Chief Justice Roberts wrote a dissenting opinion, joined by Justices Scalia, Thomas, and Alito. *Id.* at 535 (Roberts, C.J., dissenting). Justice Scalia also wrote a dissenting opinion, joined by Chief Justice Roberts and Justices Thomas and Alito. *Id.* at 549 (Scalia, J., dissenting). Note that these four justices, joined with Justice Kennedy, comprise the majority in *Summers*. See *infra* Part III.

109. *Massachusetts*, 549 U.S. at 536 (Roberts, C.J., dissenting).

redressability.”¹¹⁰ In other words, the dissent suggested that the majority applied the standing test more leniently in *Massachusetts* because the plaintiff was a sovereign state. The dissent urged that Massachusetts failed to show a “particularized” injury because global warming is “global” and, therefore, cannot be an individualized injury to Massachusetts.¹¹¹

This brief history of jurisprudence demonstrates that the issue of standing in environmental cases often divides the Court and that the disagreements on the Court repeatedly focus on whether the plaintiff satisfied the injury-in-fact element of the test for standing. This trend continues with the Court’s five-to-four split in *Summers*.

III. *SUMMERS V. EARTH ISLAND INSTITUTE*

Summers continues the Court’s inconsistent application of the injury-in-fact test in environmental jurisprudence. The specific facts of the case, the procedural history, and the injury-in-fact tests applied by both the majority and the dissent demonstrate the need to reconsider how the Supreme Court analyzes standing to sue. Although the majority repeats the traditional injury-in-fact test, the dissent presents a broader test for establishing standing to sue.

A. *Factual and Procedural Background*

In the summer of 2002, a wildfire burned 150,700 acres of the 1.2 million acre Sequoia National Forest in California.¹¹² A year after this fire, the largest in the forest’s history, the United States Forest Service approved a salvage sale of timber on land damaged by the fire.¹¹³ In response, several non-profit environmental organizations concerned with conservation of the Sequoia National Forest objected to this logging project.¹¹⁴

110. *Id.* at 540.

111. *Id.* at 541. The dissent also noted that Massachusetts failed to demonstrate a causal connection between specific EPA-controlled emissions and the erosion of the coastline. *Id.* at 544–45. Additionally, the dissent found that there was no opportunity for redressability in this case because emissions from other countries added to the problem of global warming, and the EPA only controls domestic emissions. *Id.* at 545.

112. *McNally Fire Area Restoration Project*, U.S. FOREST SERVICE, http://www.fs.fed.us/r5/sequoia/projects/mcnally_fire/mcnally_fire_restoration.html (last modified Jan. 23, 2007).

113. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1147 (2009); *McNally Fire Area Restoration Project*, *supra* note 112.

114. *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 692 (9th Cir. 2007), *aff’d in part, rev’d in part sub nom. Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009).

Prior to 1992, the Forest Service Decisionmaking and Appeals Reform Act (“ARA”)¹¹⁵ established an administrative appeals process by which the United States Forest Service provided notice and an opportunity for public comment and appeal.¹¹⁶ However, the Forest Service passed new regulations in 1992¹¹⁷ that exempted certain activities, including fire-rehabilitation activities on less than 4,200 acres and salvage-timber sales on less than 250 acres, from the notice, comment, and appeal process.¹¹⁸ Pursuant to these new exemptions, the Forest Service conducted a salvage sale of timber on 238 acres and did not provide a means for notice or the opportunity for public comment and appeal on the project.¹¹⁹ The United States Forest Service referred to this project as the “Burnt Ridge Project.”¹²⁰

Instead of launching a facial challenge to the regulations when promulgated in 1992, Earth Island Institute, joined by four other non-profit environmental organizations¹²¹ waited 11 years to file suit against the United States Forest Service.¹²² The plaintiffs alleged that the Forest Service failed to apply certain ARA regulations to the Burnt Ridge Project that would allow for public notice, comment, and appeal.¹²³

Affidavits submitted by the plaintiffs alleged aesthetic and procedural injuries caused by the absence of an opportunity for notice of and to comment on United States Forest Service projects.¹²⁴ One affidavit explained that Sequoia ForestKeeper member Ara Marderosian repeatedly visited the Burnt Ridge site

115. Pub. L. No. 102-381, 106 Stat. 1419 (1992).

116. *Summers*, 129 S. Ct. at 1147.

117. 36 C.F.R. § 215.4(a) (2010) (discussing notice and comment); *id.* § 215.12(f) (discussing appeal).

118. Notice of Final National Environmental Policy Act Implementing Procedures, 68 Fed. Reg. 33,814, 33,824 (June 5, 2003). Although the United States Forest Service did not announce a reason for amending the regulations to exempt certain projects from notice, comment, and appeal, perhaps the Forest Service wanted to save time and money by limiting these administrative procedures. For further discussion of potential motives for the amendments, see *infra* Part IV.B.2.

119. *Summers*, 129 S. Ct. at 1148.

120. *Id.* at 1147.

121. The plaintiffs in *Summers* were five environmental groups: the Earth Island Institute; the Sequoia ForestKeeper; Heartwood, Inc.; the Center for Biological Diversity; and the Sierra Club. *Id.* at 1154 (Breyer, J., dissenting).

122. *Id.* at 1148 (majority opinion).

123. *Id.* These regulations were 36 C.F.R. § 215.4(a) (discussing notice and comment) and 36 C.F.R. § 215.12(f) (discussing appeal). *Summers*, 129 S. Ct. at 1147.

124. *Summers*, 129 S. Ct. at 1158 (Breyer, J., dissenting).

and had plans to do so again in the near future.¹²⁵ Marderosian argued that the Forest Service going forward with the Burnt Ridge Project would harm his interests in viewing the flora and fauna of the area.¹²⁶ Marderosian also explained that he wanted to comment on the Burnt Ridge project but did not have an opportunity to do so because of the exemptions under the amended regulations.¹²⁷

Although the Marderosian affidavit focused only on the Burnt Ridge project, the Bensman affidavit did not allege injuries specific to the Burnt Ridge Project.¹²⁸ Heartwood, Inc. member and employee Jim Bensman argued that he visited many national forests in the past and that he planned to visit more in the future.¹²⁹ Bensman's affidavit specifically referred to a series of projects in the Allegheny National Forest in Pennsylvania that were subject to the challenged regulations of the ARA.¹³⁰

The plaintiff organizations initially brought suit to challenge both the Burnt Ridge project and the regulations that exempted notice, comment, and appeal.¹³¹ The district court granted a preliminary injunction to prevent the execution of the Burnt Ridge project.¹³² Several months later, the parties settled the case, and the Forest Service withdrew plans for the Burnt Ridge project.¹³³

Despite the settlement, the District Court for the Eastern District of California proceeded with the case, noting that the Burnt Ridge timber sale was not at issue and that the court instead would rule on the merits of the plaintiff organizations' challenges to the Forest Service regulations.¹³⁴ The court found that the environmental organizations had standing to sue.¹³⁵ The district court explained that when plaintiffs "submit[] affidavits concerning direct effects to the affiant's 'recreational, aesthetic,

125. *Id.* at 1149 (majority opinion).

126. *Id.*

127. *Id.*

128. *Id.* at 1149–50.

129. *Id.* at 1150; *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 691 (9th Cir. 2007), *aff'd in part, rev'd in part sub nom.* *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009).

130. *Summers*, 129 S. Ct. at 1150.

131. *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 999 (E.D. Cal. 2005), *aff'd sub nom.* *Earth Island Inst. v. Ruthenbeck*, 459 F.3d 954 (9th Cir. 2006), *aff'd in part, rev'd in part*, 490 F.3d 687 (9th Cir. 2007), *aff'd in part, rev'd in part sub nom.* *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009).

132. *Id.*

133. *Ruthenbeck*, 490 F.3d at 692.

134. *Summers*, 129 S. Ct. at 1148; *Pengilly*, 376 F. Supp. 2d at 999.

135. *Pengilly*, 376 F. Supp. 2d at 1001.

and economic interests,' standing is appropriate."¹³⁶ Reasoning that the procedural regulations that excluded the notice, comment, and appeals process for projects like Burnt Ridge were invalid under federal regulations,¹³⁷ the district court then invalidated several of the Forest Service's regulations¹³⁸ and called for a nationwide injunction against the application of the regulations.¹³⁹

On appeal, the Court of Appeals for the Ninth Circuit unanimously affirmed the district court's finding of standing and issuance of the nationwide injunction against application of some of the regulations.¹⁴⁰ The court of appeals then held that other regulations invalidated by the district court were not ripe for review.¹⁴¹ It explained that affiant "Bensman's preclusion from participation in the appeals process may yield diminished recreational enjoyment of the national forests."¹⁴² In other words, the court stated that Bensman might suffer aesthetic injuries because of his procedural injuries resulting from his inability to appeal and therefore demonstrated an injury in fact.

136. *Id.* at 1000 (quoting *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000)).

137. *Id.* at 1004. These regulations stated that projects that affect "land and resource management plans . . . shall" be subject to notice, comment, and appeal procedures." *Id.* at 1004 (emphasis added) (quoting Notice of Adoption of Final Policy, 57 Fed. Reg. 43,180, 43,208 (Sept. 18, 1992)).

138. The district court invalidated the following Forest Service regulations:

36 C.F.R. § 215.4(a) (excluding from notice and comment procedures projects and activities that are categorically excluded from documentation in an environmental impact statement (EIS) or environmental assessment (EA)); 36 C.F.R. § 215.12(f) (excluding from appeal procedures decisions that have been excluded from documentation in an EIS or EA); 36 C.F.R. § 215.20(b) (exempting from notice, comment, and appeal procedures decisions signed directly by the Secretary); 36 C.F.R. § 215.10(a) (permitting delegation of the determination that an emergency situation exists); and 36 C.F.R. § 215.18(b)(1) (providing that an appeal decision will be sent to appellants five days after the decision is rendered).

Pengilly, 376 F. Supp. 2d at 1011.

139. *Pengilly*, 376 F. Supp. 2d at 1011.

140. *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 690 (9th Cir. 2007), *aff'd in part, rev'd in part sub nom. Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009).

141. *Id.* at 690–91. The court of appeals upheld the district court's invalidation of 36 C.F.R. § 215.12(f) and 36 C.F.R. § 215.4(a). The court of appeals vacated the district court's invalidation of the other regulations because plaintiffs failed to show that "the other challenged regulations were applied in the context of the Burnt Ridge Timber Sale or any other specified project." *Ruthenbeck*, 490 F.3d at 696.

142. *Ruthenbeck*, 490 F.3d at 693.

The Supreme Court of the United States granted certiorari to determine whether the plaintiff environmental organizations had established standing to challenge the regulations at issue in the timber sale and, if so, whether the nationwide injunction was proper relief.¹⁴³ A five-to-four majority held that the environmental organizations lacked standing to bring suit against the United States Forest Service.¹⁴⁴ Because the plaintiff organizations failed to establish the requisite standing to sue, the Court declined to determine whether the nationwide injunction on the regulations was proper relief.¹⁴⁵

B. The Majority Opinion

In the majority opinion, Justice Scalia¹⁴⁶ explained that the constitutional basis for standing comes from Article III of the Constitution, which limits judicial power to “Cases” and “Controversies.”¹⁴⁷ He noted that the “traditional role of Anglo-American courts” is to “prevent actual or imminently threatened injury to persons caused by private or official violation of law.”¹⁴⁸ Before deciding a case on the merits, courts must make sure that the “plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant *his* invocation of federal-court jurisdiction.”¹⁴⁹

Justice Scalia repeated the Court’s familiar three-part test for establishing standing,¹⁵⁰ stating that a plaintiff must demonstrate: (1) that he will “suffer” an “actual and imminent” injury in fact, (2) that the injury is “fairly traceable” to the defendant’s actions, and (3) that the Court can “prevent or redress the injury.”¹⁵¹ Applying these requirements to the facts of *Summers*, Justice Scalia determined that the plaintiffs failed to prove the required element of injury in fact.¹⁵² He noted that the plaintiff organizations “point[ed] to their members’ recreational interest in the National Forests” to “establish the concrete and particularized injury that

143. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1148 (2009).

144. *Id.* at 1149–50.

145. *Id.* at 1153.

146. Justice Scalia was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. *Id.* at 1146–47.

147. *Id.* at 1148 (quoting U.S. CONST. art. III, § 2); see *supra* Part II.A.

148. *Summers*, 129 S. Ct. at 1148.

149. *Id.* at 1149 (quoting *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975)).

150. These are the same requirements that Justice Scalia applied in *Defenders of Wildlife*. See *supra* Part II.B.

151. *Summers*, 129 S. Ct. at 1149 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)).

152. *Id.* at 1151.

standing requires.”¹⁵³ The Court asserted, however, that “generalized harm” to the national forests and the environment alone does not create standing; “if that harm *in fact* affects the recreational or even the mere aesthetic interests of the plaintiff, that will suffice.”¹⁵⁴

The Court found that the allegations in both the Marderosian and Bensman affidavits relied on insufficiently specific facts.¹⁵⁵ It quickly rejected the harm alleged in the Marderosian affidavit as an injury in fact because the affidavit consisted of injuries solely related to the Burnt Ridge project.¹⁵⁶ Justice Scalia noted that because Marderosian’s injury in fact was remedied when the parties settled, it was “not at issue in this case.”¹⁵⁷

Following the dismissal of the injuries asserted in the Marderosian affidavit, the majority turned its attention to the harm alleged in the Bensman affidavit,¹⁵⁸ in which Jim Bensman asserted both past and current injuries.¹⁵⁹ First, Bensman alleged that he “suffered injury in the past from development on Forest Service land.”¹⁶⁰ Justice Scalia explained that this alleged injury failed to meet the injury-in-fact test “for several reasons: because it was not tied to application of the challenged regulations, because it d[id] not identify any particular site, and because it relate[d] to past injury rather than imminent future injury.”¹⁶¹

In addition to his assertions of past harm, Bensman also claimed that in the future he intended to visit other national forests that were subject to Forest Service regulations.¹⁶² The majority denied these future plans as an injury in fact because Bensman “fail[ed] to allege that *any* particular timber sale . . . will impede a specific and concrete plan . . . to enjoy the National Forests.”¹⁶³ In particular, the Court found fault with Bensman’s lack of

153. *Id.* at 1149.

154. *Id.* (emphasis added) (citing *Sierra Club v. Morton*, 405 U.S. 727, 734–36 (1972)).

155. *Id.* at 1150–51.

156. *Id.* at 1149–50.

157. *Id.* (quoting *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 999 (E.D. Cal. 2005)); see *supra* Part III.A.

158. *Summers*, 129 S. Ct. at 1150.

159. *Id.* at 1150–51.

160. *Id.* at 1150.

161. *Id.*

162. *Id.* Bensman alleged that he made “hundreds” of visits to over 70 national forests and that he “probably commented on a thousand” Forest Service projects before this case. *Id.* at 1157 (Breyer, J., dissenting).

163. *Id.* at 1150 (majority opinion).

specificity¹⁶⁴ in his future plans.¹⁶⁵ Justice Scalia explained that a “vague desire” to visit a national forest “is insufficient to satisfy the requirement of imminent injury.”¹⁶⁶ Without a “concrete plan” to visit places subject to Forest Service projects, the Court refused to find “the ‘actual or imminent’ injury that [standing] cases require.”¹⁶⁷

Justice Scalia further noted that “[a]ccepting an intention to visit the National Forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact.”¹⁶⁸ The Court concluded that because the affidavit only showed that “Bensman ‘want[ed] to go’” and “d[id] not assert . . . any firm intention” to visit a national forest, the plaintiff organizations failed to meet the burden of proving injury in fact.¹⁶⁹

After rejecting the aesthetic injuries claimed in both affidavits,¹⁷⁰ the Court focused on the alleged procedural injuries resulting from the elimination of the opportunity for public notice, comment, and appeal.¹⁷¹ Justice Scalia stated that “deprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing.”¹⁷² The Court further stated that “[o]nly a ‘person who has been accorded a procedural right to protect *his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy.”¹⁷³ Noting his divergence from the view on congressional grants of standing discussed in Justice Kennedy’s concurring opinion,¹⁷⁴ Justice Scalia stated that “[i]t makes no difference that the procedural right has been accorded by Congress.”¹⁷⁵ Justice Scalia added that “[u]nlike redressability . . .

164. See *supra* Part II.B. Compare *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871 (1990) (requiring specificity in alleged injuries), with *Summers*, 129 S. Ct. 1142 (requiring specificity in alleged injuries).

165. *Summers*, 129 S. Ct. at 1150.

166. *Id.*

167. *Id.* at 1151 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)).

168. *Id.* at 1150.

169. *Id.* (quoting Brief for the Petitioners at 6, *Summers*, 129 S. Ct. 1142 (No. 07-463), 2008 WL 976399).

170. *Id.* at 1150–51.

171. *Id.* at 1151.

172. *Id.*

173. *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992)).

174. See *infra* Part III.C.

175. *Summers*, 129 S. Ct. at 1151.

the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.”¹⁷⁶

After determining that the plaintiff organizations failed to demonstrate an imminent injury in fact, the majority characterized the dissent’s finding of standing as incorrect.¹⁷⁷ The Court found fault in the dissent’s proposal of a “hitherto unheard-of test for organizational standing: Whether, accepting the organization’s self-description of the activities of its members, there is a statistical probability that some of those members are threatened with concrete injury.”¹⁷⁸ Justice Scalia urged that this new realistic-threat test “would make a mockery of . . . prior cases” that require “specific allegations establishing that at least one identified member had suffered or would suffer harm.”¹⁷⁹

Because the affidavits of the various members of the environmental organizations failed to demonstrate an imminent threat of either aesthetic or procedural injury, the Court held that the plaintiffs did not establish the injury-in-fact prong of the three-part standing test.¹⁸⁰ The majority made it clear that without actual plans to visit a specific national forest affected by a future Forest Service project, the plaintiff organizations could not establish sufficient evidence of injury in fact and, thus, did not have standing to sue.¹⁸¹

C. *The Concurring Opinion*

In a very brief opinion, Justice Kennedy joined the majority opinion in full and added a concise commentary on congressional grants of procedural rights.¹⁸² He explained that “[t]his case would present different circumstances if Congress had sought to provide redress for a concrete injury ‘giv[ing] rise to a case or controversy where none existed before.’”¹⁸³ Justice Kennedy pointed out that “[n]othing in the [the Appeals Reform Act], however, indicates Congress intended to identify or to confer some interest separate and apart from a procedural right.”¹⁸⁴ In other words, Justice Kennedy suggested that Congress could amend the ARA to provide standing for all potential plaintiffs. Under this amendment,

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 1151–52.

180. *Id.* at 1149–50.

181. *Id.* at 1151.

182. *Id.* at 1153 (Kennedy, J., concurring).

183. *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992)).

184. *Id.*

the plaintiff organizations in *Summers* would automatically establish standing. However, because Congress had not statutorily granted standing to challenge procedural injuries under the ARA, Justice Kennedy declined to find that the plaintiff organizations established standing to sue.

D. The Dissenting Opinion

In the dissenting opinion,¹⁸⁵ Justice Breyer argued that the plaintiff organizations met the injury-in-fact requirement and therefore did have standing to sue.¹⁸⁶ The dissent found fault in the majority's requirement of imminent harm in its test for injury in fact.¹⁸⁷ Justice Breyer stated that this requirement was one "more appropriately considered in the context of ripeness or the necessity of injunctive relief."¹⁸⁸ He explained that the imminent-injury requirement is too "stringent" of an interpretation of the realistic-threat test enumerated in precedential cases.¹⁸⁹ Justice Breyer suggested that "a threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates."¹⁹⁰ The dissent also drew a comparison to *Massachusetts*, where although the harm to Massachusetts may not have occurred for several decades, the Court still found sufficient injury to establish standing.¹⁹¹

After explaining why the realistic-threat test does not require an imminent threat of harm, the dissent applied its test to the facts offered in the organization members' affidavits.¹⁹² Justice Breyer pointed out that the plaintiffs' affidavits described several "then-pending Forest Service projects, all excluded from notice, comment, and appeal and all scheduled to take place on parcels that the plaintiff organizations' members use."¹⁹³ Justice Breyer found that "[t]hese allegations and affidavits more than adequately show a 'realistic threat' of injury to plaintiffs brought about by reoccurrence of the challenged conduct—conduct that the Forest Service thinks lawful and *admits* will reoccur [in the reasonably

185. Justice Breyer wrote the dissenting opinion, which Justices Stevens, Souter, and Ginsburg joined. *Id.* at 1153 (Breyer, J., dissenting).

186. *Id.* at 1153–54.

187. *Id.* at 1155.

188. *Id.*

189. *Id.* at 1156 (citing *Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982)).

190. *Id.*

191. *Id.* (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

192. *Id.*

193. *Id.* at 1158.

near future].”¹⁹⁴ The dissent found that the plaintiff organizations did establish standing.

The disagreement between the majority and dissent over how to determine injury in fact falls in line with the jurisprudence of environmental standing cases. This inconsistent application of the injury-in-fact prong of the standing-to-sue test suggests the need to reconsider how courts analyze standing and illustrates the need for new injury-in-fact tests.

IV. CRITIQUES OF THE INJURY-IN-FACT TESTS APPLIED IN *SUMMERS* AND PROPOSALS FOR NEW INJURY-IN-FACT TESTS FOR STANDING TO SUE

The five-to-four split of the Court in *Summers* follows consistently with the jurisprudence on standing to sue in environmental cases.¹⁹⁵ The jurisprudential pattern of the Court’s division on the issue of standing and the inconsistency in the application of the injury-in-fact test suggest the need to reevaluate the three-part test developed in *Defenders of Wildlife*.¹⁹⁶ Following the Court’s decision in *Summers*, simply formulating a broad new test under which to examine all allegations of injury in fact is not a sufficient remedy. Instead, the Court should evaluate procedural and aesthetic injuries separately and apply different, individualized tests to each.¹⁹⁷ The problems raised by all three opinions in *Summers* demonstrate the consequences of adhering to the status quo.

A. Critique of *Summers*

Although both the majority and the dissent offer explanations of what a plaintiff must establish to prove injury in fact, neither the imminent-threat test nor the realistic-threat test is appropriate for cases like *Summers* where the plaintiffs received no notice of the injury-causing event.¹⁹⁸ The majority’s test is too stringent and prevents injured parties from bringing suit, and the dissent’s test is too broad and allows for non-injured parties to establish

194. *Id.* The Forest Service “conceded that it will conduct thousands of exempted projects in the future.” *Id.* at 1157.

195. *See supra* Part III.

196. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *see supra* Part II.B.

197. Although the tests proposed in this Note apply only to aesthetic and procedural injuries, the Court should reevaluate its analysis of injury in fact for other types of injuries, as well.

198. *Summers*, 129 S. Ct. at 1148.

standing.¹⁹⁹ Furthermore, the majority and dissent apply their respective standing tests to both procedural and aesthetic injuries.²⁰⁰ Because these injuries are different in nature, courts should analyze them under individualized tests. Justice Kennedy's concurring opinion, however, takes a step in the right direction by focusing solely on procedural injuries.²⁰¹

1. Critique of the Majority Opinion

The majority's imminent-threat requirement is too stringent a test and leaves little, if any, opportunity for environmental groups like the plaintiffs in *Summers* to establish standing in cases where the plaintiffs cannot receive notice of a potential injury-causing event. Although the majority presented a three-part standing test in its opinion,²⁰² it only applied the injury-in-fact prong because it found that none of the injuries alleged in the affidavits were, in fact, injuries.²⁰³

Despite the faults of the test applied, the majority's analysis was correct with respect to finding that the injuries alleged in the Marderosian affidavit did not confer standing in *Summers*.²⁰⁴ Because the parties settled the issue of the Burnt Ridge project out of court, the *Summers* Court could not further redress the injuries alleged in the Marderosian affidavit.²⁰⁵ Therefore, the majority properly found that all injuries alleged concerning the Burnt Ridge project were not injuries in fact.

Conversely, the Bensman affidavit illustrates a deficiency of the imminent-threat test applied by the majority. Affiant Bensman asserted that he planned to visit national forests subjected to Forest Service projects in the future.²⁰⁶ He added that the timber sales and fire-rehabilitation projects would take away from his future visits to the Allegheny National Forest.²⁰⁷ Applying the imminent-threat test, the majority found that these future travel plans "fail[ed] to allege that *any* particular timber sale or other project . . . will impede a specific and concrete plan of Bensman's to enjoy the

199. See *supra* Part III.D.

200. *Summers*, 129 S. Ct. at 1148–51 (majority opinion), 1154–58 (Breyer, J., dissenting).

201. See *supra* Part III.C.

202. See *supra* Part III.B.

203. *Summers*, 129 S. Ct. at 1151.

204. See *supra* Part III.B.

205. *Summers*, 129 S. Ct. at 1148.

206. *Id.* at 1150.

207. *Id.* at 1150; *id.* at 1157 (Breyer, J., dissenting).

National Forests.”²⁰⁸ Additionally, the Court determined that Bensman’s affidavit “does not assert . . . any firm intention to visit [a national forest], saying only that Bensman ‘want[s] to go.’”²⁰⁹ According to the majority, an injury cannot be imminent if the plaintiff presents no proof of specific plans to travel to a forest that will be affected by Forest Service projects.²¹⁰

Although the Court correctly requires more from a plaintiff than just a desire to visit a national forest sometime in the future, the Court asks too much of a plaintiff by requiring exact travel plans when the plaintiff has not received notice of the injury-causing event. Requiring plans to visit a specific location where an injury-causing event will take place is reasonable. For example, the court could require travel plans to a particular national forest where the Forest Service admitted that excluded timber sales will occur. However, requiring plans to visit a *specific location* within that national forest is inequitable because the plaintiff has no means of acquiring knowledge of the precise location of the Forest Service project when the Forest Service does not provide notice of its proposed projects.

Under the majority’s test, future plaintiffs similarly situated to the environmental organizations in *Summers* will never meet the standing requirements. The land parcels that are exempt from notice, comment, and appeal are very small—250 acres—in relation to the size of a national forest.²¹¹ The imminent-threat test presents a plaintiff with the almost impossible task of pinpointing all of the exact locations that he or she might visit while in a national forest. A potential plaintiff could only meet this task if he or she had notice that provided such specific information of future projects.

Furthermore, timber sales and fire rehabilitation activities conducted in one area of a national forest could affect a visitor’s enjoyment of a nearby area in the forest. For example, noise from a logging project will not remain isolated to the acres where the trees are being cut down. Therefore, even if a plaintiff did not plan to visit one of the specific acres subject to a Forest Service project, he or she could still suffer aesthetic injuries as a result of the project. Because the effects of the Forest Service projects may affect acreage outside of the area devoted to the project, the majority’s

208. *Id.* at 1150 (majority opinion).

209. *Id.* (quoting Brief for the Petitioners, *supra* note 169, at 6).

210. *Id.*

211. For example, the Sequoia National Forest, in which the Burnt Ridge project occurred, is 1.2 million acres. *McNally Fire Area Restoration Project*, *supra* note 112.

requirement of showing plans to visit the specific locations where projects are planned is flawed—a person might suffer an injury even if he or she had not planned to visit that specific area of a national forest. A broader requirement of showing plans to visit a specific national forest, rather than a particular acre in the national forest, would be more reasonable.²¹²

In addition to the inapplicability of the imminent-injury test to Bensman's aesthetic injuries, the majority's analysis of injury in fact is also flawed because it does not distinguish between aesthetic and procedural injuries. The Bensman affidavit alleges two different types of injuries—aesthetic, as discussed above, and procedural, from not having the opportunity for notice, comment, and appeal.²¹³ As a result of the procedural injury, affiant Bensman did not receive notice of the Forest Service projects in the Allegheny National Forest or the Sequoia National Forest. Had he received notice, he could have alleged more specific injuries in his affidavit. If Bensman alleged his injuries with more particularity, it is possible that the plaintiffs in *Summers* could have satisfied the majority's imminent-injury test. However, because the procedural injury affected the plaintiffs' ability to allege specific imminent injuries, the Court should have examined each injury separately.

In the majority opinion of *Summers*, Justice Scalia did not afford much attention to the procedural-injury issue, which conflicts with his comment in *Defenders of Wildlife* that procedural rights are "special."²¹⁴ He noted in *Defenders of Wildlife* that "[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."²¹⁵ This statement suggests that the Court would relax the imminent-threat requirement in *Summers* because of the allegations of procedural injuries. However, after quoting this statement from *Defenders of Wildlife*, Justice Scalia added that "[u]nlike redressability . . . the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."²¹⁶ Because the Court stopped its application of the three-part test after determining that the plaintiff organizations failed to meet the injury-in-fact prong of the test, the Court analyzed the procedural injuries in the same manner as the aesthetic injuries and declined to take redressability into account. Instead, the Court should have

212. See *infra* Part IV.B.

213. *Summers*, 129 S. Ct. at 1150–51.

214. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

215. *Id.*

216. *Summers*, 129 S. Ct. at 1151.

afforded special analysis to the procedural injuries because they are of a different nature than aesthetic injuries. However, the acknowledgment that procedural injury is a “special” injury sets a firm foundation for a more applicable injury-in-fact test.²¹⁷

2. Critique of the Concurring Opinion

Justice Kennedy’s concurring opinion provides the basis for a reasonable solution to the problem of procedural injury—congressional authorization of standing. In two sentences,²¹⁸ Justice Kennedy suggested that the Court could have found a procedural injury if Congress statutorily “provide[d] redress” for such an injury within the Appeals Reform Act.²¹⁹ However, Congress did not provide redress for injuries arising under the ARA, which suggests that Congress did not intend for any person to be able to challenge the Forest Service projects.²²⁰ Although Justice Kennedy’s concurrence suggests that he might find standing under a factual situation where Congress authorized a means for challenge and redress, this future intention does not solve the problem at hand.²²¹ However, because Congress has not statutorily granted standing, the courts must make the standing determination.

3. Critique of the Dissenting Opinion

The *Summers* dissent recommended the realistic-threat test, a test more equitable than the majority’s imminent-threat test because it provides an actual opportunity for a plaintiff to establish

217. See *infra* Part IV.B.1.

218. Although his concurring opinion in *Summers* is very brief, Justice Kennedy’s unique voting history in environmental standing jurisprudence offers more insight into his opinion in *Summers*. See *supra* note 105. Justice Kennedy’s concurring opinion in *Defenders of Wildlife* is especially telling of his views on standing to sue. Justice Kennedy agreed with the majority that under the facts of *Defenders of Wildlife*, respondents did not establish standing; however, he refused to “foreclose the possibility . . . that in different circumstances” a plaintiff could demonstrate injury in fact. *Defenders of Wildlife*, 504 U.S. at 579 (Kennedy, J., concurring).

219. *Summers*, 129 S. Ct. at 1153 (Kennedy, J., concurring).

220. Nonetheless, Justice Kennedy’s suggestion harkens back to the traditional comprehension of standing as an illustration of the writ system where anyone, including “strangers,” could bring suit. See *supra* Part II.A. Within this analogy, Congress’s authorization of standing would represent a specific writ.

221. Justice Kennedy’s suggestion of congressional authorization for procedural injuries does not help formulate a workable test for aesthetic injury. Furthermore, it does not provide a solution for cases involving procedural injuries where Congress has not provided redress.

standing. However, this test is not without fault. Where the majority's injury-in-fact test is too restrictive, the dissent's test is too broad.

The dissent attacked the majority's imminent-threat test and its requirement that plaintiffs allege specific plans to visit a particular parcel of land subject to Forest Service projects.²²² The dissent explained that the majority in *Summers* misinterpreted the word "imminent" as used by the Court in prior standing cases, stating instead that former Courts interpreted the word "imminent" to mean "'conjunctural' or 'hypothetical' or otherwise speculative."²²³ This distinction is significant because a hypothetical imminent-injury test suggests that plaintiffs would only need to show that they *could* be injured in the near future, but under the *Summers* majority's non-hypothetical imminent-injury test, plaintiffs must show that they *will* be injured in the near future. The dissent's interpretation suggests that the Court intended a much broader requirement and, therefore, a much lower burden for plaintiffs to meet when alleging injuries.

Following this broad interpretation of prior standing cases, the dissent suggested that the majority's interpretation of the injury-in-fact test is too "stringent" and that a more reasonable inquiry is whether there is a realistic threat of injury to the plaintiff.²²⁴ The dissent stated that if an act occurred in the past and caused harm, the "reoccurrence of the challenged activity would cause [the plaintiff] harm 'in the reasonably near future.'"²²⁵ Therefore, under the dissent's reasoning, the United States Forest Service's admission that thousands of similar projects will occur in the future is enough to demonstrate realistic injuries.²²⁶

Although the dissent correctly suggested that the majority demands too much from potential plaintiffs in terms of providing information of future plans, the dissent's test does not require enough from plaintiffs.²²⁷ The realistic-threat test is too easily satisfied and allows plaintiffs with very vague future plans to establish standing to sue.²²⁸

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

223. *Id.* at 1155-56.

224. *Id.* at 1156. The dissent adopted this realistic-threat test from the Court's opinion in *Los Angeles v. Lyons*, 461 U.S. 95, 107 (1983).

225. *Summers*, 129 S. Ct. at 1156 (Breyer, J., dissenting) (quoting *Lyons*, 461 U.S. at 107).

226. *Id.* at 1157.

227. *See infra* Part IV.B.1.

228. This is especially true when the plaintiffs are organizations with thousands of members. *See infra* note 229. With so many members, it is likely that at least one could realistically be injured by the Forest Service projects.

The dissent noted that the environmental organizations in *Summers* have thousands of members²²⁹ and that these members participate in many activities in the national forests across the United States.²³⁰ The dissent deduced that because of this fact, “[t]he majority must therefore agree that ‘at least one identified member has suffered . . . harm.’”²³¹ However, in this statement, the dissent employed faulty logic and pointed out a major weakness in the plaintiff organizations’ claim. Although at least one of the thousands of members of the plaintiff organizations might visit a parcel of land subject to Forest Service projects, the burden falls on the plaintiffs to submit an affidavit detailing the plans of such a member.²³² When the injuries alleged in the Marderosian affidavit became moot following the settlement of the Burnt Ridge project,²³³ the plaintiff organizations should have amended their complaint to add as plaintiff another organization member who had actual plans to visit a national forest subject to a Forest Service project.²³⁴ The plaintiff organizations would have had a much stronger case had they chosen more specific illustrations of aesthetic injury.²³⁵

These failures by the plaintiff organizations illustrate the problem that permeates all aspects of the *Summers* case—the Forest Service did not provide plaintiffs with notice of the proposed projects. Under the current regulations that exempt notice on certain Forest Service projects, potential plaintiffs like those in *Summers* cannot provide more detailed allegations of injury in fact because they have no administrative means of receiving notice. With notice from the United States Forest Service, the plaintiffs could have prepared affidavits alleging injuries specific to a particular Forest Service project.

Furthermore, like the majority, the dissent failed to differentiate between aesthetic injuries and procedural injuries. The dissent blurred the two injuries together and applied the realistic-threat test to both. Because the procedural injury of having no

229. The dissent noted that the Earth Island Institute has over 15,000 members, the Sequoia ForestKeepers have over 100 members, the Center for Biological Diversity has over 5,000 members, and the Sierra Club has more than 700,000 members. *Summers*, 129 S. Ct. at 1154 (Breyer, J., dissenting).

230. *Id.*

231. *Id.* at 1157 (quoting Brief for the Petitioners, *supra* note 169, at 6).

232. *Id.* at 1149 (majority opinion).

233. *Id.* at 1149–50.

234. *See id.* at 1157–58 (Breyer, J., dissenting).

235. For example, Bensman’s affidavit could have shown that he planned to travel to the Sequoia National Forest on a specific date to take pictures of the damage caused by the wildfire.

opportunity for notice affects that plaintiff's ability to allege aesthetic injuries, the Court should analyze each injury separately. Therefore, the Court needs to adopt new injury-in-fact tests for both aesthetic and procedural injuries when analyzing if a plaintiff has standing to sue.

B. Proposed Solutions

The stringent imminent-threat interpretation of injury in fact²³⁶ should not apply to cases like *Summers* where the plaintiff has not received notice of an injury-causing event. Under this test, the environmental group, as a potential plaintiff, cannot procedurally challenge, through comment and appeal, the validity of regulations that prevent individuals and groups from commenting on actions of the United States Forest Service that negatively impact the environment. Although the dissent offers a more reasonable standard to apply when determining whether an environmental organization has standing, the realistic-threat test is not ideal in all situations, especially in situations outside the realm of *Summers* where potential plaintiffs did receive notice of potential injury-causing events.

Because there are two different types of injuries, aesthetic and procedural, the Court should not apply the same standing test to both injuries. For cases involving aesthetic injuries, two standing tests should be available to potential plaintiffs, where the test applied depends on whether the plaintiffs received notice of the injury-causing event. These tests must strike an equitable middle ground between the very narrow imminent-threat test and the overly broad realistic-threat test. In cases involving procedural injuries, a new method of determining whether a plaintiff has standing must be applied; the procedural injury should be treated like a procedural due process issue.

236. The proposed solution in this Note focuses solely on the injury-in-fact prong of the three-part standing test. Because the majority and the dissent in *Summers* both limit their analyses to the issue of injury in fact, and the jurisprudential history demonstrates that previous standing disagreements focused almost solely on the issue of injury in fact, causation and redressability will not be discussed in the proposed solutions of this Note. See *supra* Part II.B. Therefore, in the future, the Court should apply the proposed injury-in-fact tests in conjunction with the requirements for causation and redressability. See *supra* Part II.B.

1. *The Aesthetic Injury Test*

Neither the majority nor the dissent in *Summers* offers an ideal test for determining whether a plaintiff established standing through an aesthetic injury in fact. Where the majority demands proof that an injury *will* happen in the immediate future, the dissent asks for some evidence that an injury *could* happen sometime in the future. As previously discussed,²³⁷ both of these tests are flawed because they are too polarized. When a plaintiff can receive administrative notice of an impending injury-causing event, the Court should hold the potential plaintiff to a higher standard of proof of injury in fact than a plaintiff who cannot receive notice. Therefore, the Court should make two tests available for plaintiffs that allege aesthetic injuries—one that applies when plaintiffs have notice of injury-causing events and the other for when plaintiffs have no opportunity to receive notice.

a. *The Test for Aesthetic Injury with Actual Notice*

In cases where plaintiffs have actual notice of an impending injury-causing event,²³⁸ the Court should place a higher burden of proof on the plaintiff to demonstrate injury in fact. In these cases, potential plaintiffs have access to information through administrative notice that can be incorporated into affidavits to prove specific imminent injuries. The *Summers* majority's test can be applied equitably in circumstances where plaintiffs have "actual notice"²³⁹ of aesthetic injury-causing events because they can meet the high standard of proving specific allegations.²⁴⁰

With actual notice, potential plaintiffs will be able to draft their alleged injuries to include specific times and locations of when and where the injury will occur. Had affiant Bensman received notice from the Forest Service that a timber sale was planned for September 12, 2003, on 238 specific acres of the Sequoia National

237. See *supra* Part IV.A.

238. In this Note, "actual notice" refers to administrative notice from a government agency. It is possible that a potential plaintiff could receive notice that is not actual notice. In other words, the plaintiff could informally learn of a potential injury-causing event by means other than administrative notice. In this situation, the test for aesthetic injury without actual notice should be applied as discussed in Part IV.B.1.b, *infra*.

239. "Actual notice" means that an administrative organization provides notice in a systematic way to the public.

240. These circumstances would be similar to the facts in *Friends of the Earth*, where the Court found that the plaintiff organization's affidavits presented sufficiently specific allegations of injury to warrant an opportunity for standing. See *supra* Part II.B.

Forest, Bensman easily could state in his affidavit that he planned to visit those 238 acres of the Sequoia National Forest on September 12, 2003. This specifically detailed affidavit could easily meet the *Summers* majority's imminent-threat test for determining injury in fact. Therefore, when a potential plaintiff receives actual notice of a potential injury-causing event, the Court should continue to apply the same imminent-threat test applied in *Summers* because the plaintiff has the information needed to allege specific and particular injuries in fact.²⁴¹

b. The Test for Aesthetic Injury Without Actual Notice

In cases like *Summers* where the plaintiff has not received actual notice of an injury-causing event, the majority's requirement of imminent harm with specific future plans is too high of a burden for a plaintiff to prove. Without notice, potential plaintiffs cannot know for certain whether their travels will bring them to the exact location of an injury-causing event.²⁴²

A plaintiff who knew of the location where the Forest Service planned to execute projects could provide more detailed allegations of aesthetic injuries. Without notice from the Forest Service, potential plaintiffs cannot provide the *Summers* majority with the requisite information to establish injury in fact because they cannot prove, in certain terms, that during their trips to national forests they will come upon a Forest Service project. Without notice of proposed Forest Service projects, the majority's imminent-harm test places too heavy a burden on potential plaintiffs to prove that aesthetic injuries will result from their travels.

This lack of notice presents problems not only in the context of the Forest Service, but also in situations where there is no administrative body to give notice or where there is no specific event of which to give notice. In *Massachusetts*, the erosion of the coastline did not result from one particular event that an administrative agency could announce to the public.²⁴³ In this situation, Massachusetts could not demonstrate one specific action by the EPA that would increase the erosion of the coastline. Under the *Summers* majority's test, Massachusetts could not provide enough specific proof of future harm to satisfy the imminent-harm

241. See Brief for the Petitioners, *supra* note 169, at 6.

242. The dissent in *Summers* provided an illustration of this problem, stating: "To know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where it is bound to arrive." *Summers*, 129 S. Ct. at 1157 (Breyer, J., dissenting).

243. 549 U.S. 497 (2007).

test.²⁴⁴ As illustrated by the regulatory exclusions of public notice in *Summers* and by situations where notice cannot be given, the majority's imminent-threat test is inapplicable because it asks an impossible task of potential plaintiffs—in these situations, potential plaintiffs cannot provide the requisite proof of injury in fact.

At the same time, the *Summers* dissent's request that a plaintiff show a realistic threat without actual travel plans is too low of a threshold for a potential plaintiff to meet. Without actually visiting the national forest where the event will occur, a potential plaintiff cannot be injured by the Forest Service's projects. However, because plaintiffs in cases like *Summers* want to challenge projects as preventative measures for future harm and do not have actual injuries to raise in their complaints, the plaintiffs must demonstrate that they will likely be injured in the future. Potential plaintiffs with actual plans to visit the location where the injury will occur are more likely to suffer an injury than potential plaintiffs who do not plan to visit a national forest. At the same time, without notice from the Forest Service of future projects, a potential plaintiff cannot know if he or she will come in contact with a project while visiting a national forest. Under the current Forest Service regulations that exempt certain projects from public notice,²⁴⁵ the dissent provides a more equitable test for establishing standing to sue. Without the information needed to allege the injuries required by the majority, the dissent's broader test provides potential plaintiffs with an actual opportunity to establish standing. However, the dissent does not articulate the best test for aesthetic injury in fact.

Because of the deficiencies in the majority and dissent's respective tests, courts must adopt a new test: the realistic-threat-with-actual-plans test. By requiring a realistic threat in conjunction with actual plans of an organization member, environmental organizations have an opportunity to establish standing but at the same time, the requirements are not too easy to meet. This hybrid test combines the strengths of both the majority and the dissent's tests. Under this test, potential plaintiffs must demonstrate a realistic threat of harm through actual plans to be where the injury will likely occur. "Actual plans" in this sense does not mean that a potential plaintiff must go on an elaborate trip. Plans could simply mean, for example, that a plaintiff demonstrates that he walks by a river every day and that this river is at risk of pollution from a new chemical plant built on the river. Under the facts of *Summers*,

244. See *supra* Part II.B.

245. See *supra* Part III.A.

affiant Bensman could allege that he plans to visit the Allegheny National Forest on four specified weekends in the future. These plans, coupled with the Forest Service's admission that "thousands" more projects exempt from notice will occur in the future, demonstrate a situation where the plaintiff faces a realistic threat of injury.

Without notice of injury-causing events, plaintiffs cannot provide the detailed plans required by the majority in *Summers* to establish standing. Although this hybrid realistic-threat-with-actual-plans test takes into account the absence of notice, it does not meet all the procedural needs of plaintiffs like those in *Summers*. Potential plaintiffs still need to regain their procedural rights to notice, comment, and appeal. Because the procedural device of notice determines which aesthetic injury test to apply, environmental groups must have an opportunity to litigate their procedural injuries so that they can then challenge their aesthetic injuries in the future.

2. The Procedural Injury Test

As seen above, procedural devices like public notice, comment, and appeal directly affect a potential plaintiff's ability to demonstrate aesthetic injury in fact—with notice, plaintiffs can allege specific injuries in fact. In addition to this effect on aesthetic injury, a procedural injury can serve as an injury in fact in its own right.²⁴⁶ The Court in *Summers*, however, failed to afford the plaintiff organizations' procedural injury its own analysis.²⁴⁷ Additionally, courts must analyze a procedural injury in an individualized manner because of its effect on the analysis of aesthetic injuries. In these instances, a court must first determine whether a plaintiff had notice of a potential injury-causing event to know which aesthetic injury test to apply.²⁴⁸ If a court analyzes procedural and aesthetic injuries in the same manner, the significance of notice is lost.

Courts should analyze the procedural injury of not having the opportunity for notice, comment, and appeal with a procedural due process-like balancing test. Although an actual procedural due process claim is not available to plaintiffs raising these procedural injuries because the injury affects all United States citizens and not

246. See *supra* Part II.A. For example, an environmental organization could have facially challenged the Forest Service regulations.

247. See *supra* Part IV.A.1.

248. See *supra* Part IV.B.1.

just a specific individual,²⁴⁹ the elements of a procedural due process balancing test should be adapted into a new test to determine if a procedural injury is an injury in fact for the purpose of standing.

The procedural injury-in-fact test derives from Justice Powell's majority opinion in *Mathews v. Eldridge*.²⁵⁰ Justice Powell explained that courts should consider three "distinct factors" when analyzing procedural due process: (1) the interest of the person "affected by the official action"; (2) "the risk of erroneous deprivation" of a personal interest because of the procedures used by the government; and (3) the government's interest, which takes into account "the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."²⁵¹

This procedural due process test can be adapted into a three-factor balancing test of competing interests to determine procedural injury in fact: (1) the potential plaintiff's procedural rights; (2) any other rights of the plaintiff that could be affected by the government's procedural regulations; and (3) the government's interest, which includes fiscal and administrative efficiency. If a court determines that the plaintiff's interests outweigh the government's interests, then the plaintiff has demonstrated sufficient procedural injury to satisfy the injury-in-fact prong of the three-part standing test. When the government's interests outweigh the plaintiff's interests, the plaintiff has not met the burden of proving injury in fact.

Applying this balancing test to the facts of *Summers* demonstrates that the Court decided the case incorrectly. The plaintiff's procedural interest in *Summers* was the right to notice, comment, and appeal of proposed projects of the Forest Service under the ARA. When first passed in 1992, the ARA "required the Forest Service to establish a notice, comment and appeal process" for proposed projects.²⁵² However, when the Forest Service passed regulations to circumvent the ARA and exempt from notice, comment, and appeal any fire-rehabilitation projects on less than 4,200 acres or any timber sales on less than 250 acres, United States citizens lost their procedural rights to notice, comment, and appeal.²⁵³

249. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

250. *Id.* This case was chosen as a basis for a procedural injury test because of its importance in administrative law, and procedural injuries often arise in administrative law. See *supra* Part II.A.

251. *Mathews*, 424 U.S. at 335.

252. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1147 (2009).

253. *Id.*

In addition to protecting these specific procedural rights under the ARA, potential plaintiffs also have a substantial interest in having access to the judicial system because their only other means of relief is through the political process. Through the political process, environmental organizations could lobby Congress to amend the ARA to include a statutory grant of standing or to repeal the 1992 Forest Service regulations. However, Congress may refuse to entertain either suggestion. Furthermore, use of the political process to regain the right to notice, comment, and appeal is not as efficient as bringing suit. The political process takes time and resources that small environmental organizations may not have. Therefore, it is imperative that these environmental organizations at least have access to the courts, through an ability to establish standing, to challenge their members' procedural injuries.

Although the government's interest in limiting notice, comment, and appeal is not stated in *Summers* or in the amendment to the regulations, the government might have an interest in saving time and money by not reporting every Forest Service project. Although agency efficiency is a legitimate governmental interest, this interest does not outweigh the rights of citizens to have the opportunity to receive notice of, to comment on, and to appeal proposed Forest Service projects that may injure them aesthetically. Because notice and the opportunity to be heard form the foundation of procedural due process,²⁵⁴ a plaintiff's procedural interests in having access to public notice, comment, and appeal outweigh the government's interests in administrative efficiency. Applying this test of competing interests to the facts of *Summers*, the plaintiff organizations would have standing to challenge their procedural injuries resulting from the Forest Service regulations that prevent the opportunity for notice, comment, and appeal.

The Supreme Court's inconsistent jurisprudential history in the realm of environmental standing²⁵⁵ demonstrates the need to reconsider how the Court analyzes standing to sue. As illustrated in *Summers*, the application of the current three-part test prevented environmental organizations from establishing standing to challenge their aesthetic and procedural injuries. Although the *Summers* majority's imminent-threat test required too much

254. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) ("[T]here can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

255. See *supra* Part II.B.

specification from potential plaintiffs in order to demonstrate an injury in fact, the dissent's realistic-threat test failed to require enough specificity from potential plaintiffs. Because of these weaknesses in the injury-in-fact tests presented in *Summers*, the Court should adopt new analyses for determining injury in fact. The proposed injury-in-fact tests provide potential plaintiffs with more equitable opportunities to establish standing than under the current injury-in-fact prong of the three-part standing test.

V. CONCLUSION

Summers demonstrates the need to reconsider the application of the injury-in-fact prong of the three-part standing test for both aesthetic and procedural injuries. Potential plaintiffs must have an opportunity to challenge their procedural injuries because of the impact that notice of injury has on plaintiffs' abilities to demonstrate aesthetic injuries in fact. By finding a middle ground between the majority and dissenting opinions in *Summers* and taking into account a potential plaintiff's ability to receive notice, plaintiffs like Earth Island Institute will have an opportunity to meet the requirements to establish standing to sue. The proposed tests in this Note provide potential plaintiffs with the prospect of establishing standing where before they had no opportunity to challenge projects that harm the environment.

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