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# INFORMATIONAL STANDING AFTER *SUMMERS*

BRADFORD C. MANK\*

**Abstract:** In its recent *Wilderness Society v. Rey* decision, the Ninth Circuit addressed the difficult question of when a statute may establish a right to informational standing. The decision interpreted the Supreme Court's decision in *Summers v. Earth Island Institute*, and concluded that general notice and appeal provisions in a statute that do not establish an explicit public right to information from the government are insufficient to establish informational standing. The *Wilderness Society* decision indirectly raised the broader question of when Congress may modify common law injury requirements or even Article III constitutional standing requirements. Although the *Wilderness Society* decision relied on the implications of *Summers*, the Ninth Circuit would have been better advised to examine Justice Kennedy's concurring opinions in *Lujan v. Defenders of Wildlife* and *Summers*. His opinions suggest that Congress has significant authority to expand citizen suit standing as long as it carefully defines the statutory injuries it seeks to remedy. *Wilderness Society* is important because it is the first court of appeals decision that attempts to reconcile *Summers* and *FEC v. Akins*, the crucial informational standing case. Although the result in *Wilderness Society* may be correct, the Ninth Circuit failed to grasp the full complexities of the Supreme Court's standing jurisprudence. This Article argues how to best interpret *Lujan*, *Summers*, and *Akins* in determining how much authority Congress has to establish informational standing and other standing rights that have divided lower federal courts.

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INTRODUCTION<sup>1</sup>

In its recent decision, *Wilderness Society v. Rey*, the Ninth Circuit addressed the difficult question of when a statute may establish a right to informational standing.<sup>2</sup> The D.C. Circuit and the Sixth Circuit had previously reached different conclusions about whether environmental statutes promoting public participation or requiring environmental assessments in certain circumstances create a right to informational standing.<sup>3</sup> The Ninth Circuit's decision interpreted the Supreme Court's decision in *Summers v. Earth Island Institute*<sup>4</sup>—which explicitly narrowed procedural rights standing—as implicitly narrowing standing rights in general.<sup>5</sup> The *Wilderness Society* decision concluded that general notice and appeal provisions in a statute that are designed to promote public participation, but do not establish an explicit public right to information from the government, are insufficient to establish informational standing.<sup>6</sup>

The decision in *Wilderness Society* indirectly raised the broader question of when Congress may modify common law injury requirements, or even Article III constitutional standing requirements for a concrete injury.<sup>7</sup> That question in turn raises broader separation of powers questions.<sup>8</sup> Although *Wilderness Society* relied on the implications of *Summers* to limit informational standing, the Ninth Circuit would have been better advised to examine Justice Kennedy's concurring

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<sup>1</sup> This Article is one of a series of explorations of possible extensions of modern standing doctrines. The other pieces are: (1) Bradford Mank, *Revisiting the Lyons Den: Summers v. Earth Island Institute's Misuse of Lyons's "Realistic Threat" of Harm Standing Test*, 42 ARIZ. ST. L.J. 837 (2010); (2) Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 49 WM. & MARY L. REV. 1701 (2008) [hereinafter Mank, *States Standing*]; (3) Bradford C. Mank, *Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?*, 34 COLUM. J. ENVTL. L. 1 (2009) [hereinafter Mank, *Standing and Future Generations*]; (4) Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665 (2009) [hereinafter Mank, *Standing and Statistical Persons*]; (5) Bradford C. Mank, *Summers v. Earth Island Institute: Its Implications for Future Standing Decisions*, 40 ENVTL. L. REP. 10,958 (2010) [hereinafter Mank, *Implications for Future Standing Decisions*]; (6) Bradford Mank, *Summers v. Earth Island Institute Rejects Probabilistic Standing, but a "Realistic Threat" of Harm Is a Better Standing Test*, 40 ENVTL. L. 89 (2010)

<sup>2</sup> 622 F.3d 1251, 1257–60 (9th Cir. 2010).

<sup>3</sup> Compare *infra* notes 200–237 and accompanying text, with *infra* notes 238–299 and accompanying text.

<sup>4</sup> 555 U.S. 488, 493 (2009).

<sup>5</sup> See *infra* notes 300–354 and accompanying text.

<sup>6</sup> 622 F.3d at 1259.

<sup>7</sup> See *infra* notes 362–394 and accompanying text.

<sup>8</sup> See *infra* notes 36–48, 145–150, 362–394 and accompanying text.

opinions in *Lujan v. Defenders of Wildlife* and *Summers* as a guide to the Supreme Court's approach to when Congress may confer standing rights.<sup>9</sup> Justice Kennedy's concurring opinions suggest that Congress has significant authority to expand citizen suit standing as long as it carefully defines the statutory injuries it seeks to remedy through such suits.<sup>10</sup>

The Supreme Court's standing requirements are confusing because its decisions have oscillated between relatively liberal and restrictive approaches to defining the types of injuries sufficient under Article III of the Constitution.<sup>11</sup> Justice Scalia proposed a restrictive approach to standing because he believes that it is a "crucial and inseparable element" of the constitutional separation-of-powers principle, and that limiting standing rules reduces judicial interference with the democratically elected legislative and executive branches.<sup>12</sup> In response, his critics argue that he is more concerned with protecting executive branch decisions from lawsuits than protecting congressional prerogatives.<sup>13</sup> The *Lujan* Court, in an opinion by Justice Scalia, interpreted standing doctrine to require a party to show "an injury-in-fact," which is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."<sup>14</sup> In footnote seven of *Lujan*, however, the Court created an exception to its otherwise narrow approach to standing by ob-

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<sup>9</sup> See *infra* notes 362–415 and accompanying text.

<sup>10</sup> See *infra* notes 362–415 and accompanying text.

<sup>11</sup> See *infra* notes 36–92 and accompanying text (discussing Article III standing requirements and, in particular, what is a sufficient "injury-in-fact" for standing).

<sup>12</sup> Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1, 29 (2005) (discussing and criticizing Justice Scalia's 1983 standing article) [hereinafter Mank, *Global Warming*]; Robert V. Percival, "Greening" the Constitution—Harmonizing Environmental and Constitutional Values, 32 ENVTL. L. 809, 847 (2002) (discussing and criticizing Justice Scalia's 1983 standing article); see Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983); see also LARRY W. YACKLE, *FEDERAL COURTS* 332–35 (3d ed. 2009) (examining Justice Scalia's approach to standing and the consequences of his argument).

<sup>13</sup> See *Lujan*, 504 U.S. 555, 602 (1992) (Blackmun, J., dissenting) (arguing that the "principal effect" of Justice Scalia's restrictive approach to standing was "to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates"); Kimberly N. Brown, *Justiciable Generalized Grievances*, 68 MD. L. REV. 221, 283 (2008) ("If Justice Scalia is correct, and standing should strictly operate to shield the executive from judicial review notwithstanding congressional intent, laws passed by a democratically elected branch could simply go unenforced."); Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1050 (2009) ("With respect to the argument that a broad reading of Article III standing improperly limits executive power under Article II, some scholars contend that it does not give sufficient weight to the balance, as opposed to the separation, of powers.")

<sup>14</sup> 504 U.S. at 560 (citations omitted); Mank, *Global Warming*, *supra* note 12, at 23–24.

serving that plaintiffs who may suffer a concrete injury resulting from a procedural violation by the government are entitled to a more relaxed application of both the imminent injury and the redressability standing requirements.<sup>15</sup> Justice Kennedy, who has often been the swing vote in standing cases, wrote a concurring opinion in *Lujan* arguing that Congress may use its legislative authority to go beyond common law principles in defining a concrete injury, although he acknowledged that Congress did not have the authority to eliminate the concrete injury requirement of Article III.<sup>16</sup>

In *Federal Election Commission v. Akins*, Justice Breyer, joined by five other justices including Justice Kennedy, endorsed informational injuries as potentially sufficient for standing.<sup>17</sup> The Court held that the plaintiff voters suffered a “concrete and particular” injury in fact sufficient for Article III standing because they were deprived of the statutory right to receive designated “information [which] would help them . . . to evaluate candidates for public office”—despite the fact that many other voters shared the same informational injury.<sup>18</sup> Justice Scalia wrote a dissenting opinion, joined by two other justices, arguing that the plaintiffs did not have standing because their injury was common to the public at large and did not cause them a particularized injury.<sup>19</sup>

Both before and after *Akins*, lower court decisions have been divided when plaintiffs in environmental cases seek standing based on an alleged informational injury resulting from the government or a private defendant’s failure to provide information regarding their environmental impacts.<sup>20</sup> Before *Akins*, in *Foundation on Economic Trends v. Lying*, the D.C. Circuit questioned, but did not decide, whether informational injury alone can meet the Article III injury in fact requirement.<sup>21</sup> By contrast, citing *Akins*, a divided panel of the Sixth Circuit in *American Canoe Ass’n v. City of Louisa Water & Sewer Commission* concluded that environmental groups had standing to seek information

<sup>15</sup> *Lujan*, 504 U.S. at 572 n.7; see Mank, *States Standing*, *supra* note 1, at 1716–20; Mank, *Global Warming*, *supra* note 12, at 35–36.

<sup>16</sup> *Lujan*, 504 U.S. at 580–81 (Kennedy, J., concurring in part and concurring in the judgment); see Mank, *Global Warming*, *supra* note 12, at 34–35.

<sup>17</sup> 524 U.S. 11, 20 (1998).

<sup>18</sup> *Id.* at 21, 23–25; see Mank, *Global Warming*, *supra* note 12, at 37–38.

<sup>19</sup> *Akins*, 524 U.S. at 29, 33–37 (Scalia, J., dissenting); see Mank, *Global Warming*, *supra* note 12, at 38–40.

<sup>20</sup> See *infra* notes 196–355 and accompanying text.

<sup>21</sup> 943 F.2d 79, 84–85 (D.C. Cir. 1991); see also *Akins*, 524 U.S. at 11; *Am. Canoe Ass’n v. City of Louisa Water & Sewer Comm’n*, 389 F.3d 536, 547–48 (6th Cir. 2004) (Kennedy, J., concurring in part and concurring in the judgment in part and dissenting in part) (discussing *Lying*’s criticism of informational standing).

about water pollution issues pursuant to the citizen suit provision of the Clean Water Act, if it would assist their members' understanding of pollution issues and legislative proposals.<sup>22</sup>

In *Summers*, the Supreme Court, in a five-to-four decision written by Justice Scalia, adopted a restrictive approach to standing that requires plaintiffs to prove how they are concretely injured, or will be imminently injured, by the government's allegedly illegal actions.<sup>23</sup> This opinion rejected Justice Breyer's proposed test for organizational standing based upon the statistical probability that some of an organization's members will likely be harmed in the near future.<sup>24</sup> The Court held that the plaintiff organizations failed to establish that they would suffer an "imminent" injury necessary for standing because they could not prove the specific places and times when their members would be harmed by the government's allegedly illegal policy of selling fire-damaged timber without public notice and comment.<sup>25</sup> By emphasizing that plaintiffs must demonstrate an imminent injury even for procedural rights, the *Summers* decision implicitly overruled previous decisions that had relaxed the imminence requirement for standing in procedural rights cases.<sup>26</sup> Justice Kennedy, however, wrote a concurring opinion in *Summers* that echoed his opinion in *Lujan*—while plaintiffs had failed to prove a concrete injury, Congress could provide a broader statutory definition of what constitutes a "concrete" injury for similar plaintiffs in the future.<sup>27</sup>

In *Wilderness Society*, the Ninth Circuit interpreted *Summers* and *Akins* to implicitly restrict the scope of informational standing to statutes that give plaintiffs an explicit right to information from the government.<sup>28</sup> The court reasoned that *Akins*'s support for informational standing was limited to statutes that explicitly give the public the right to particular information from the government.<sup>29</sup> Conversely, if an environmental statute only seeks to encourage public participation and does not provide a right to information about certain types of govern-

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<sup>22</sup> 389 F.3d at 544–47.

<sup>23</sup> See 555 U.S. at 495–97. Justice Scalia's majority opinion was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. *Id.* at 489. Justice Breyer's dissenting opinion was joined by Justices Stevens, Souter, and Ginsburg. *Id.* at 501.

<sup>24</sup> *Id.* at 496–500 (majority opinion).

<sup>25</sup> *Id.* at 490–96.

<sup>26</sup> Compare *infra* notes 49–57 and accompanying text with *infra* notes 160–176 and accompanying text.

<sup>27</sup> See *infra* notes 178–181 and accompanying text.

<sup>28</sup> *Wilderness Soc'y*, 622 F.3d at 1259.

<sup>29</sup> *Id.*

ment projects, such a statute should be read narrowly in light of *Summers*.<sup>30</sup> Otherwise, a broad doctrine of informational standing would allow plaintiffs to bypass *Summers*'s conclusion that procedural injury alone does not provide standing, unless it is attached to a particular project or if the procedural injury results in informational harm.<sup>31</sup>

Although the Supreme Court generally tightened standing requirements in *Lujan* and *Summers*, the *Akins* decision nonetheless left open the possibility of broad informational standing.<sup>32</sup> The Ninth Circuit's decision in *Wilderness Society* is important because it is the first court of appeals decision that attempts to reconcile *Summers* and *Akins*.<sup>33</sup> The result in *Wilderness Society*—that Congress must explicitly establish informational standing rights—may be correct, but the Ninth Circuit failed to grasp the full complexities of the Supreme Court's standing jurisprudence by focusing only on how *Summers* might limit *Akins*.<sup>34</sup> Because he was the key swing vote in *Lujan* and *Summers* and was a member of the *Akins* majority, Justice Kennedy's analysis of standing issues is crucial to understanding the Supreme Court's standing jurisprudence.<sup>35</sup> This Article argues how to best interpret *Lujan*, *Summers*, and *Akins* in determining how much authority Congress has to establish informational standing and other standing rights issues that have divided lower federal courts.

Part I provides an introduction to standing doctrine. Part II discusses the Supreme Court's informational standing decisions in *Public Citizen v. U.S. Department of Justice* and *Akins*. Part III examines the *Summers* decision. Part IV explicates conflicting decisions on informational standing in the D.C. Circuit, Sixth Circuit, and most recently the Ninth Circuit decision. Part V uses Justice Kennedy's concurring opinion in *Lujan* to propose a framework for courts to assess Congress's authority to grant standing rights in general, and informational standing rights in particular.

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<sup>30</sup> See *id.* at 1259–60.

<sup>31</sup> *Id.* at 1260.

<sup>32</sup> See *infra* notes 119–144, 151–176 and accompanying text.

<sup>33</sup> See *infra* notes 300–354 and accompanying text.

<sup>34</sup> See *infra* notes 362–394 and accompanying text.

<sup>35</sup> See *infra* notes 119–144, 178–181, 362–415 and accompanying text.

## I. STANDING DOCTRINE

## A. Constitutional and Prudential Standing

Although the Constitution does not explicitly require that a plaintiff have standing to file suit in federal courts, since 1944 the Supreme Court has inferred from the Constitution's Article III limitation of judicial decisions to "Cases" and to "Controversies" that federal courts must utilize standing requirements to guarantee that the plaintiff has a genuine interest and stake in a case.<sup>36</sup> Federal courts only have jurisdiction over a case if a plaintiff has standing for the relief sought.<sup>37</sup> If the plaintiff fails to meet constitutional standing requirements, a federal court will dismiss the case without deciding the merits.<sup>38</sup>

Standing requirements derive from broad constitutional principles,<sup>39</sup> and prohibit unconstitutional advisory opinions.<sup>40</sup> Furthermore, standing supports separation of powers principles—defining the division of powers between the judiciary and political branches of govern-

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<sup>36</sup>See U.S. CONST. art. III, § 2. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States . . ." *Id.* See also *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340–42 (2006) (explaining why the Supreme Court infers that the Article III case and controversy requirement necessitates standing limitations); Ryan Guilds, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863, 1868–71 (1996) (discussing rationales for standing jurisprudence and citing *Stark v. Wickard*, 321 U.S. 288, 310 (1944), as the first time the Article III standing requirement was referenced); Mank, *States Standing*, *supra* note 1, at 1709–10; Mank, *Standing and Statistical Persons*, note 1, at 673. *But see* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168–79 (1992) (arguing that framers of the Constitution did not intend Article III to require standing). See generally Solimine, *supra* note 13, at 1036–38 (discussing debate on whether the Constitution implicitly requires standing to sue).

<sup>37</sup>*Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."); Mank, *States Standing*, *supra* note 1, at 1710; Mank, *Standing and Statistical Persons*, *supra* note 1, at 673; see *DaimlerChrysler*, 547 U.S. at 351–54. Standing is one factor in determining whether a suit is legitimately justiciable in court. See, e.g., Jeremy Gaston, Note, *Standing on Its Head: The Problem of Future Claimants in Mass Tort Class Actions*, 77 TEX. L. REV. 215, 219 (1998). "[R]ipeness, mootness, advisory opinions, and political questions" are other factors in determining justiciability. *Id.*

<sup>38</sup>See *DaimlerChrysler*, 547 U.S. at 340–46; *Friends of the Earth*, 528 U.S. at 180 ("[W]e have an obligation to assure ourselves that [petitioner] had Article III standing at the outset of the litigation."); Mank, *States Standing*, *supra* note 1, at 1710; Mank, *Standing and Statistical Persons*, *supra* note 1.

<sup>39</sup>See *DaimlerChrysler*, 547 U.S. at 340–42; Mank, *Standing and Statistical Persons*, *supra* note 1, at 673.

<sup>40</sup>See, e.g., Gaston, *supra* note 37, at 219.



ment so that the “Federal Judiciary respects ‘the proper—and properly limited—role of the courts in a democratic society.’”<sup>41</sup> There is, however, disagreement as to what extent the principle of separation of powers limits the standing of suits challenging alleged executive branch under or non-enforcement of congressional requirements mandated by statute.<sup>42</sup> In *Lujan* for example, Justice Scalia reasoned that allowing any person to sue the U.S. government to challenge its alleged failure to enforce the law would improperly interfere with the President’s Article II constitutional authority to “take Care that the Laws be faithfully executed . . . .”<sup>43</sup> Some commentators have argued that Justice Scalia’s approach to standing undermines the role of Congress in using judicial review to guarantee that the executive branch obeys enacted laws.<sup>44</sup>

In addition to constitutional Article III standing requirements, federal courts may impose prudential standing requirements to restrict unreasonable demands on limited judicial resources or for other policy reasons.<sup>45</sup> Congress may enact legislation to override prudential limitations but must “expressly negate[]” such limitations.<sup>46</sup> The Supreme Court has been unclear regarding whether its restriction on suits alleg-

<sup>41</sup> *DaimlerChrysler*, 547 U.S. at 341 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)); Mank, *States Standing*, *supra* note 1, at 1709–10; Mank, *Standing and Statistical Persons*, *supra* note 1, at 679; *see* Scalia, *supra* note 12, at 881, 896.

<sup>42</sup> *See* Scalia, *supra* note 12, at 881–82 (arguing for restrictive standing, thereby limiting the role of the judiciary). *But see Lujan* 504 U.S. at 602 (Blackmun, J., dissenting) (The “principal effect” of Justice Scalia’s majority opinion’s restrictive approach to standing was “to transfer power into the hands of the Executive at the expense—not of the Courts—but of Congress, from which that power originates and emanates.”).

<sup>43</sup> *Lujan*, at 504 U.S. at 577 (quoting U.S. CONST. art. II, § 3). Justice Scalia acknowledged that Congress may “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.” *Id.* at 578.

<sup>44</sup> *See* Heather Elliott, *The Functions of Standing*, 61 *STAN. L. REV.* 459, 496 (2008) (arguing courts should not use standing doctrine “as a backdoor way to limit Congress’s legislative power”); *infra* notes 365–401 and accompanying text (discussing broad standing rights as means to protect congressional authority to ensure that the executive branch enforces federal laws).

<sup>45</sup> *See, e.g., Bennett v. Spear*, 520 U.S. 154, 162–63 (1997) (describing the “zone of interests” standard as a prudential limitation rather than a mandatory constitutional requirement); *Flast v. Cohen*, 392 U.S. 83, 97 (1968) (stating that prudential requirements are based “in policy, rather than purely constitutional, considerations”); YACKLE, *supra* note 12, at 318 (stating that prudential limitations are policy-based “and may be relaxed in some circumstances”).

<sup>46</sup> *Bennett*, 520 U.S. at 163. Unlike constitutional standing, prudential limits on standing “can be modified or abrogated by Congress.” *Id.* at 162. Prudential limitations are judge-made and must be “expressly negated.” *Id.* at 163. Furthermore, citizen suit provisions abrogate the zone of interest limitation. *Id.* at 166.

ing “generalized grievances”<sup>47</sup>—a term used to refer to suits involving large segments of the public, or those where a citizen lacking a personal injury seeks to force the government to obey a duly enacted law—is a prudential or constitutional limitation.<sup>48</sup>

### B. *The Injury Requirement*

In *Lujan*, the Court summarized and refined its three-part standing test.<sup>49</sup> First, a plaintiff must show “an injury-in-fact” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.”<sup>50</sup> Next, the plaintiff must also show “a causal connection between the injury and the conduct complained of,” directly linking the injury to the challenged action of the defendant.<sup>51</sup> Finally, the injury must be likely, rather than speculatively, redressable by the court.<sup>52</sup> A plaintiff has the burden of establishing all three parts of the standing test.<sup>53</sup>

This Article will focus primarily on the injury requirement for standing. In *Lujan*, the majority concluded that the plaintiff, Defenders of Wildlife, lacked standing to challenge the failure of certain government agencies to consult with the Secretary of Interior about funding projects that might hurt endangered species in foreign countries.<sup>54</sup> The court found that the plaintiff lacked standing because the two members of the organization who filed affidavits only had intentions to visit the relevant foreign countries—Egypt and Sri Lanka—at some indeterminate future date.<sup>55</sup> The Court concluded, “[s]uch ‘some day’ intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of

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<sup>47</sup> *Guilds*, *supra* note 36, at 1884 (“Beyond the uncertainty about whether generalized grievances are constitutional or prudential limitations, there is also uncertainty about their precise definition.”); see *YACKLE*, *supra* note 12, at 342 (“The ‘generalized grievance’ formulation is notoriously ambiguous.”).

<sup>48</sup> See *YACKLE*, *supra* note 12, at 342–49 (discussing the Supreme Court debate on whether the rule against generalized grievances is a constitutional rule or a non-constitutional policy waivable by Congress); *Guilds*, *supra* note 36, at 1878; *Mank*, *States Standing*, *supra* note 1, at 1710–16.

<sup>49</sup> See 504 U.S. at 560–61.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 560.

<sup>53</sup> *Id.* at 561 (stating that “[t]he party invoking federal jurisdiction bears the burden of establishing these elements”); see *DaimlerChrysler*, 547 U.S. at 342 (stating that parties asserting federal jurisdiction must “carry the burden of establishing their standing under Article III”); *YACKLE*, *supra* note 12, at 336.

<sup>54</sup> 504 U.S. at 557–59, 578.

<sup>55</sup> *Id.* at 562–64.

an ‘actual or imminent’ injury that our cases require.”<sup>56</sup> Similarly, in *Summers*, Justice Scalia’s majority opinion concluded that the plaintiff organizations failed to demonstrate a concrete injury because they could not specify precise times and locations when their members would visit national parks where the U.S. Forest Service was allegedly engaged in illegal salvage timber sales.<sup>57</sup>

### C. *Relaxed Standing in Procedural Cases*

In cases involving procedural violations, such as the failure of the government to prepare an environmental impact statement (EIS) pursuant to the National Environmental Policy Act (NEPA),<sup>58</sup> courts relax the imminence and redressability portions of the standing test.<sup>59</sup> The *Summers* decision, however, may suggest that the Court is retrenching its relaxation of the imminence requirement.<sup>60</sup> In footnote seven of *Lujan*, Justice Scalia stated that plaintiffs who may suffer a concrete injury resulting from the government’s procedural error are entitled to a more relaxed application of these standing requirements because remedying the procedural violation may not change the government’s substantive decision.<sup>61</sup> Justice Scalia offered the prototypical example of procedural injury to a plaintiff who lives near a proposed dam who seeks an environmental assessment under NEPA to study its potential impacts.<sup>62</sup> He stated:

There is this much truth to the assertion that “procedural rights” are special: The 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. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s

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<sup>56</sup> *Id.* at 564.

<sup>57</sup> 555 U.S. at 493–97.

<sup>58</sup> National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2006).

<sup>59</sup> *See, e.g., Lujan*, 504 U.S. at 572 n.7.

<sup>60</sup> *See Summers*, 555 U.S. at 498–99; Brown, *supra* note 13, at 257–64 (discussing the Court’s leniency in deciding standing in cases involving procedural violations). A plaintiff must still allege that the proposed government action would have some possibility of causing a concrete harm. *See Lujan*, 504 U.S. at 572 n.7. The Supreme Court has never clearly explained to what extent the immediacy or redressability portions of the standing test are relaxed in procedural rights cases. Mank, *States Standing*, *supra* note 1, at 1719.

<sup>61</sup> *See* 504 U.S. at 572 n.7.

<sup>62</sup> *Id.*; *see* Mank, *States Standing*, *supra* note 1, at 1716; Mank, *Global Warming*, *supra* note 12, at 35–36.

failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.<sup>63</sup>

Justice Scalia limited standing in this example to plaintiffs with concrete injuries resulting from the government's procedural error.<sup>64</sup> Furthermore, "persons who live (and propose to live) at the other end of the country from the dam" do not have "concrete interests affected" and thus do not have standing to challenge such a violation.<sup>65</sup>

A plaintiff normally must establish standing by showing it is likely that they will suffer a concrete injury from actions traceable to the defendant, and that injury could be redressed by a favorable judicial decision.<sup>66</sup> A plaintiff, however, claiming government procedural error need not prove that the government's actions will cause imminent harm, or that a judicial remedy will actually prevent the government from taking the proposed action.<sup>67</sup> For example, a NEPA plaintiff is entitled to a remedy mandating that the government follow NEPA's procedural requirement of conducting an EIS, even if it is uncertain that it will lead the government to change its substantive decision.<sup>68</sup>

In *Massachusetts v. EPA*, the Court arguably adopted an even more relaxed approach to redressability for procedural rights plaintiffs than that suggested in footnote seven of *Lujan*.<sup>69</sup> The decision declared that procedural rights litigants need only demonstrate "some possibility" that their requested remedy would redress a procedural injury.<sup>70</sup> Illustrating the volatility of the Court's position on standing, the four dissenting jus-

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<sup>63</sup> *Lujan*, 504 U.S. at 572 n.7; see Mank, *Global Warming*, *supra* note 12, at 35–36, 35 n.240 (discussing relaxed standing requirements for procedural injures); Blake R. Bertagna, Comment, "Standing" Up for the Environment: The Ability of Plaintiffs to Establish Legal Standing to Redress Injuries Caused by Global Warming, 2006 BYU L. REV. 415, 457 (discussing relaxed standing requirements for procedural injuries).

<sup>64</sup> See *Lujan*, 504 U.S. at 572 n.7.

<sup>65</sup> *Id.*; see *id.* at 573 n.8 ("We do not hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing."); William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL'Y F. 247, 257 (2001); Mank, *States Standing*, *supra* note 1, at 1716.

<sup>66</sup> *Lujan*, 504 U.S. at 560–61.

<sup>67</sup> See *id.* at 572 n.7; Mank, *Global Warming*, *supra* note 12, at 35–36, 35 n.240, 36 n.244.

<sup>68</sup> See *Lujan*, 504 U.S. at 572 n.7; Mank, *Global Warming*, *supra* note 12, at 35–36.

<sup>69</sup> See 549 U.S. 497, 501, 525–26 (2007).

<sup>70</sup> *Id.* at 518 ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.").

tices in *Massachusetts v. EPA*—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—were in the *Summers* majority two years later, while four of the justices in the *Massachusetts v. EPA* majority—Justices Stevens, Souter, Ginsburg, and Breyer—dissented in *Summers*.<sup>71</sup> Justice Kennedy was the only justice in the majority in both cases, thus demonstrating that he is the key vote in standing cases.<sup>72</sup> In *Massachusetts v. EPA*, the Court rejected the argument by the Environmental Protection Agency (EPA) that petitioners must prove that federal courts could remedy the global problem of climate change.<sup>73</sup> Instead, the Court determined that petitioners satisfied the redressability portion of the standing test because a court order requiring the EPA to regulate emissions from new vehicles will “slow or reduce” global climate change.<sup>74</sup> The decision’s “some possibility” test appears to be applicable to all procedural rights plaintiffs.<sup>75</sup> The *Summers* decision did not address *Massachusetts v. EPA*’s relaxed approach to redressability for procedural rights plaintiffs, but it may have tightened the imminence requirement.<sup>76</sup>

Typical of much of the Supreme Court’s imprecise standing jurisprudence, footnote seven of *Lujan* does not clearly explain the degree to which the immediacy and redressability requirements are waived or relaxed in procedural rights cases, the plaintiff’s burden of proof to establish standing in procedural rights cases, or how to define procedural rights.<sup>77</sup> As a result, what plaintiffs must show regarding their like-

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<sup>71</sup> Compare *Summers*, 555 U.S. at 488 (2009) (listing majority and dissenting members), with *Massachusetts v. EPA*, 549 U.S. at 501 (listing majority and dissenting members).

<sup>72</sup> Compare *Summers*, 555 U.S. at 488 (listing majority and dissenting members); with *Massachusetts v. EPA*, 549 U.S. at 501 (listing majority and dissenting members).

<sup>73</sup> See 549 U.S. at 525.

<sup>74</sup> *Id.*; Mank, *Standing and Statistical Persons*, *supra* note 1, at 675.

<sup>75</sup> See *Massachusetts v. EPA*, 549 U.S. at 518; Mank, *States Standing*, *supra* note 1, at 1727 (arguing the “some possibility” standard in *Massachusetts v. EPA* applies to all procedural plaintiffs).

<sup>76</sup> See *infra* notes 200–237 and accompanying text.

<sup>77</sup> See Brian J. Gatchel, *Informational and Procedural Standing After Lujan v. Defenders of Wildlife*, 11 J. LAND USE & ENVTL. L. 75, 99–105 (1995) (criticizing footnote seven in *Lujan* for failing to explain to what extent immediacy and redressability standing requirements are relaxed or eliminated); Mank, *States Standing*, *supra* note 1, at 1718–20 (criticizing the Court’s lack of guidance on how to apply footnote seven in *Lujan*); Mank, *Global Warming*, *supra* note 12, at 36–37, 36 n.244 (“[F]ootnote seven does not clearly explain the extent to which redressability and immediacy requirements are waived in procedural rights cases.”); Sunstein, *supra* note 36, at 208 (“The Court acknowledged (without any real expansion) that in some cases involving procedural violations, plaintiffs need not show redressability.”); Christopher T. Burt, Comment, *Procedural Injury Standing After Lujan v. Defenders of Wildlife*, 62 U. CHI. L. REV. 275, 285 (1995) (“*Lujan*’s procedural injury dicta is not without its problems, however. At best, it is vague and provides little guidance for prospective plaintiffs and the lower courts . . .”).

likelihood of harm arising from the agency's action is unclear.<sup>78</sup> For example, the D.C. Circuit employs a strict "substantial probability" test, but the Ninth Circuit utilizes a more lenient "reasonable probability" test.<sup>79</sup> The Supreme Court could have prevented confusion in lower courts by eliminating the immediacy requirement for procedural rights plaintiffs as they have no control over how quickly the government will act, but the *Lujan* decision does not address the issue of timing.<sup>80</sup> Additionally, footnote seven does not provide clear guidance as to what extent courts can relax or eliminate the redressability requirement.<sup>81</sup> Yet, the subsequent *Massachusetts v. EPA* decision appears to adopt a relaxed approach to the redressability requirement in procedural rights cases.<sup>82</sup>

#### D. Threatened and Imminent Injuries

In some cases, a threatened injury may be sufficiently concrete and imminent if the harm is likely to occur in the relatively near future, although the Supreme Court has never precisely defined "imminent injury."<sup>83</sup> In *Babbitt v. United Farm Workers National Union*, the Court stated "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is

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<sup>78</sup> Compare *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 665–72 (D.C. Cir. 1996) (applying a strict four-part test for standing in a procedural rights case, including requiring a procedural rights plaintiff to demonstrate a particularized injury, that "a particularized environmental interest of theirs [] will suffer demonstrably increased risk," and that it is "substantially probable" that the agency action will cause the demonstrable injury alleged), with *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 972 (9th Cir. 2003) (rejecting *Florida Audubon's* standing test for procedural rights plaintiffs and stating that such plaintiffs must show "the reasonable probability of the challenged action's threat to [their] concrete interest") (quoting *Churchill Cnty. v. Babbitt*, 150 F.3d 1072, 1078 (9th Cir. 1998)), and *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 451–52 (10th Cir. 1996) (disagreeing with *Florida Audubon's* "substantial probability" test for procedural rights plaintiffs and instead adopting a test requiring plaintiff to establish an "increased risk of adverse environmental consequences" from the alleged failure to follow NEPA). See generally Mank, *Global Warming*, *supra* note 12, at 45–63.

<sup>79</sup> Compare *Fla. Audubon*, 94 F.3d at 665–72 (applying a substantial probability test), with *Citizens for Better Forestry*, 341 F.3d at 972 (applying a reasonable probability test).

<sup>80</sup> See Gatchel, *supra* note 77, at 93–94, 99–100; Douglas Sinor, *Tenth Circuit Survey: Environmental Law*, 75 DENV. U. L. REV. 859, 880 (1998).

<sup>81</sup> See Gatchel, *supra* note 77, at 100, 108; Mank, *States Standing*, *supra* note 1, at 1719; Sinor, *supra* note 80, at 879 (criticizing footnote seven because it "is confusing and raises more questions than it answers").

<sup>82</sup> See 549 U.S. at 518.

<sup>83</sup> See Mank, *Standing and Future Generations*, *supra* note 1, at 39; Mank, *Standing and Statistical Persons*, *supra* note 1, at 684.

enough.”<sup>84</sup> *Lujan’s* approach to “imminent injury” is similar to *Babbitt’s* approach to threatened injuries.<sup>85</sup> The imminent injury test, however, fails to define a sufficient probability of risk to a plaintiff and how quickly injury must result.<sup>86</sup> For instance, the Ninth Circuit has interpreted the imminent standing test to require an increased risk of harm.<sup>87</sup> The subsequent *Summers* decision arguably overruled the Ninth Circuit’s approach to the imminence test by requiring plaintiffs to demonstrate when and where they would be injured in the future.<sup>88</sup>

### E. Oscillating Standing Requirements

The Court has oscillated between relatively strict and lenient standing requirements. *Lujan* adopted a relatively strict definition of concrete injury, but footnote seven allowed a more lenient standard for plaintiffs in procedural rights cases to meet the imminence and redressability requirements for standing.<sup>89</sup> *Massachusetts v. EPA* appeared to relax the redressability standard for procedural rights plaintiffs.<sup>90</sup> Yet just two years later, *Summers* arguably narrowed procedural standing in regard to the imminence standard.<sup>91</sup> The Court’s confusing standing jurisprudence results from profound philosophical disagreements among the justices on the Court.<sup>92</sup>

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<sup>84</sup> 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)); see also *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (reasoning that a threatened injury may satisfy standing requirements); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979) (requiring a plaintiff to have “suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant”); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc) (“The Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III standing requirements.”).

<sup>85</sup> See *Lujan*, 504 U.S. at 560–64; *Babbitt*, 442 U.S. at 298.

<sup>86</sup> Mank, *Standing and Future Generations*, *supra* note 1, at 39; see Mank, *Standing and Statistical Persons*, *supra* note 1, at 684.

<sup>87</sup> See *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000).

<sup>88</sup> See 555 U.S. at 498–99; *infra* notes 160–176 and accompanying text.

<sup>89</sup> See *supra* notes 36–57 and accompanying text.

<sup>90</sup> See 549 U.S. at 518; *supra* notes 49–57 and accompanying text.

<sup>91</sup> See 555 U.S. at 498–501; *infra* notes 160–176 and accompanying text.

<sup>92</sup> See *infra* notes 119–144, 160–195 and accompanying text.

## II. INFORMATIONAL STANDING: *PUBLIC CITIZEN* AND *AKINS*

### A. *Public Citizen v. U.S. Department of Justice: Endorsing Pure Informational Standing*

In *Public Citizen v. U.S. Department of Justice*, the Supreme Court endorsed the concept of pure informational standing but did not discuss the issue at length.<sup>93</sup> Justice Scalia took no part in the consideration of the case, and perhaps his absence is the reason for the lack of such discussion.<sup>94</sup> For many years, the American Bar Association's Standing Committee on the Federal Judiciary (ABA Committee) provided advice to the President on the nomination of federal judges.<sup>95</sup> The Federal Advisory Committee Act (FACA) imposes a number of requirements<sup>96</sup> on committees or similar groups that advise the President or federal agencies.<sup>97</sup> The plaintiff filed suit requesting both a declaration that the Justice Department's utilization of the ABA Committee was covered by FACA and an order mandating the Justice Department to comply with FACA's requirements.<sup>98</sup>

Justice Brennan's majority opinion concluded that the ABA Committee did not constitute an "advisory committee" for purposes of FACA.<sup>99</sup> FACA's legislative history indicated that Congress did not intend to apply the term "utilize" in the statute to the advisory relationship between the Justice Department and the ABA Committee.<sup>100</sup> The majority acknowledged that it avoided interpreting FACA to apply to the ABA Committee in part because such an interpretation would raise serious constitutional concerns regarding whether FACA unduly infringed on the President's constitutional power to nominate federal judges and thus violated the doctrine of separation of powers.<sup>101</sup> In a concurring opinion, Justice Kennedy, joined by Chief Justice Rehnquist and Justice O'Connor, applied a "plain language" construction of the statute in reasoning that FACA included the ABA Committee's activities

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<sup>93</sup> 491 U.S. 440, 449–50 (1989).

<sup>94</sup> See *id.* at 442.

<sup>95</sup> *Id.* at 443–45.

<sup>96</sup> These requirements include the public availability of records consistent with the Freedom of Information Act's public information requirements and exemptions. See 5 U.S.C. § 552 (2006).

<sup>97</sup> See *Public Citizen*, 491 U.S. at 445–47.

<sup>98</sup> *Id.* at 447.

<sup>99</sup> *Id.* at 463–65.

<sup>100</sup> See *id.* at 451–65.

<sup>101</sup> See U.S. CONST. art. 2, § 2, cl. 2; *Public Citizen*, 491 U.S. at 465–67.



when advising the Justice Department on such matters.<sup>102</sup> But Justice Kennedy ultimately concluded that the application of FACA to the President's use of the ABA Committee was unconstitutional because it violated Article II's appointments clause by interfering with the President's ability to gather information about potential judicial nominees.<sup>103</sup>

Most relevant for this Article, the ABA argued that the plaintiffs lacked standing because they failed to allege an "injury sufficiently concrete and specific" since they "advanced a general grievance shared in substantially equal measure by all or a large class of citizens . . ."<sup>104</sup> Following its decisions relating to informational standing under the Freedom of Information Act (FOIA), the Court concluded that the plaintiffs had standing to seek information pursuant to FACA's statutory mandates.<sup>105</sup> The Court reasoned that prohibiting the appellant from studying the ABA Committee's activities is comparable to a denial of information under FOIA.<sup>106</sup> The Court's interpretation of FOIA never required more than a showing that the information requested was denied.<sup>107</sup> Thus, a refusal to grant information under FACA, like a refusal to grant information under FOIA, constitutes a distinct injury and affords standing to sue.<sup>108</sup>

The Court rejected the ABA's argument that the plaintiffs did not have standing because they alleged a generalized grievance.<sup>109</sup> The Court found that it was not reason enough to deny the appellants their asserted injury solely because other citizens or groups of citizens may also claim the same injury.<sup>110</sup> Similarly, FOIA is not restricted by the fact that many citizens might request the same information under its authority.<sup>111</sup>

The court in *Public Citizen* did not attempt to reconcile its approval of standing in FACA suits with its recognition of standing in FOIA cases, or with other decisions that questioned standing in circumstances

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<sup>102</sup> See *Public Citizen*, 491 U.S. at 467–89 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>103</sup> *Id.* at 481–89; see U.S. CONST. art. 2, § 2, cl. 2.

<sup>104</sup> See *Public Citizen*, 491 U.S. at 448–49 (majority opinion).

<sup>105</sup> See *id.* at 449.

<sup>106</sup> See *id.*

<sup>107</sup> *Id.*

<sup>108</sup> See *id.*

<sup>109</sup> See *id.* at 449–50.

<sup>110</sup> See *Public Citizen*, 491 U.S. at 449–50.

<sup>111</sup> See 5 U.S.C. § 552 (2006); *Public Citizen*, 491 U.S. at 449–50.

where a plaintiff asserted a generalized grievance.<sup>112</sup> In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, for example, the Supreme Court held that a court could deny standing in a suit involving generalized harms because such a suit would raise “general prudential concerns ‘about the proper—and properly limited—role of the courts in a democratic society.’”<sup>113</sup> *Public Citizen*’s approach to informational standing—allowing any citizen to seek information under FACA—is arguably inconsistent with *Duke Power*’s restrictive approach to generalized grievances, but *Public Citizen* did not discuss that case.<sup>114</sup> One problem typical of standing jurisprudence is that the Court has never precisely defined the term “generalized grievance” and whether its prohibition is a flexible judicial prudential doctrine or a firmer constitutional rule.<sup>115</sup> As a result, it is difficult to decide whether the decisions in *Public Citizen* and *Duke Power* are merely in tension or actually contradict each other.<sup>116</sup> Justice Kennedy’s concurring opinion in *Public Citizen* did not address the issue of standing; he, Chief Justice Rehnquist, and Justice O’Connor presumptively agreed with the majority’s reasoning on that issue.<sup>117</sup> If Justice Scalia had participated in this case, it is possible that he might have raised objections similar to those he raised later in *Federal Election Commission v. Akins*.<sup>118</sup>

### B. Justice Breyer’s Majority Opinion in *Akins*

In *Akins*, the Supreme Court concluded that an injury resulting from the government’s failure to provide required information can constitute a concrete injury sufficient for standing.<sup>119</sup> *Akins* addressed

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<sup>112</sup> See 491 U.S. at 448–51; *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978).

<sup>113</sup> 438 U.S. at 80 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)); Mank, *Global Warming*, *supra* note 12, at 21–22.

<sup>114</sup> Compare *Duke Power Co.*, 438 U.S. at 80; with *Public Citizen*, 491 U.S. at 440.

<sup>115</sup> See YACKLE, *supra* note 12, at 342 (“The ‘generalized grievance’ formulation is notoriously ambiguous.”); Solimine, *supra* note 13, at 1027 (discussing “whether the barrier to bring [generalized grievance] cases is a constitutional or prudential one”).

<sup>116</sup> See Solimine, *supra* note 13, at 1027 (discussing ambiguities in the concept of generalized grievances).

<sup>117</sup> See *Public Citizen*, 491 U.S. at 467–89 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>118</sup> See 524 U.S. 11, 29–37 (1998) (Scalia, J., dissenting).

<sup>119</sup> *Id.* at 21 (majority opinion) (discussing Federal Election Campaign Act of 1971, Pub. L. No. 92–225, 86 Stat. 3 (codified as amended at 2 U.S.C. § 437g(a)(8) (2006) (stating that an aggrieved party may file a petition if the FEC dismisses a complaint or fails to act on a complaint within the stated time period)); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 634–36, 644–45 (1999).

whether voters had standing to challenge a Federal Election Commission (FEC) decision that a lobbying group was not a “political committee” within the definition of the Federal Election Campaign Act of 1971 (FECA),<sup>120</sup> and accordingly, did not have to disclose its donors, funding, or expenses.<sup>121</sup> FECA “imposes extensive recordkeeping and disclosure requirements upon groups that fall within the Act’s definition of a ‘political committee.’”<sup>122</sup> The statute authorized “[a]ny party aggrieved by” a FEC order to seek judicial review in federal court.<sup>123</sup>

The Court rejected the FEC’s argument that prudential standing considerations should bar the suit because “[h]istory associates the word ‘aggrieved’ with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which ‘prudential’ standing traditionally rested.”<sup>124</sup> Furthermore, the *Akins* decision concluded that “[t]he injury of which respondents complain—their failure to obtain relevant information—is injury of a kind that FECA seeks to address.”<sup>125</sup> After examining the statute’s language, the Court decided that Congress intended to protect citizens from this type of injury and that respondents, therefore, satisfied the prudential standing requirements.<sup>126</sup>

Additionally, *Akins* concluded that Congress had “the constitutional power to authorize federal courts to adjudicate this lawsuit.”<sup>127</sup> The *Akins* decision determined that the government’s refusal to provide information to the plaintiff voters for which the Act required disclosure was a constitutionally “genuine ‘injury in fact.’”<sup>128</sup> The Court concluded that such deprivation of information, which the plaintiffs could use “to evaluate candidates for public office,” constituted a “concrete and particular” injury.<sup>129</sup> Furthermore, the Court observed that the Court in *Public Citizen* had “held that a plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be pub-

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<sup>120</sup> Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431-456 (2006 & West Supp. 2011)).

<sup>121</sup> See *Akins*, 524 U.S. at 13-14; Mank, *Global Warming*, *supra* note 12, at 37.

<sup>122</sup> *Akins*, 524 U.S. at 14.

<sup>123</sup> *Id.* at 19 (quoting 2 U.S.C. § 437g(a)(8)(A) (1994)) (brackets in original).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 20.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Akins*, 524 U.S. at 21.

<sup>129</sup> *Id.*

lily disclosed pursuant to a statute” and implied that the same reasoning applied to *Akins*.<sup>130</sup>

The government argued that the plaintiffs should not have standing because they suffered only a generalized grievance common to all other voters.<sup>131</sup> The Court rejected this argument because the statute specifically authorized voters to request information from the FEC, which therefore overrode any prudential standing limitations against generalized grievances.<sup>132</sup> The Court distinguished prior cases with judicially imposed prudential norms against generalized grievances by reasoning that it would deny standing for widely shared, generalized injuries only if the harm “is not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the ‘common concern for obedience to law.’”<sup>133</sup> *Akins* stated that Article III standing was permissible even if many people suffered similar injuries as long as those injuries were concrete and not abstract.<sup>134</sup> If such an interest were sufficiently concrete, then it could qualify as an injury in fact.<sup>135</sup> Accordingly, the *Akins* decision recognized that a plaintiff who suffers a concrete injury may sue even though many others have suffered similar injuries.<sup>136</sup> Although a political forum might be appropriate to address widely shared injuries, this fact alone does not exclude an interest for Article III purposes.<sup>137</sup> “This conclusion seems particularly obvious where . . . large numbers of individuals suffer the same common-law injury . . . or where large numbers of voters suffer interference with voting rights conferred by law.”<sup>138</sup> Thus, *Akins* makes clear that courts should not deny standing merely because large numbers of persons have the same or similar inju-

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 23.

<sup>132</sup> *Id.* at 19–21; see Mank, *Standing and Statistical Persons*, *supra* note 1, at 718; Sunstein, *supra* note 119, at 634–36, 642–45 (stating that *Akins* concluded that the statute at issue overrode any prudential limitations against generalized grievances); see Kimberly N. Brown, *What’s Left Standing? FECA Citizen Suits and the Battle for Judicial Review*, 55 U. KAN. L. REV 677, 678 (2007).

<sup>133</sup> *Akins*, 549 U.S. at 23. The Supreme Court has not been clear on whether generalized grievances pose a constitutional or prudential barrier to standing, and the issue has been subject to much debate. Solimine, *supra* note 13, at 1027 n.14. The *Akins* decision implied that the rule against generalized grievances is only prudential in nature, but did not explicitly decide the issue. See *Akins*, 524 U.S. at 19; accord Mank, *Standing and Statistical Persons*, *supra* note 1, at 718 (discussing *Akins* as treating generalized grievances as prudential); Sunstein, *supra* note 119, at 634–36 (discussing the four-part analysis of plaintiff’s standing in *Akins*).

<sup>134</sup> 524 U.S. at 24–25.

<sup>135</sup> *Id.* at 24; see Mank, *Standing and Statistical Persons*, *supra* note 1, at 717.

<sup>136</sup> *Akins*, 524 U.S. at 24.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

ries so long as those injuries are concrete.<sup>139</sup> Furthermore, *Akins* implies that Congress has the authority to extend standing to the outer limits of Article III by broadly defining what constitutes a concrete statutory injury as opposed to an abstract injury.<sup>140</sup>

The *Akins* decision stressed that courts should strongly consider Congress's intent in defining statutory rights when determining whether a statutory injury is concrete.<sup>141</sup> By implying that "Congress has broad authority to define which injuries are sufficient for constitutional standing," the *Akins* majority adopted a more similar approach to Justice Kennedy's concurrence rather than Justice Scalia's majority opinion in *Lujan*.<sup>142</sup> Justice Scalia emphasized that Article III prohibits Congress from granting standing to a plaintiff with merely a generalized grievance caused by the government's failure to enforce the law.<sup>143</sup> *Akins*, on the other hand, implied that a generalized grievance is usually a prudential limitation that Congress can waive by defining the circumstances in which a class of litigants may seek a remedy for a widely shared injury.<sup>144</sup>

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<sup>139</sup> *Id.*

<sup>140</sup> See *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001); Solimine, *supra* note 13, at 1050 ("FEC v. *Akins*, seem[s] to evince a more generous reading of congressional power to influence standing."); accord Mank, *Standing and Statistical Persons*, *supra* note 1, at 719.

<sup>141</sup> *Akins*, 524 U.S. at 19, 24–25; Brown, *supra* note 132, at 688, 690–94 (arguing that *Akins* recognized that Congress has significant power to define which injuries are sufficient for Article III standing); Mank, *Standing and Statistical Persons*, *supra* note 1, at 719 (arguing that the *Akins* court emphasized the weight congressional intent should be given); Sunstein, *supra* note 119, at 616–17, 645 (arguing that *Akins* gives Congress the authority to waive the prudential presumption against suits involving generalized grievances, especially in suits involving informational injuries).

<sup>142</sup> Mank, *Standing and Statistical Persons*, *supra* note 1, at 719 (noting that *Akins* looked to Justice Kennedy's concurrence in *Lujan* over Justice Scalia's majority opinion on this point); see Brown, *supra* note 132, at 693–94 (stating that *Akins* "elevated Justice Kennedy's concurrence in *Lujan*, in which he reiterated that Congress is empowered to define injuries that give rise to a cause of action that did not exist at common law"); Sunstein, *supra* note 119, at 617 ("*Akins* appears to vindicate the passage from Justice Kennedy's important concurring opinion in *Lujan*.").

<sup>143</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992); Mank, *Standing and Statistical Persons*, *supra* note 1, at 719–20; Sunstein, *supra* note 119, at 643 (stating that "before *Akins* . . . the ban on generalized grievances was moving from a prudential one to one rooted in Article III. *Lujan* seemed to suggest that to have standing, citizens would have to show that their injuries were 'particular' in the sense that they were not widely shared.") (footnotes and citations omitted). Justice Scalia also suggested that the Constitution's Article II, section 3 provision that the President is responsible to "take Care that the Laws be faithfully executed" bars Congress from authorizing citizen suits as private attorneys general by those who lack a concrete injury. *Lujan*, 504 U.S. at 577.

<sup>144</sup> Mank, *Standing and Statistical Persons*, *supra* note 1, at 719–20; see Brown, *supra* note 132 at 689–94 (arguing that *Akins* differs from *Lujan* by recognizing Congress's authority to define standing in statutes); Mank, *States Standing*, *supra* note 1, at 1714–15 (arguing

### C. Justice Scalia's Dissenting Opinion in *Akins*

Justice Scalia, in a dissent joined by Justices O'Connor and Thomas, argued that the plaintiffs suffered a generalized grievance common to all members of the public.<sup>145</sup> Justice Scalia contended that Article III prohibits even generalized grievances involving concrete injuries because *Lujan* mandated that an injury be concrete and that the harm be "particularized"—the injury "must affect the plaintiff in a personal and individual way."<sup>146</sup> Because the *Akins* plaintiffs' alleged informational injury was an "undifferentiated" generalized grievance that was "common to all members of the public," the plaintiffs must resolve the injury "by political, rather than judicial, means."<sup>147</sup> More broadly, Justice Scalia dissented in *Akins* because he believed that the majority opinion inappropriately granted the judiciary the authority to decide generalized grievances that are instead the exclusive responsibility of the executive branch under both Article III and the President's Article II authority.<sup>148</sup> Thus, he returned to the broader principle that the "standing doctrine was a 'crucial and inseparable element' of separation of powers principles" and "that more restrictive standing rules" would limit judicial interference with the popularly elected legislative and executive branches.<sup>149</sup> Perhaps surprisingly, Justice Scalia did not explicitly argue that the Court had overruled any part of *Lujan*; he may have believed that the two cases could be reconciled or perhaps he hoped to limit the scope of *Akins* in subsequent cases, as he arguably did in his *Summers* decision.<sup>150</sup>

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that *Akins* held generalized grievances as prudential barriers that can be waived by Congress without ruling on Congress's constitutional power to define standing); Sunstein, *supra* note 119, at 635–36, 644–45, 672–75 (discussing Congress's authority to grant standing and legal interests in light of *Akins*). *Akins* did not address or resolve whether Article III in some circumstances forbids suits that are generalized grievances. 524 U.S. at 23 ("Whether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." (citations omitted)).

<sup>145</sup> *Akins*, 524 U.S. at 29–31.

<sup>146</sup> *Id.* at 35 (Scalia, J., dissenting) (quoting 504 U.S. at 560 n.1); accord Mank, *Standing and Statistical Persons*, *supra* note 1, at 720.

<sup>147</sup> 524 U.S. at 35 (Scalia, J., dissenting) (quoting *United States v. Richardson*, 418 U.S. 166, 177 (1974)); accord Mank, *Global Warming*, *supra* note 12, at 39; Mank, *Standing and Statistical Persons*, *supra* note 1, at 720.

<sup>148</sup> 524 U.S. at 29–37; see Brown, *supra* note 132, at 702–03; Mank, *Standing and Statistical Persons*, *supra* note 1, at 721; Sunstein, *supra* note 119, at 616–17, 637, 643–47.

<sup>149</sup> Percival, *supra* note 12, at 847 (quoting Scalia, *supra* note 2, at 881); see also Mank, *Global Warming*, *supra* note 12, at 29.

<sup>150</sup> See 524 U.S. at 29–37; *Summers v. Earth Island Inst.*, 555 U.S. 488, 491–98 (2009).

### III. *SUMMERS* REJECTS PROBABILISTIC STANDING AND LIMITS PROCEDURAL STANDING

The litigation that culminated in the *Summers v. Earth Island Institute* decision began when the U.S. Forest Service (Service) approved the Burnt Ridge Project, which involved the salvage sale—without public notice and comment—of timber on 238 acres of fire-damaged land in the Sequoia National Forest.<sup>151</sup> Several environmental organizations then filed suit seeking an injunction to prevent the Service from implementing new regulations.<sup>152</sup> These regulations exempted salvage sales of less than 250 acres from the notice, comment, and appeal process that Congress required the Service to apply to “significant land management decisions.”<sup>153</sup> The plaintiffs also challenged other Service regulations that did not apply to Burnt Ridge.<sup>154</sup> After the court granted a preliminary injunction against the Burnt Ridge salvage-timber sale, the plaintiffs and Service settled their dispute.<sup>155</sup> Despite the government’s argument that the plaintiffs lacked standing to challenge other salvage sales once they settled the Burnt Ridge Project case, the court decided the plaintiffs’ broader challenges to the Service’s salvage sale policies.<sup>156</sup> The court invalidated five of the Service’s regulations and entered a nationwide injunction against their application.<sup>157</sup> The Ninth Circuit later concluded that the plaintiffs’ challenges to regulations not at issue in the Burnt Ridge Project were not yet ripe for adjudication.<sup>158</sup> Nevertheless, the Ninth Circuit affirmed the court’s conclusion that two regulations applicable to the Burnt Ridge Project were illegal and, therefore, upheld the nationwide injunction against the application of those two regulations.<sup>159</sup>

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<sup>151</sup> 555 U.S. 488, 490–92 (2009). This discussion of *Summers* is based in part on my articles: Mank, *Rejects Probabilistic Standing*, *supra* note 1, at 103–11 and Mank, *Implications for Future Standing Decisions*, *supra* note 1, at 10,962–65.

<sup>152</sup> *Summers*, 555 U.S. at 489–90 (basing claims on Act that “required the Forest Service to establish a notice, comment, and appeal process for ‘proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974’”).

<sup>153</sup> Forest Service Decision Making and Appeals Reform Act, Pub. L. No. 102–381, § 322, 106 Stat. 1374, 1419 (1992), *reprinted in* 16 U.S.C. § 1612 (2006).

<sup>154</sup> *Summers*, 555 U.S. at 491.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 491–92.

<sup>157</sup> *Id.* at 492.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 488.

A. *Justice Scalia's Majority Opinion Rejects Probabilistic Standing and Arguably Limits Procedural Standing*

In *Summers*, Justice Scalia's majority opinion determined that the plaintiffs failed to meet the injury portion of the standing test once they settled the Burnt Ridge Project dispute.<sup>160</sup> The Court reasoned that the plaintiffs had initially satisfied the injury requirement when they submitted an affidavit alleging that an organization member "had repeatedly visited the Burnt Ridge site, that he had imminent plans to do so again," and that the government's actions would harm his aesthetic interests in viewing the flora and fauna at the site.<sup>161</sup> Justice Scalia concluded, however, that the settlement had resolved the member's injury and that none of the other affidavits submitted by the plaintiffs alleged an imminent injury at a specific site.<sup>162</sup> Another affiant for the plaintiffs asserted that he visited a large number of national parks during his lifetime, that he had suffered injury in the past from development on Forest Service land, and that he planned to visit several unnamed national forests in the future.<sup>163</sup> The Court deemed his affidavit insufficient for standing because he could not identify any particular site and time where he was likely to be harmed by salvage timber sales or other allegedly illegal actions authorized by the challenged regulations, thereby failing to satisfy the imminent injury requirement.<sup>164</sup>

Justice Scalia's majority opinion rejected the concept of probabilistic standing, which states that an organization has standing based on the probability that some members of the organization will be harmed in the future.<sup>165</sup> The Sierra Club alleged in the complaint that it has more than 700,000 national members, and, accordingly, that it was probable the Service's implementation of the challenged regulations would harm at least one of its members in the near future.<sup>166</sup> The Court rejected the plaintiffs' probabilistic standing argument because it concluded that an organizational plaintiff must identify specific members who are being injured or will be imminently injured at a particular

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<sup>160</sup> 555 U.S. at 491–92.

<sup>161</sup> *Id.* at 494.

<sup>162</sup> *Id.* at 493–96.

<sup>163</sup> *Id.* at 495.

<sup>164</sup> *Id.* at 495–97. "There may be a chance, but is hardly a likelihood, that [affiant's] wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations." *Id.* at 495.

<sup>165</sup> *Id.* at 496; Mank, *Standing and Statistical Persons*, *supra* note 1, at 750.

<sup>166</sup> See *Summers*, 555 U.S. at 502 (Breyer, J., dissenting) (quoting Corrected Complaint for Declaratory and Injunctive Relief Appendix ¶ 12 at 34, *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994 (E.D. Cal. 2005) (No. CIV F-03-6386 JKS)).



time and location.<sup>167</sup> Justice Scalia argued that although it may be possible that a member of the plaintiff organization would meet the standing criteria at some point in the future, mere statistical probability is insufficient to meet standing requirements.<sup>168</sup>

Arguably, the *Summers* Court assigned a rigorous standing burden for procedural rights plaintiffs.<sup>169</sup> The *Summers* decision may have retreated from the relaxation of the imminence standard for procedural rights plaintiffs found in footnote seven of *Lujan v. Defenders of Wildlife*.<sup>170</sup> By implicitly conceding that footnote seven in *Lujan* recognized that Congress has some authority to redefine the redressability requirement to enable procedural rights plaintiffs to sue, the *Summers* decision appeared to limit congressional authority to change standing rules by emphasizing that procedural rights plaintiffs must still meet the Article III concrete injury requirement.<sup>171</sup> Congress has the power to relax the standing requirement in terms of redressability, but not the requirement of injury in fact.<sup>172</sup> Instead, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."<sup>173</sup> Importantly, Justice Scalia stated in *Summers* that procedural rights plaintiffs are entitled to relaxed redressability requirements, but did not address relaxed standards for immediacy.<sup>174</sup> The *Summers* decision, however, did not explicitly overrule the relaxed imminence test established in footnote seven of *Lujan*.<sup>175</sup> Therefore, the impact of *Summers* on future procedural rights cases remains uncertain.<sup>176</sup>

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<sup>167</sup> *Id.* at 499 (majority opinion). Justice Scalia acknowledged that an organization has standing if all of its members are likely to suffer an injury. *Id.* (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958)).

<sup>168</sup> *Id.*

<sup>169</sup> Mank, *Implications for Future Standing Decisions*, *supra* note 1, at 10,963; *see* 555 U.S. at 493.

<sup>170</sup> *See* 555 U.S. at 496 (citing *Lujan*, 504 U.S. at 572 n.7 (1992)); Mank, *Implications for Future Standing Decisions*, *supra* note 1, at 10,963.

<sup>171</sup> Mank, *Implications for Future Standing Decisions*, *supra* note 1, at 10,963; *see Summers*, 555 U.S. at 496.

<sup>172</sup> *Summers*, 555 U.S. at 496.

<sup>173</sup> *Id.*

<sup>174</sup> Mank, *Implications for Future Standing Decisions*, *supra* note 1, at 10,963; *see* 555 U.S. at 496.

<sup>175</sup> *See Summers*, 555 U.S. at 496.

<sup>176</sup> Mank, *Implications for Future Standing Decisions*, *supra* note 1, at 10,963; *see Summers*, 555 U.S. at 497.

### B. Justice Kennedy's Concurring Opinion

In a short concurrence in *Summers*, Justice Kennedy echoed his concurring opinion in *Lujan*, and explained that he believed a plaintiff can challenge the alleged violation of a procedural right only if the plaintiff can demonstrate a separate concrete injury.<sup>177</sup> Kennedy further found that the plaintiffs did not meet this standard in *Summers*.<sup>178</sup> He asserted that, “[t]his case would present different considerations if Congress had sought to provide redress for a concrete injury ‘giv[ing] rise to a case or controversy where none existed before.’”<sup>179</sup> Justice Kennedy concluded that the statute at issue did not include an express citizen suit provision, meaning that Congress did not intend the statute to bestow any right other than a procedural right.<sup>180</sup> Like his concurrence in *Lujan*, Justice Kennedy’s concurrence in *Summers* left open the possibility that he might have concluded that the plaintiffs met Article III standing requirements, despite Justice Scalia’s more fundamental separation of powers concerns, if Congress had enacted a more explicit statute that clearly defined when a procedural injury constitutes a concrete harm to a particular class of plaintiffs.<sup>181</sup>

### C. Justice Breyer's Dissenting Opinion

In his dissent in *Summers*, Justice Breyer proposed that the Court adopt a “realistic threat” test for determining when an injury is sufficiently imminent and concrete for standing.<sup>182</sup> Although acknowledging that the Court had sometimes used the term “imminent” as a test in its standing decisions, he argued that the majority’s opinion wrongly used the term to prohibit standing.<sup>183</sup> In contrast, prior decisions had used the term to reject standing only when the alleged harm “was merely ‘conjectural’ or ‘hypothetical’ or otherwise speculative.”<sup>184</sup> Justice Breyer contended that the majority’s use of the imminent test was

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<sup>177</sup> 555 U.S. at 500.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)).

<sup>180</sup> *Id.*

<sup>181</sup> See *id.*; *Lujan*, 504 U.S. at 579–81 (Kennedy, J., concurring in part and concurring in the judgment); Mank, *Implications for Future Standing Decisions*, *supra* note 1, at 10,963–64.

<sup>182</sup> See 555 U.S. at 503–09.

<sup>183</sup> *Id.* at 504–06.

<sup>184</sup> *Id.* at 504 (quoting *Lujan*, 504 U.S. at 560); see also Mank, *Standing and Statistical Persons*, *supra* note 1, at 668.

unsuitable if a plaintiff was already injured, as was the case in *Summers*.<sup>185</sup> Furthermore, standing should not be denied if “there is a *realistic likelihood* that the challenged future conduct will, in fact, recur and harm the plaintiff.”<sup>186</sup> Justice Breyer argued that the Court’s prior standing decisions demanded only that a plaintiff establish a “realistic threat” of injury, which does not require more “than the word ‘realistic’ implies.”<sup>187</sup> Although he conceded that the plaintiffs could not predict where and when their members would be harmed by the Service’s sale of salvage timber, Justice Breyer reasoned that there was a realistic threat that some of the thousands of members of the plaintiff organizations would likely be harmed in the reasonably near future.<sup>188</sup> Accordingly, Justice Breyer concluded that the plaintiffs satisfied the Court’s standing requirements.<sup>189</sup> If it is likely that at least one member of the plaintiff organizations will meet all standing criteria in the near future, Justice Breyer reasoned that federal courts should recognize Article III standing even if a court does not know the details of the specific harm that may occur.<sup>190</sup>

Perhaps anticipating that the issue might arise in the future, Justice Breyer argued that the plaintiffs would have had standing if Congress expressly sought to give standing to groups like the plaintiffs, stating:

To understand the *constitutional* issue that the majority decides, it may prove helpful to imagine that Congress enacted a *statutory* provision that expressly permitted environmental groups like the respondents here to bring cases just like the present one, provided (1) that the group has members who have used salvage-timber parcels in the past and are likely to do so in the future, and (2) that the group’s members have opposed Forest Service timber sales in the past (using notice, comment, and appeal procedures to do so) and will likely use those procedures to oppose salvage-timber sales in the future. The majority cannot, and does not, claim that such a statute would be unconstitutional.<sup>191</sup>

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<sup>185</sup> 555 U.S. at 503–04 (Breyer, J., dissenting).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 506.

<sup>188</sup> *Id.* at 506–09.

<sup>189</sup> *Id.*

<sup>190</sup> See *id.* at 506–07; Mank, *Implications for Future Standing Decisions*, *supra* note 1, at 10,965.

<sup>191</sup> *Summers*, 555 U.S. at 502–03 (Breyer, J., dissenting) (citations omitted).

In making the claim that the “majority cannot, and does not, claim that such a statute would be unconstitutional,” Justice Breyer cited *Massachusetts v. EPA* for support,<sup>192</sup> which Justice Kennedy joined and Justice Scalia and the three other members of the *Summers* majority dissented.<sup>193</sup> Based on Justice Kennedy’s previous decisions in other major standing cases, Justice Breyer appeared to rely on Justice Kennedy for support in future cases if Congress were to explicitly define injury in fact as an injury similar to the one suffered by the plaintiffs in *Summers*.<sup>194</sup> Thus, *Summers*, like *Lujan*, *Akins* and *Massachusetts v. EPA*, demonstrated both the importance of Justice Kennedy’s vote and his belief that Congress has significant authority under Article III to define a constitutional concrete injury.<sup>195</sup>

#### IV. DIVIDED LOWER COURT DECISIONS ON INFORMATIONAL STANDING

Lower courts are divided in environmental cases where plaintiffs have sought standing based on alleged injuries resulting from the government’s, or private defendant’s, failure to provide information about their environmental impacts.<sup>196</sup> In *Foundation on Economic Trends v. Lyng*, a case decided prior to *FEC v. Akins*, the D.C. Circuit questioned whether informational standing alone could meet the Article III injury in fact requirement.<sup>197</sup> In contrast, citing *Akins*, a divided panel of the Sixth Circuit in *American Canoe Association, Inc. v. City of Louisa Water & Sewer Commission* concluded that environmental groups had standing to seek information from the government about water pollution issues, pursuant to the citizen suit provision of the Clean Water Act, that would assist their members’ understanding of pollution issues and legislative proposals.<sup>198</sup> Most recently, the Ninth Circuit in *Wilderness Society Inc. v. Rey* interpreted *Summers* and *Akins* to implicitly restrict the scope of informational standing to statutes that give plaintiffs an explicit right to information from the government.<sup>199</sup>

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<sup>192</sup> *Id.* at 504 (citing 549 U.S. 497, 516–518 (2007)).

<sup>193</sup> Compare *id.* at 488 (majority opinion) (listing members of the Court joining the majority opinion and dissenting opinion) with *Massachusetts v. EPA*, 549 U.S. at 501 (listing members of the Court joining the majority opinion and dissenting opinion).

<sup>194</sup> See 555 U.S. at 502–03 (Breyer, J., dissenting).

<sup>195</sup> See *infra* notes 338–401 and accompanying text.

<sup>196</sup> See generally *Am. Canoe Ass’n v. City of Louisa Water & Sewer Comm’n*, 389 F.3d 536 (6th Cir. 2004); *Found. on Econ. Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991).

<sup>197</sup> *Lyng*, 943 F.2d at 84–85. See generally *FEC v. Akins*, 524 U.S. 11 (1998).

<sup>198</sup> 389 F.3d at 545–46; see *infra* notes 238–300 and accompanying text.

<sup>199</sup> See 622 F.3d 1251, 1257–58 (9th Cir. 2010); *infra* notes 301–355 and accompanying text.

A. Foundation on *Economic Trends v. Lyng*: *The D.C. Circuit Suggests Limiting Informational Standing to Informational Injuries*

In *Lyng*, the D.C. Circuit expressed doubts regarding whether informational standing alone can meet the Article III injury in fact requirement, but did not actually decide the issue.<sup>200</sup> The plaintiffs—including a private nonprofit organization active in issues of biotechnology and genetics engineering—sought an injunction and a declaratory judgment against officials of the United States Department of Agriculture (USDA).<sup>201</sup> The plaintiffs sought an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA) regarding the USDA’s “germplasm preservation program.”<sup>202</sup> The USDA had undertaken a variety of actions to preserve and expand a diverse plant genetic base to assure the nation’s food supply, but there was no specific “germplasm preservation program.”<sup>203</sup> “On cross-motions for summary judgment, the trial court held that the plaintiffs failed to identify ‘a particular proposal for federal action’ or ‘any revisions or changes taken by the defendants in the germplasm program that would trigger the obligation to prepare an [EIS] . . . .’”<sup>204</sup>

The trial court did not address standing concerns because the defendants did not challenge the issue.<sup>205</sup> After the trial court granted summary judgment, the Supreme Court issued its *Lujan v. National Wildlife Federation* decision.<sup>206</sup> On appeal, the D.C. Circuit decided that *National Wildlife Federation* required it to first consider whether the plaintiffs had standing.<sup>207</sup>

*Lyng* reviewed previous D.C. Circuit decisions that had discussed “informational standing” as a basis for standing and then considered whether those cases were still good law in light of *National Wildlife Federation*.<sup>208</sup> In *Scientists’ Institute for Public Information, Inc. (SIPI) v. Atomic Energy Commission*, the D.C. Circuit suggested, in a footnote, that the plaintiff might have informational standing because its organizational purpose—distributing scientific information to the public—was nega-

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<sup>200</sup> 943 F.2d at 84–85; see also *Am. Canoe Ass’n*, 389 F.3d at 547–50 (Kennedy, J., concurring in part and dissenting in part) (discussing the *Lyng* majority’s criticism of informational standing favorably).

<sup>201</sup> *Lyng*, 943 F.2d at 80.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 80–81.

<sup>204</sup> *Id.* at 82.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Lyng*, 943 F.2d at 80.

<sup>208</sup> *Id.* at 80, 82–85.

tively affected by the Agency's failure to provide an EIS.<sup>209</sup> While a previous D.C. Circuit decision erroneously characterized *SIPI* as holding that standing could be based on an informational injury,<sup>210</sup> *Lyng* correctly observed that the informational standing footnote in *SIPI* was not necessary to the decision in that case.<sup>211</sup> In *Action Alliance of Senior Citizens v. Heckler*, the D.C. Circuit held that organizations devoted to advising senior citizens about age discrimination and other matters had standing to challenge regulations restricting the flow of public information concerning an agency's compliance with the Age Discrimination Act of 1975 because such restrictions injured the plaintiff through the "alleged inhibition of their daily operations."<sup>212</sup>

Citing *Action Alliance* and *SIPI*, the D.C. Circuit in *National Wildlife Federation v. Hodel* endorsed informational standing by stating that "for affiants voicing environmental concerns . . . the elimination of the opportunity to see and use an EIS prepared under federal law does constitute a constitutionally sufficient injury on which to ground standing."<sup>213</sup> It was not clear, however, that the Department of Interior (Interior) violated NEPA when it delegated its authority to the states to approve mining plans on federal lands—a process governed by NEPA when performed by federal authorities.<sup>214</sup> Furthermore, prior courts did not indicate whether NEPA provided plaintiffs with the right to demand that Interior issue EISs of new mines approved by state authorities.<sup>215</sup> Nevertheless, the D.C. Circuit concluded that the plaintiffs suffered an informational injury because the plaintiff could no longer request an EIS, and therefore lost the "ability to evaluate and oppose future mining."<sup>216</sup>

In *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, the D.C. Circuit endorsed the plaintiffs' informational standing theory, but concluded for other reasons that the plaintiffs lacked standing.<sup>217</sup> The court agreed with the plaintiffs' informational standing theory, stating "[a]llegations of injury to an organization's

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<sup>209</sup> See 481 F.2d at 1086–87 n.29; see also *Lyng*, 943 F.2d at 83 (discussing *SIPI*).

<sup>210</sup> *Sierra Club v. Andrus*, 581 F.2d 895, 900 n.16 (1978), *rev'd on other grounds*, 442 U.S. 347 (1979).

<sup>211</sup> 943 F.2d at 83.

<sup>212</sup> 789 F.2d 931, 937–38 (D.C. Cir. 1986); see also *Lyng*, 943 F.2d at 84 (discussing *Action Alliance*).

<sup>213</sup> 839 F.2d 694, 712 (D.C. Cir. 1988); see also *Lyng*, 943 F.2d at 84 (discussing *Hodel*).

<sup>214</sup> See *Hodel*, 839 F.2d at 712.

<sup>215</sup> See *id.* at 711–12; *Lyng*, 943 F.2d at 84 (discussing *Hodel*).

<sup>216</sup> *Hodel*, 839 F.2d at 712.

<sup>217</sup> 901 F.2d 107, 122–23 (D.C. Cir. 1990); see also *Lyng*, 943 F.2d at 84 (discussing *Competitive Enter. Inst.*).

ability to disseminate information may be deemed sufficiently particular for standing purposes where that information is essential to the injured organization's activities."<sup>218</sup> The court, however, held that the plaintiff lacked standing because they wanted information about traffic fatalities, not environmental issues, and thus were "outside the sphere of any definition of injury adopted in NEPA cases."<sup>219</sup>

Although acknowledging that *Hodel* and *Competitive Enterprise Institute* endorsed informational standing, the *Lyng* decision held that the D.C. Circuit had "never sustained an organization's standing in a NEPA case solely on the basis of 'informational injury,' that is, damage to the organization's interest in disseminating the environmental data an impact statement could be expected to contain."<sup>220</sup> The court realized that "if the *injury in fact* is the lack of information about the environmental impact of agency action, it follows that the injury is *caused* by the agency's failure to develop such information in an impact statement and can be *redressed* by ordering the agency to prepare one."<sup>221</sup> The court noted, however, that adopting such an expansive approach would raise complications.<sup>222</sup> For example, a court might do away with the standing requirement in NEPA cases unless the organization alleged that the information they required did not concern the environment.<sup>223</sup> Additionally, "[t]he proposition that an organization's desire to supply environmental information to its members, and the consequent 'injury' it suffers when the information is not forthcoming in an impact statement, establishes standing [but] *without more* [it] also encounters the obstacle of *Sierra Club v. Morton*."<sup>224</sup> In *Morton*, the Court concluded that it did not matter how long the Sierra Club had been interested in the issue or how qualified the organization was in assessing environmental issues, interest and qualification alone were inadequate to allow standing.<sup>225</sup> Accordingly, the *Lyng* court reasoned that standing could not be conferred based on a mere interest.<sup>226</sup>

The *Lyng* court also observed that the Supreme Court in *United States v. Richardson* "rejected a similar claim of informational standing

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<sup>218</sup> *Competitive Enter. Inst.*, 901 F.2d at 122.

<sup>219</sup> *Id.* at 123; see also *Lyng*, 943 F.2d at 84 (discussing *Competitive Enter. Inst.*).

<sup>220</sup> 943 F.2d at 84.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 84-85 (citations omitted).

<sup>225</sup> *Sierra Club v. Morton*, 405 U.S. at 727, 739 (1972); see also *Lyng*, 943 F.2d at 85 (discussing *Morton*).

<sup>226</sup> 943 F.2d at 85.

on the ground that the effect on the plaintiff there from the lack of information was undifferentiated and common to all members of the public."<sup>227</sup> The *Lyng* court thus reasoned that there was no basis to treat a request for information from an organization, such as the plaintiff's, differently from the individual request for information rejected in *Richardson*.<sup>228</sup> Additionally, the *Lyng* court warned that plaintiffs could use the theory of informational injury to demand information from agencies pursuant to NEPA about any of their daily operations.<sup>229</sup> The Court suggested that if informational injury could confer standing, then a potential plaintiff could have standing anytime an agency could not create the requested information.<sup>230</sup>

The *Lyng* court did not decide whether the plaintiffs had standing because it concluded that the Supreme Court's decision in *National Wildlife Federation* precluded their case under section 702 of the Administrative Procedure Act (APA).<sup>231</sup> The *Lyng* court interpreted *National Wildlife Federation* to require NEPA plaintiffs to identify a particular agency action that triggered a duty to prepare an EIS.<sup>232</sup> The court considered NEPA suits without a triggering event to be requests for information relating to an agency's day-to-day operations that should therefore be rejected.<sup>233</sup> The court also concluded that the trial court should have dismissed the complaint for lack of subject matter jurisdiction.<sup>234</sup> This conclusion derived from the understanding that the plaintiff's request for information about the USDA's "germplasm preservation program" was really a request for information about daily operations similar to those made in *National Wildlife Federation*.<sup>235</sup> The *Lyng* decision did not bar all requests for information under NEPA, but limited informational requests to cases where a particular agency action triggers an injury to the plaintiff.<sup>236</sup> Although it did not prohibit informational standing claims under NEPA, the *Lyng* court suggested that standing

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<sup>227</sup> *Id.* (discussing *United States v. Richardson*, 418 U.S. 166, 176–80 (1974)).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* (discussing 5 U.S.C. § 702 (2006) and *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990)).

<sup>232</sup> *Lyng*, 943 F.2d at 85.

<sup>233</sup> *Id.* at 85–86.

<sup>234</sup> *Id.* at 86–87.

<sup>235</sup> *Id.*

<sup>236</sup> *See id.* at 87.



should be limited to those circumstances where plaintiffs may invoke informational injury.<sup>237</sup>

B. *American Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Commission: A Divided Sixth Circuit Endorses Informational Standing Under the Citizen Suit Provision of the Clean Water Act*

1. Panel Majority Holds Plaintiffs Have Informational Standing

In a post-*Akins* decision, a divided panel of the Sixth Circuit concluded that environmental groups had standing to seek information from the government about water pollution issues pursuant to the citizen suit provision of the Clean Water Act (CWA) if it would assist their members in understanding pollution issues and legislative proposals.<sup>238</sup> Two organizational plaintiffs filed a CWA citizen suit in federal court alleging that the defendants violated their National Pollution Discharge Elimination System permit and various provisions of the CWA.<sup>239</sup> The court dismissed the complaint for lack of subject matter jurisdiction because it concluded that the plaintiffs did not meet standing requirements.<sup>240</sup> The Sixth Circuit panel, however, decided that the plaintiffs had standing and reversed and remanded the case for further proceedings.<sup>241</sup>

a. *Standing for Kash's Recreational and Informational Injuries*

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc.*, a case analyzed by the Sixth Circuit in *American Canoe*, the Supreme Court held that the plaintiffs had standing to sue pursuant to the CWA citizen suit provision because they avoided swimming and recreational activities in a river due to "reasonable concerns" about pollution released by the defendant.<sup>242</sup> In *American Canoe* the Sixth Circuit concluded that Daniel Kash, a member of the Sierra Club, also had standing to sue under the CWA citizen suit provision.<sup>243</sup> The plaintiff alleged that he used the Big Sandy River for recreation in the past and hoped to in the future, but declined to do so currently because of the

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<sup>237</sup> See *id.* at 85–87.

<sup>238</sup> *Am. Canoe Ass'n*, 389 F.3d at 546.

<sup>239</sup> *Id.* at 538.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 538–39, 546.

<sup>242</sup> 528 U.S. 167, 183–85 (2000).

<sup>243</sup> 389 F.3d at 540–43.

pollution the defendants released into the river.<sup>244</sup> The Sixth Circuit determined that such “averments are virtually indistinguishable from those that the Court found sufficient to establish an injury in fact in *Laidlaw*,” and, accordingly that the Sierra Club had representational standing to sue on behalf of its injured member.<sup>245</sup>

Additionally, the Sixth Circuit panel concluded that the Sierra Club had standing to sue for such informational injuries because “[t]he averments of its member, Kash, establish that the lack of information caused an injury beyond the ‘common concern for obedience to law.’”<sup>246</sup> Kash’s affidavit asserted that the defendants’ failure to provide the public with statutorily required information about the amount of pollution it released into the Big Sandy River deprived him of the ability to assess the river’s safety.<sup>247</sup> According to the court, these allegations constituted “a concrete and particularized injury” and established standing.<sup>248</sup> In a footnote, the court acknowledged that federal courts of appeals had disagreed over whether plaintiffs without standing to sue for a defendant’s discharge violations could have standing to sue for its violations of monitoring and reporting requirements.<sup>249</sup> The Sixth Circuit determined it was unnecessary to resolve that issue because, by representing its members, the Sierra Club had standing to sue the defendants for their discharge violations.<sup>250</sup>

Furthermore, the Sixth Circuit determined that the Sierra Club demonstrated that Kash’s injury was “fairly traceable to the . . . allegedly unlawful conduct [of the defendants] and likely to be redressed by the requested relief.”<sup>251</sup> The court reasoned that plaintiffs’ informational injury would have been redressed had the defendants met their monitoring and reporting obligations.<sup>252</sup> Similarly, Kash’s aesthetic and recreational injury from the pollution in the Big Sandy River could be traced plausibly to defendants’ effluent discharges and would be redressed by a finding against the defendants.<sup>253</sup> Thus, plaintiffs’ claim

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<sup>244</sup> *Id.* at 540–42.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 542 (quoting *L. Singer & Sons v. Union Pac. R.R. Co.*, 311 U.S. 295, 303 (1940)).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Am. Canoe*, 389 F.3d at 542 n.1.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 542 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

<sup>252</sup> *Id.* at 543.

<sup>253</sup> *See id.*

was sufficient to survive defendants' motion to dismiss for lack of standing.<sup>254</sup>

b. *Organizational Standing for the American Canoe Association and Sierra Club to Sue on Their Own Behalf for the Defendants' Monitoring and Reporting Violations*

In addition to claiming standing as representatives of their members, the American Canoe Association and the Sierra Club alleged that the defendants' monitoring and reporting violations injured their organizations, and thus provided them with organizational standing independent of their representative capacity to sue on behalf of their members.<sup>255</sup> The Sixth Circuit recognized Supreme Court precedent for the principle that an association may sue for its own injuries even if its members also have standing.<sup>256</sup> The plaintiff organizations alleged an informational injury sufficient for standing because the defendants' violations hindered their efforts to research and report on the compliance of Kentucky dischargers, and to propose and lobby for legislation to limit a facility's discharge to protect water quality.<sup>257</sup> The plaintiff organizations relied on *Akins*, where the Court found an informational injury under the Federal Election Campaign Act, and *Public Citizen v. U.S. Department of Justice*, where the Court recognized informational standing pursuant to the Federal Advisory Committee Act (FACA).<sup>258</sup> The Sixth Circuit concluded that the plaintiff's informational injury under the CWA was analogous to both cases.<sup>259</sup>

The Sixth Circuit acknowledged that *Akins* did not specify whether Congress can create standing by simply establishing a statutory right to information or whether there must be an additional plus factor.<sup>260</sup> Yet, the court concluded that a plus factor existed.<sup>261</sup> In coming to this conclusion, the Sixth Circuit compared *Akins* to the Court's decision in

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<sup>254</sup> *See id.*

<sup>255</sup> *Am. Canoe*, 389 F.3d at 544.

<sup>256</sup> *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 545 (citing *Akins*, 524 U.S. at 24–25). *Akins* emphasized the importance of information relating to the fundamental right to vote in finding standing. 524 U.S. at 24–25 (“We conclude that . . . the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.”).

<sup>261</sup> *See Akins*, 389 F.3d at 546.

*Public Citizen*.<sup>262</sup> In *Public Citizen*, the Court concluded that there was a low threshold for informational standing under the Freedom of Information Act (FOIA) and plaintiffs had to show only that the Agency refused to provide specific records upon request.<sup>263</sup> Accordingly, the Court held plaintiffs seeking information under FACA had standing.<sup>264</sup> In light of *Public Citizen*, the Sixth Circuit did not interpret *Akins* to require any additional plus factor for standing if a statute grants a plaintiff the right to information that was denied.<sup>265</sup>

To the extent that *Akins* implicitly requires a plus factor for informational standing, such as an additional reason for needing the information, the Sixth Circuit concluded that this demand is satisfied in *American Canoe*.<sup>266</sup> Consequently, the court observed that “it is difficult to imagine what information would not make a citizen a better-informed voter, or would not affect her ability to participate in some workings of government.”<sup>267</sup> The Sixth Circuit therefore determined that the monitoring and reporting information sought by the plaintiffs was similar enough to the information sought in *Akins* and *Public Citizen* to grant standing and find informational injury.<sup>268</sup>

The Sixth Circuit held that the injury alleged by the American Canoe Association and the Sierra Club was sufficient to grant informational standing.<sup>269</sup> Distinguishing the Court’s rejection of pure ideological standing in *Sierra Club v. Morton*, the court in *American Canoe* explained that the plaintiffs did not base their claims solely on an ideological or societal belief.<sup>270</sup> Instead, the Sixth Circuit reasoned that the plaintiffs demonstrated an informational injury because the defendants’ failure to adequately monitor and report their discharges harmed the plaintiffs’ organizational interests.<sup>271</sup> The court supported

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<sup>262</sup> *Id.* at 545–46.

<sup>263</sup> *See* 491 U.S. at 449.

<sup>264</sup> *See id.*

<sup>265</sup> *See Am. Canoe*, 389 F.3d at 545–46 (stating that plaintiff’s generalized, but not abstract, grievance does not prohibit standing because the defendant’s disobeyed the law “in failing to provide information that the plaintiff’s allegedly need,” and thus it was not the type of grievance “condemned in *Akins*”).

<sup>266</sup> *Id.* at 546.

<sup>267</sup> *Id.* (citing *Akins*, 524 U.S. at 21; *Public Citizen*, 491 U.S. at 449).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* (citing *Morton*, 405 U.S. at 739).

<sup>271</sup> *Am. Canoe*, 389 F.3d at 546.

its decision with a detailed list of specific harms that the plaintiff suffered as a result of the defendants' actions.<sup>272</sup>

The Sixth Circuit also relied on the Court's decision in *Havens Realty Corp. v. Coleman*, a Fair Housing Act case, for the principle that injuries to an organization's operations are cognizable injuries for standing.<sup>273</sup> The Court in *Havens* found that the plaintiff organization had standing to sue because the defendant owner of an apartment complex harmed the plaintiff by engaging in racial steering practices that injured the plaintiff's ability to provide housing counseling and referral services to its members.<sup>274</sup> In *American Canoe*, the Sixth Circuit relied on the reasoning that "[s]uch concrete an [sic] demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interest . . . ."<sup>275</sup> Thus, the *American Canoe* court recognized that the plaintiffs suffered informational injuries as a result of the defendants' failure to provide information required by the CWA.<sup>276</sup> Therefore, they had organizational standing because the defendants' withholding of information hampered their ability to provide important information to their members and engage in legislative reform initiatives.<sup>277</sup>

## 2. Judge Kennedy's Concurring and Dissenting Opinion

Judge Cornelia G. Kennedy agreed with the majority that the Sierra Club had representational standing because the defendants' actions had injured one of its members.<sup>278</sup> However, she disagreed with the majority's decision that the American Canoe Association had informational standing.<sup>279</sup> Judge Kennedy relied on the D.C. Circuit's opinion in *L yng* to question whether an informational injury, without

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<sup>272</sup> *Id.* (discussing the importance of the requested information to both plaintiff organization's operations and thus their fulfillment of standing requirements under *Akins*, despite their general interest that environmental laws be faithfully executed.)

<sup>273</sup> *See id.* at 547 (citing 455 U.S. 363, 379 (1982)).

<sup>274</sup> 455 U.S. at 379.

<sup>275</sup> 389 F.3d at 547 (quoting *Havens*, 455 U.S. at 379).

<sup>276</sup> *Am. Canoe*, 389 F.3d at 546.

<sup>277</sup> *Id.* at 546–47.

<sup>278</sup> *Id.* at 547 (Kennedy, J., concurring in part and concurring in the judgment in part and dissenting in part).

<sup>279</sup> *Id.* Since the Sierra Club had representational standing on behalf of its members, Judge Kennedy saw no need to reach the issue of whether it had informational standing. *Id.*

more, is sufficient to satisfy the injury in fact requirement.<sup>280</sup> Additionally, she interpreted the Supreme Court's decision in *Morton* to hold that informational injuries alone are insufficient to satisfy the injury in fact requirement.<sup>281</sup>

Judge Kennedy concluded her discussion of *Lyng* and *Morton* by noting the potential contradiction in granting standing to associations injured by a lack of access to information for problems of special interest, and yet not completely eliminating standing requirements for other organizations and citizens.<sup>282</sup> By this reasoning, Judge Kennedy cast doubt upon the broad adoption of an informational standing theory in *American Canoe*.<sup>283</sup> Judge Kennedy rejected the majority's novel interpretation of *Akins* and *Public Citizen* in part because it was broader than that adopted by any other federal circuit court of appeals.<sup>284</sup> In creating such a permissive standard, Judge Kennedy observed, the majority ignored the precedent set by *Lujan* and *Morton*, and interpreted *Akins* and *Public Citizen* far more broadly than the Court intended.<sup>285</sup>

Although Judge Kennedy acknowledged that *Akins* and *Public Citizen* found specific injuries based on a lack of information, she distinguished those cases because they involved statutes conferring a specific right to information upon certain individuals and groups.<sup>286</sup> By contrast, Judge Kennedy suggested that the CWA does not create a specific right to any information.<sup>287</sup> Nevertheless, the CWA requires the discharger to file permit compliance information, which is then available as a public record.<sup>288</sup> Judge Kennedy, however, concluded the information rights under the CWA are secondary to its environmental protection goals and are thus significantly different than the rights in *Akins* and *Public Citizen*, where the statutes at issue were explicitly created to provide the voting public with pertinent information.<sup>289</sup>

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<sup>280</sup> *Id.* at 547–48 (citing 943 F.2d at 84–85).

<sup>281</sup> *Id.* at 548 (Kennedy, J., concurring in part and concurring in the judgment in part, and dissenting in part). However, *Morton* did not expressly use the term “informational standing” and instead explicitly rejected giving the plaintiff standing based upon its “special interest” in environmental issues. *See* 405 U.S. at 739.

<sup>282</sup> *Am. Canoe*, 389 F.3d at 548 (Kennedy, J., concurring in part and concurring in the judgment in part, and dissenting in part).

<sup>283</sup> *See id.*

<sup>284</sup> *See id.*

<sup>285</sup> *Id.*

<sup>286</sup> *See id.* at 549.

<sup>287</sup> *Id.*

<sup>288</sup> *Am. Canoe*, 389 F.3d at 549 (Kennedy, J., concurring in part and concurring in the judgment in part, and dissenting in part).

<sup>289</sup> *Id.*

Judge Kennedy feared that the majority's interpretation of informational standing rights would encourage future litigation and allow "any other national organization with a passing interest in rivers or the environment [to] prosecut[e] a claim."<sup>290</sup> Judge Kennedy characterized the plaintiff's injury as the basic common interest of invested individuals and organizations to "uphold[] the rule of law," and therefore too broad to allow standing.<sup>291</sup> She distinguished *Havens*, which implicated broad societal interests because the harms were far more concentrated.<sup>292</sup> Specifically, Judge Kennedy viewed the discriminatory harms to the *Havens*' plaintiff organization's work of promoting minority group access to suitable apartments as more "specific, cognizable, and particular" than the plaintiff organization's generalized grievance in this case.<sup>293</sup> Judge Kennedy dismissed the plaintiff organization's need to access information as too general to establish standing because it would apply to any organization with a special interest in preserving the environment.<sup>294</sup>

Finally, Judge Kennedy expressed doubt as to whether the inability to access this information could even be considered an injury.<sup>295</sup> The American Canoe Association alleged that, without the information at issue, they could not research and report on the compliance status of pollutant emitters in Kentucky, propose legislation, or bring litigation to protect water from harmful discharges.<sup>296</sup> In response, Judge Kennedy maintained that there was no evidence that the twelve alleged reporting violations impeded the plaintiff organization's work with its members or legislative proposals, particularly in light of the fact that the plaintiffs' complaint identified 405 violations.<sup>297</sup> Therefore, Judge Kennedy concluded the American Canoe Association's alleged injury was not sufficiently concrete to satisfy the injury in fact requirement.<sup>298</sup>

The Ninth Circuit's subsequent decision in *Wilderness Society* substantially supports Judge Kennedy's narrow interpretation of *Akins* and

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<sup>290</sup> *Id.*

<sup>291</sup> *See id.*

<sup>292</sup> *See id.* at 549–50.

<sup>293</sup> *Id.* at 550 (Kennedy, J., concurring in part and concurring in the judgment in part, and dissenting in part).

<sup>294</sup> *Am. Canoe*, 389 F.3d at 549–50.

<sup>295</sup> *Id.* at 550.

<sup>296</sup> *Id.*

<sup>297</sup> *See id.* ("[I]f the organization or any of its members were directly injured by the pollution in some concrete fashion (similar to the direct injury that Sierra Club can and did claim), the organization could easily use the 405 violations to provide the basis for a lawsuit.")

<sup>298</sup> *Id.*

*Public Citizen* as limited to statutes granting the public an explicit right to specific information.<sup>299</sup>

C. *Wilderness Society v. Rey: The Ninth Circuit Interprets Summers to Restrict Procedural Standing to Concrete Injuries*

In *Wilderness Society*, the Ninth Circuit interpreted the Supreme Court's *Summers* decision to restrict procedural standing to only those plaintiffs who can demonstrate a concrete injury.<sup>300</sup> The Ninth Circuit restricted the scope of informational standing to prevent plaintiffs from using it to avoid *Summers*'s limitation of procedural standing.<sup>301</sup> The Ninth Circuit implicitly used a limited interpretation of *Akins*'s recognition of informational standing for suits brought under statutes that explicitly provide the public with the right to particular information from the government.<sup>302</sup> The Ninth Circuit further concluded that, in light of *Summers*, when an environmental statute only promotes public participation and does not explicitly provide the public with a right to information about certain government projects, it should be read narrowly.<sup>303</sup> Otherwise a broad doctrine of informational standing would allow plaintiffs to circumvent *Summers*'s principle that violations of a statute are not injuries in fact unless they are connected to a concrete project or result in an informational harm.<sup>304</sup>

The Forest Service Decisionmaking and Appeals Reform Act (Appeals Reform Act) requires the Secretary of Agriculture, acting through the U.S. Forest Service (Forest Service), to create notice and comment procedures for proposed actions related to "projects and activities implementing land and resource management plans."<sup>305</sup> Additionally, the Appeals Reform Act compels the Secretary to adjust the appeals process for decisions regarding such projects.<sup>306</sup> In 2003, the Forest Service restricted, through its regulations, the range and accessibility of its notice, comment, and appeals procedures under the Appeals Reform Act.<sup>307</sup> Various environmental organizations, including The Wilderness Society (TWS), filed facial challenges to three portions of the new regu-

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<sup>299</sup> See *infra* notes 300–354 and accompanying text.

<sup>300</sup> 622 F.3d at 1260.

<sup>301</sup> See *id.*

<sup>302</sup> See *id.* at 1258–60; *infra* notes 329–338 and accompanying text.

<sup>303</sup> See *Wilderness Soc'y*, 622 F.3d at 1259–60.

<sup>304</sup> *Id.* at 1260.

<sup>305</sup> 16 U.S.C. § 1612 (2006); *Wilderness Soc'y*, 622 F.3d at 1253.

<sup>306</sup> 16 U.S.C. § 1612(a)i; *Wilderness Soc'y*, 622 F.3d at 1253.

<sup>307</sup> *Wilderness Soc'y*, 622 F.3d at 1253.



lations.<sup>308</sup> Specifically, TWS alleged the regulations violated the Appeals Reform Act by inappropriately restricting the notice, comment, and appeals processes.<sup>309</sup> In 2006, the court ruled in favor of TWS and granted it declaratory and injunctive relief.<sup>310</sup>

On appeal to the Ninth Circuit, the government argued the plaintiffs did not have standing because of *Summers*.<sup>311</sup> The trial court, prior to the *Summers* decision, found that TWS's deprivation of right to notice and comment was an injury giving rise to procedural standing.<sup>312</sup> The court also held that TWS had standing because the Forest Service's withholding of notice regarding its actions constituted an informational injury.<sup>313</sup> On appeal, the Forest Service argued the plaintiffs lacked procedural standing in light of *Summers*'s holding that mere denial of a procedural right without an additional harm is inadequate for standing.<sup>314</sup> Moreover, the Forest Service contended that 36 C.F.R. section 215.20(b) remedied the informational injuries upon which plaintiffs claimed standing.<sup>315</sup>

In response to the government's argument that the *Summers* decision narrowed standing law, the plaintiffs made two separate arguments depending upon the regulation at issue.<sup>316</sup> Regarding its challenge to section 215.12(f),<sup>317</sup> TWS argued it had standing because it tied the challenge to a particular project at a specific location, and one of its members suffered an aesthetic or recreational injury cognizable pursuant to the Supreme Court's *Laidlaw* decision.<sup>318</sup> By contrast, while TWS acknowledged it did not connect its challenges to sections 215.20(b) and 215.13(a) to a particular project or application, they argued that

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<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at 1253–54. Initially, because TWS failed to allege a waiver of sovereign immunity in its complaint, the trial court could not grant a remedy. *Id.* at 1254. However, the court granted declaratory and injunctive relief after allowing TWS to amend its complaint. *Id.*

<sup>311</sup> *Id.* at 1255.

<sup>312</sup> *Id.*

<sup>313</sup> *Wilderness Soc'y*, 622 F.3d at 1255.

<sup>314</sup> *Id.* (citing *Summers*, 555 U.S. at 496).

<sup>315</sup> *Id.* Section 215.20(b) exempts decisions made by the Secretary or Under Secretary from the notice, comment, and appeals procedures and states that any decision of the Secretary or Under Secretary is final. *Id.* at 1253.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 1255–56. Section 215.12(f) exempts from appeal those projects that the Forest Service categorically excludes from certain NEPA filing requirements based on a finding that they do not have significant environmental impacts. *Id.* at 1253–54.

<sup>318</sup> *Id.* at 1255–56 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)).

*Summers* did not govern because it did not define informational injury.<sup>319</sup> Additionally, TWS asserted a broader theory of informational injury from its inability to participate in the notice and comment process, as well as the Forest Service's procedure for appeal and decision-making.<sup>320</sup> The Ninth Circuit observed that if it accepted TWS's broader approach to informational standing then the Forest Service's standing challenge would fail for each of the three regulations.<sup>321</sup>

The Ninth Circuit concluded that TWS failed to prove that its member suffered recreational and aesthetic injuries sufficient to challenge section 215.12(f).<sup>322</sup> The court acknowledged that *Summers* did not eliminate standing for aesthetic and recreational injuries.<sup>323</sup> However, the Ninth Circuit explained that proving an aesthetic or recreational injury required the plaintiffs to demonstrate that its member (Anderson) "had repeatedly visited an area affected by a project, that he had concrete plans to do so again, and that his recreational or aesthetic interests would be harmed if the project went forward without his having the opportunity to appeal."<sup>324</sup> Although Anderson demonstrated he repeatedly visited the Umpqua National Forest and even authored a hiking book about the area, the court concluded that his general intention to return to the national forest was too vague to confer standing.<sup>325</sup> Specifically, the Ninth Circuit found the asserted interest vague because, even if Anderson planned travel to the Umpqua National Forest in the future, he had not shown sufficient evidence that he would likely visit an area affected by the Forest Service's projects.<sup>326</sup> Even if Anderson established sufficiently concrete plans to return to the forest, he failed to allege that his recreational interests would be harmed.<sup>327</sup> Thus, the Ninth Circuit concluded that TWS failed to demonstrate a recreational or aesthetic injury to Anderson sufficient to establish standing to challenge section 215.12(f).<sup>328</sup>

Most importantly for the purposes of this Article, the Ninth Circuit determined that *Summers* foreclosed TWS's broad theory of informa-

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<sup>319</sup> *Wilderness Soc'y*, 622 F.3d at 1255.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 1257.

<sup>323</sup> *Id.* at 1256.

<sup>324</sup> *Id.*

<sup>325</sup> *Wilderness Soc'y*, 622 F.3d at 1256.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 1257.

<sup>328</sup> *Id.*

tional standing.<sup>329</sup> Prior to the *Summers* decision, the trial court concluded that the plaintiffs suffered an informational injury because the Forest Service's regulations foreclosed their opportunity to comment and appeal, and they "need not assert that any specific injury will occur in any specific national forest that their members visit."<sup>330</sup> TWS acknowledged that because *Summers* "expressly held that deprivation of procedural rights, alone, cannot confer Article III standing,"<sup>331</sup> the trial court's reasoning was no longer valid.<sup>332</sup> On appeal, TWS relied on "the district court's finding that it suffered informational injury resulting from the violation of the obligation to provide notice" pursuant to section 215.20(b),<sup>333</sup> which exempted decisions of the Secretary and Under Secretary of Agriculture from otherwise applicable notice requirements.<sup>334</sup> Furthermore, TWS argued a broader theory of informational injury based on its inability to appeal under each of the three Forest Service provisions.<sup>335</sup> The Ninth Circuit rejected TWS's informational standing arguments because it concluded that *Summers*'s "discussion of procedural injury casts serious doubt on the applicability of informational injury here,"<sup>336</sup> although the Supreme Court had not expressly addressed that issue.<sup>337</sup> Because the Appeals Reform Act provides a specific right to information similar to FOIA, the Ninth Circuit was "not convinced that the doctrine of informational injury can be applied to the statutory framework of the [Appeals Reform Act], regardless of the specific provision."<sup>338</sup>

After reviewing *Akins* and other decisions supporting informational standing, the Ninth Circuit observed that the Appeals Reform Act "must grant a right to information capable of supporting a lawsuit" in order to obtain standing for an informational injury.<sup>339</sup> The court then demonstrated that the notice and appeal provisions in the Appeals Reform Act did not establish a public right to information, but instead simply bestowed a right to participate in the process.<sup>340</sup> Addi-

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<sup>329</sup> See *id.* at 1258, 1260.

<sup>330</sup> *Id.* at 1256 (quoting unpublished trial court opinion).

<sup>331</sup> *Wilderness Soc'y*, 622 F.3d at 1257-58.

<sup>332</sup> See *id.* at 1255.

<sup>333</sup> See *id.* at 1258 (internal quotation omitted).

<sup>334</sup> *Id.* at 1253.

<sup>335</sup> *Id.* at 1258.

<sup>336</sup> *Id.*

<sup>337</sup> See generally *Summers* 555 U.S. 488 (2009).

<sup>338</sup> *Wilderness Soc'y*, 622 F.3d at 1258.

<sup>339</sup> *Id.* at 1259.

<sup>340</sup> *Id.*

tionally, the court clarified that “although an appeal might result in the dissemination of otherwise unavailable information, the statute does not contemplate appeals for this purpose, but to allow the public an opportunity to challenge proposals with which they disagree.”<sup>341</sup> Accordingly, the Ninth Circuit concluded that although the rights to public notice and appeal inherently provide access to information, this is not the same as a right to information.<sup>342</sup>

The Ninth Circuit agreed with the Seventh Circuit’s decision in *Bensman v. United States Forest Service*,<sup>343</sup> which “declined to find an explicit right to information in the text of the [Appeals Reform Act].”<sup>344</sup> *Bensman* distinguished the informational statutes at issue from the Appeals Reform Act.<sup>345</sup> According to *Bensman*, FOIA and FACA are statutes with the sole goal of providing information to the public.<sup>346</sup> Conversely, the goal in the Appeals Reform Act is “to increase public participation in the decision-making process” and as a result, the court found that the Appeals Reform Act does not provide the same right to information.<sup>347</sup> Although the *Bensman* decision only addressed whether the appeal provisions of the Appeals Reform Act established a right to information, the Ninth Circuit in *Wilderness Society* found the Seventh Circuit’s analysis “equally applicable” in concluding that Congress did not intend to provide a right to information when it enacted the Appeals Reform Act’s notice requirement.<sup>348</sup>

Furthermore, the Ninth Circuit interpreted the Supreme Court’s *Summers* decision to implicitly bar the *Wilderness Society*’s plaintiffs’ broad theory of informational standing.<sup>349</sup> The Ninth Circuit reasoned that TWS’s determination of informational injuries would effectively eliminate *Summers*’s core tenet that procedural rights plaintiffs must demonstrate a concrete injury apart from their procedural injury.<sup>350</sup> One of the main difficulties the Ninth Circuit had with TWS’s argument was that it characterized all procedural deprivations as informational losses.<sup>351</sup> If this argument were adopted, the Ninth Circuit be-

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<sup>341</sup> *Id.*

<sup>342</sup> *See id.*

<sup>343</sup> 408 F.3d 945 (7th Cir. 2005).

<sup>344</sup> *Wilderness Soc’y*, 622 F.3d at 1259 (agreeing with *Bensman*, 408 F.3d at 958).

<sup>345</sup> *See* 408 F.3d at 958.

<sup>346</sup> *Id.*

<sup>347</sup> *See id.*

<sup>348</sup> *See Wilderness Soc’y*, 622 F.3d at 1259–60.

<sup>349</sup> *Id.* at 1260.

<sup>350</sup> *See id.*

<sup>351</sup> *Id.*

lieved that it would render *Summers's* procedural injury doctrine meaningless.<sup>352</sup> The Ninth Circuit, therefore, refused to use the theory of informational injury in the framework of procedural rights as recognized in the Appeals Reform Act.<sup>353</sup> Thus, the Ninth Circuit in *Wilderness Society* limited informational standing to statutes that explicitly create a public right to information, and rejected the concept of informational injury for environmental statutes that merely encourage public participation through notice or appeal provisions.<sup>354</sup>

#### V. CONGRESS'S AUTHORITY TO AUTHORIZE INFORMATIONAL STANDING: A VINDICATION OF JUSTICE KENNEDY?

Informational standing is a statutory creation, such as in the Freedom of Information Act, that establishes a public right to information.<sup>355</sup> There is no common law analog to informational standing.<sup>356</sup> Thus, two questions arise. First, are there any constitutional barriers to Congress creating informational standing rights? Second, assuming Congress has some authority to establish informational standing, how clearly must Congress specify whether a plaintiff has a right to particular information?

Justice Kennedy was the only justice to join the majority in *Lujan*, *Summers*, and *Akins*;<sup>357</sup> therefore, any attempt to find a consistent line of reasoning in those cases must begin and end with Justice Kennedy.<sup>358</sup> Justice Kennedy's concurring opinion in *Lujan* offers the most insight into whether Congress may, through statutory rights, recognize injuries that would not have satisfied common law requirements.<sup>359</sup> This opinion may enlarge, albeit marginally, the definition of concrete injury under Article III standing requirements.<sup>360</sup> One may arguably infer

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Wilderness Society*, 622 F.3d at 1257–60.

<sup>355</sup> See *supra* notes 93–144, and accompanying text.

<sup>356</sup> See *supra* notes 104–108 and accompanying text (stating that plaintiffs have standing to seek information pursuant to statutory mandates).

<sup>357</sup> See *Summers v. Earth Island Inst.*, 555 U.S. 488, 489 (2009); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 13 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 556 (1992).

<sup>358</sup> See *supra* notes 119–144, 177–181 and accompanying text; *infra* notes 362–394 and accompanying text.

<sup>359</sup> See Solimine, *supra* note 13, at 1029–30. One broad interpretation of the case is that it “might suggest that Congress can recognize injuries that would not have satisfied common law requirements, at least when statutory, as opposed to constitutional, rights are at issue.” *Id.* at 1030.

<sup>360</sup> See *Lujan*, 504 U.S. at 578; *id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment in part); *infra* notes 362–415 and accompanying text.

from Justice Kennedy's concurring opinions in *Lujan* and *Summers*, as well as the *Akins* decision, that the Supreme Court is likely to give some deference to Congress if it establishes an explicit public right to information along with a relevant citizen suit provision.<sup>361</sup> At the same time, however, courts are less likely to interpret notice or appeal provisions like those in *Wilderness Society* to establish an implicit right to informational standing.

A. *To What Extent May Congress Affect Constitutional Standing Requirements?*

There has been considerable confusion and controversy regarding the extent to which Congress may enact statutes that recognize injuries that would not have satisfied common law requirements.<sup>362</sup> This controversy extends to whether Congress may even enlarge the definition of concrete injury under Article III constitutional standing requirements.<sup>363</sup> Justice Scalia has argued that Article III and broader separation of powers principles limit the authority of Congress to grant standing to plaintiffs who lack a concrete injury.<sup>364</sup> This would prevent federal courts from interfering with the President's Article II authority to enforce federal laws.<sup>365</sup> Nevertheless, Justice Scalia in *Lujan* acknowledged that Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law."<sup>366</sup> Justice Blackmun and many commentators have argued that Justice Scalia's approach to standing, however, has the practical effect of aggrandizing

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<sup>361</sup> See *Summers*, 555 U.S. at 501 (Kennedy, J., concurring in part and concurring in the judgment) (stating that nothing in the statute shows an intent to convey anything more than a procedural right); *Akins*, 524 U.S. at 12 (discussing Congress's constitutional power to authorize the right to sue in federal courts); *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment) (discussing Congress's power to define injuries).

<sup>362</sup> Solimine, *supra* note 13, at 1030.

<sup>363</sup> See YACKLE, *supra* note 12, at 382–97 (discussing Congress's authority to modify prudential standing rules and the controversy regarding whether Congress has authority to affect core constitutional standing requirements); Solimine, *supra* note 13, at 1028–31 (examining different interpretations of congressional authority to alter standing). Whether a statute grants standing is a separate question from whether a statute establishes a private right of action to sue in federal courts, although these two issues intertwine in some cases. See YACKLE, *supra* note 12, at 386.

<sup>364</sup> See *Akins*, 524 U.S. at 36 (Scalia, J., dissenting); *Lujan*, 504 U.S. at 576–78; Scalia, *supra* note 12, at 894–97.

<sup>365</sup> See *Lujan*, 504 U.S. at 577; Scalia, *supra* note 12, at 890–93; Solimine, *supra* note 13, at 1049 (arguing that Justice Scalia and Chief Justice Roberts believe that "Congress cannot tinker with the core constitutional standing requirements, though it might relax the prudential ones").

<sup>366</sup> 504 U.S. at 578.

executive authority and undermining Congress's ability to ensure that the executive branch faithfully enforces the law.<sup>367</sup> Some commentators have sought a middle ground that respects both the executive and congressional role in making and enforcing federal law, as well as a limited but appropriate role for judicial review.<sup>368</sup> Justice Kennedy's concurring opinion in *Lujan* suggests that he may take such a position with respect to Congress's authority to modify standing requirements beyond traditional common law requirements for a concrete injury.<sup>369</sup>

The Supreme Court's analysis of whether Congress has the authority to transcend traditional common law injuries, or even normal constitutional standing requirements, depends in part upon the type of statute at issue.<sup>370</sup> Based on parallels to common law traditions in England and early American federal statutes, the Court has recognized standing where a statute authorizes private persons to bring suit on behalf or as an agent of the United States.<sup>371</sup> By contrast, the Court in *Lujan* limited standing for a citizen suit statute that authorized any person to sue the government for alleged non-enforcement or under-enforcement of an environmental law, finding that Article III requires all plaintiffs in federal courts to demonstrate an injury in fact even if

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<sup>367</sup> *Id.* at 602 (Blackmun, J., dissenting) (noting that the "principal effect" of Justice Scalia's majority opinion's restrictive approach to standing was "to transfer power into the hands of the Executive at the expense—not of the Courts—but of Congress, from which that power originates and emanates"); see Brown, *supra* note 13, at 283; Elliott, *supra* note 44, at 489–90; Solimine, *supra* note 13, at 1050 ("With respect to the argument that a broad reading of Article III standing improperly limits executive power under Article II, some scholars contend that it does not give sufficient weight to the balance, as opposed to the separation, of powers.").

<sup>368</sup> Solimine, *supra* note 13, at 1052. Professor Solimine contends that liberal and conservative critiques both have persuasive arguments that can be reconciled. *Id.* "The liberal critique enhances the power of the judiciary and that of private parties empowered by Congress, at the expense of representative government in general and of the executive branch in particular." *Id.* Conversely, "[t]he conservative critique enhances the power of the President and in theory encourages Congress to exercise its nondelegable oversight and appropriations functions, at the expense of giving space for the executive branch to underenforce or violate federal law." *Id.*

<sup>369</sup> See *Lujan*, 504 U.S. at 579–81 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>370</sup> *Id.* at 576–77 (majority opinion) (discussing whether a specific statute conveys standing); *id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment) (discussing Congress's power to define injuries in statutes).

<sup>371</sup> See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773–78 (2000) (discussing historical background and upholding *qui tam* statute that offered a bounty to a prevailing plaintiff); Solimine, *supra* note 13, at 1037–41 (discussing controversy over whether early *qui tam* statutes are precedent to allow standing where citizen acts as agent of government).

Congress attempts to waive that requirement.<sup>372</sup> Conversely, *Akins* implies that Congress has the authority to broaden standing requirements, at least for statutes giving the public the right to sue to obtain information from the government.<sup>373</sup> It is also important to observe that Congress frequently wants to limit standing beyond the base limits of Article III in order to prevent persons with minimal injuries from filing suit.<sup>374</sup> Accordingly, the Supreme Court has used the “zone of interests” test to deny standing to plaintiffs whose injuries are only marginally related to a statute’s purposes.<sup>375</sup>

Justice Kennedy’s concurring opinion in *Lujan* is probably the most illuminating opinion regarding the authority of Congress to modify common law injury requirements, or even constitutional standing requirements, for a concrete injury. Justice Kennedy agreed with the majority that a plaintiff must demonstrate a concrete injury and that the affiants had failed to do so because they were uncertain as to when they would return to the project sites.<sup>376</sup> He suggested, however, that “[a]s Government programs and policies become more complex and farreaching,” courts should perhaps expand the definition of a concrete injury to include new rights of action that do not correlate to rights recognized traditionally in common law.<sup>377</sup> Justice Kennedy reasoned that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”<sup>378</sup> He tempered that broad pronouncement of congressional authority with the reservation that “[i]n exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.”<sup>379</sup>

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<sup>372</sup> See *Lujan*, 504 U.S. at 578; Solimine, *supra* note 13, at 1028–30.

<sup>373</sup> See *Akins*, 524 U.S. at 19–20; Solimine, *supra* note 13, at 1050 (“*FEC v. Akins*, seem[s] to evince a more generous reading of congressional power to influence standing.”).

<sup>374</sup> *Thompson v. N. Am. Stainless*, 131 S. Ct. 863, 869–70 (2011) (concluding Title VII’s limitation of suits to a “person claiming to be aggrieved” under 42 U.S.C. section 2000e-5(f) includes individual allegedly fired in retaliation for his fiancée’s filing employment discrimination suit, but not to stockholder who might be marginally economically affected by alleged discrimination and who would meet Article III injury requirement).

<sup>375</sup> *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987) (explaining that the “zone of interests” test denies review “if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit”).

<sup>376</sup> *Lujan*, 504 U.S. at 579.

<sup>377</sup> See *id.* at 580.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*



While proclaiming that Congress had some discretionary authority to expand the definition of injuries beyond common law limits, Justice Kennedy acknowledged that separation of powers concerns place limits on the scope of standing.<sup>380</sup> In particular, he observed that “the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government.”<sup>381</sup> In *Lujan*, Justice Kennedy concluded that the citizen suit provision of the Endangered Species Act was problematic to the extent that it purported to extend standing to “any person,” but did not define what type of injury is caused to citizen litigants by the government’s violation of the Act or explain why “any person” is entitled to sue the government to challenge a procedural violation that does not cause a concrete injury in fact to the plaintiff.<sup>382</sup> Justice Kennedy believed that the concrete injury requirement is not just a formality; rather, it ensures the continuance of the adversarial process by necessitating that both parties have a stake in the outcome.<sup>383</sup> Therefore, “the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.”<sup>384</sup>

Justice Kennedy’s argument in *Lujan* is consistent with the Court’s subsequent decision in *Akins*—that it would deny standing for generalized injuries if the harm is both widely shared and also of “an abstract and indefinite nature—for example, harm to the ‘common concern for obedience to law.’”<sup>385</sup> Thus, it was arguably consistent for Justices Kennedy and Souter to concur as they did in *Lujan* and join the majority opinion in *Akins*.<sup>386</sup> In his short concurring opinion in *Summers*, Justice

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<sup>380</sup> See *id.* at 580–81.

<sup>381</sup> *Id.* at 581.

<sup>382</sup> *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>383</sup> *Id.* at 581.

<sup>384</sup> *Id.*

<sup>385</sup> See *Akins*, 524 U.S. at 23 (quoting *L. Singer & Sons v. Union Pac. R. Co.*, 311 U.S. 295, 303 (1940)); *Lujan*, 504 U.S. at 580–81 (Kennedy, J., concurring in part and concurring in the judgment) (stating that a plaintiff must have a concrete injury to have standing, that a mere interest in the proper administration of justice is insufficient for standing, and that there is no numerical limit on how many persons may be concretely injured by a challenged action).

<sup>386</sup> See *Akins*, 524 U.S. at 13 (listing Justices Kennedy and Souter as joining the majority opinion); *Lujan*, 504 U.S. at 579 (Kennedy, J., concurring in part and concurring in the judgment).

Kennedy echoed his views from his *Lujan* concurrence and, therefore, it seems likely that his views have not significantly changed.<sup>387</sup>

Justice Kennedy rejected standing in *Lujan* and *Summers* in part because Congress had not defined what constituted an injury sufficient for standing in the relevant statutes.<sup>388</sup> He suggested, however, that the plaintiffs' injuries might have been sufficient if Congress had established a statutory framework consistent with those injuries.<sup>389</sup> By contrast, Justice Scalia's majority opinions in *Lujan* and *Summers* ridiculed the plaintiffs' injuries as constitutionally deficient because the plaintiffs could not specify when or where they would be injured.<sup>390</sup> It is doubtful that a more carefully drafted statute in either case would have persuaded Justice Scalia that the plaintiffs had constitutionally cognizable injuries.<sup>391</sup> In his *Akins* dissent, Justice Scalia argued that generalized injuries to a large portion of the public are inherently unsuitable for judicial resolution, and must be addressed by the political branches of government.<sup>392</sup> On the other hand, Justice Kennedy joined the majority opinion in *Akins*, which concluded that generalized grievances to a large segment of the public are justiciable if Congress specifies that a class of individuals has the right to particular information or if a large group of individuals suffers at least a small concrete harm.<sup>393</sup> In light of *Akins* and his concurring opinions in *Lujan* and *Summers*, Justice Kennedy appears to believe that Congress has some power to define or redefine what constitutes a cognizable concrete injury under Article III, although Congress may not confer universal standing without defining the requisite injury.<sup>394</sup>

#### B. *How Clearly Must Congress Specify Whether a Plaintiff Has a Right to Particular Information?*

While many individual statutes affect standing questions, Congress rarely attempts to enact comprehensive legislation that would signifi-

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<sup>387</sup> See *supra* notes 177–181 and accompanying text.

<sup>388</sup> See *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment); *supra* notes 177–181 and accompanying text.

<sup>389</sup> See *supra* notes 177–181 and accompanying text.

<sup>390</sup> See *Summers*, 555 U.S. at 495; *Lujan*, 504 U.S. at 563–64.

<sup>391</sup> See Solimine, *supra* note 13, at 1049 (arguing that Justice Scalia and Chief Justice Roberts believe that “Congress cannot tinker with the core constitutional standing requirements, though it might relax the prudential ones”).

<sup>392</sup> See *Akins*, 524 U.S. at 30, 36–37 (Scalia, J., dissenting).

<sup>393</sup> See *id.* at 13, 24–25 (majority opinion).

<sup>394</sup> See Solimine, *supra* note 13, at 1050.

cantly affect standing doctrine or the jurisdiction of Article III courts.<sup>395</sup> In reaction to several restrictive standing decisions by the Supreme Court in the 1970s, some liberal Democratic members of the Senate Judiciary Committee introduced legislation that would have broadly defined both who may sue and the causation requirement; however, none of the proposed legislation was enacted.<sup>396</sup> Some commentators have suggested that federal courts would seriously question the constitutionality of congressional statutes that broaden standing and thereby partially overrule restrictive Supreme Court decisions.<sup>397</sup> Nevertheless, federal courts frequently, if not always, give some weight to legislative intent in determining the standing of potential plaintiffs.<sup>398</sup>

Justice Kennedy's concurring opinion in *Lujan* reveals how the Court is likely to evaluate Congress's authority to modify the concrete injury requirement for standing.<sup>399</sup> His opinion suggests that he would defer to congressional intentions if Congress carefully drafted a statute that explains which individuals are suitable plaintiffs and which types of harms constitute a sufficient injury for standing.<sup>400</sup> In response to Justice Kennedy's opinions, Professor Solimine asked a critical standing question: "How do we know a statute meets Justice Kennedy's test?"<sup>401</sup> To address this question, the statutory text, structure, and legislative history will have to be closely examined.<sup>402</sup> Relying on Justice Kennedy's approach to standing in *Lujan*, Professor Solimine argues that the Court's decisions in *Lujan* and *Akins* "seem more reconcilable than thought by some scholars, given that the citizen suit statute in the latter

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<sup>395</sup> See *id.* at 1052.

<sup>396</sup> *Id.* at 1052–53; see also LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 66, 82–88 (1994) (discussing the positive and negative aspects of proposed legislation to expand standing rights as well as how legislation should ideally be phrased).

<sup>397</sup> See Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 190–92, 226 (2011) (questioning whether the Supreme Court would allow Congress to modify standing doctrine and whether congressional efforts would improve problems with the standing doctrine).

<sup>398</sup> See Solimine, *supra* note 13, at 1053–56 (arguing that while federal courts should give some deference to Congress in deciding standing issues, they should not abdicate judicial responsibility to limit congressional authority if necessary).

<sup>399</sup> See *supra* notes 362–394 and accompanying text.

<sup>400</sup> See *Lujan*, 504 U.S. at 580; Solimine, *supra* note 13, at 1055 (discussing "Justice Kennedy's concurring opinion in [*Lujan*], which suggested that carefully drawn congressional statutes addressing standing should be upheld as constitutional").

<sup>401</sup> See Solimine, *supra* note 13, at 1055 (footnote omitted).

<sup>402</sup> *Id.*

case had different language and a richer jurisprudential meaning giving context to the operative language.”<sup>403</sup>

Another principle that may guide the Court in interpreting the scope of statutory standing rights is that Congress may override the Court’s prudential standing rules, provided the statute does so expressly.<sup>404</sup> This requirement probably does not necessitate the level of specificity required by the clear statement rule of statutory construction.<sup>405</sup> The principle that express statutory language is necessary to override the Court’s prudential standing rules could be extended to suggest that Congress may enlarge Article III standing rights at the margin by, for example, expressly establishing a statutory injury not recognized at common law.<sup>406</sup>

An important question for this Article is whether the environmental statutes at issue in *American Canoe* and *Wilderness Society* are more like the citizen suit statute in *Lujan* or the explicit information statute in *Akins*.<sup>407</sup> The notice and appeal provisions in *Wilderness Society* and the monitoring and reporting obligations in *American Canoe* are more like the vague “any person” language in *Lujan* than the explicit public information statute at issue in *Akins*.<sup>408</sup> Because the *Akins* decision found informational standing rights in a statute that clearly granted voters an

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<sup>403</sup> See *id.* at 1056. In a footnote, Professor Solimine observes, “[i]t also cannot go unnoticed that Justice Kennedy concurred in both cases, and even Justice Scalia, dissenting in *Akins*, did not argue that the majority was overruling *Lujan*.” *Id.* at 1056 n.182. While *Lujan* and *Akins* can be reconciled to some extent in light of Justice Kennedy’s support in both cases, it is significant that Justice Kennedy’s concurrence in *Lujan* expressed significant reservations with Justice Scalia’s majority opinion. See *supra* notes 388–394 and accompanying text. Justice Scalia clearly believed that the *Akins* majority opinion was philosophically at odds with his view of standing as an essential component of separation of powers principles that he had articulated in *Lujan* and in his 1983 law review article. See *supra* notes 145–150 and accompanying text.

<sup>404</sup> See *Bennett v. Spear*, 520 U.S. 154, 162–63 (1997).

<sup>405</sup> See YACKLE, *supra* note 12, at 386 n.489 (commenting that the Court often interprets section 702 of the APA, which gives standing to those within the zone of interests, based on precedent construing that section rather than the strict statutory text).

<sup>406</sup> See *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>407</sup> See *Akins*, 524 U.S. at 13 (discussing a group of voters challenging the Federal Election Campaign Act); *Lujan*, 504 U.S. at 557–58 (discussing a challenge to a rule promulgated under the Endangered Species Act); *Wilderness Soc’y*, 622 F.3d at 1253 (discussing challenge to the Forest Service Decisionmaking and Appeals Reform Act); *Am. Canoe*, 389 F.3d at 538 (discussing violations of the Clean Water Act).

<sup>408</sup> See *Akins*, 524 U.S. at 20; *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment) (discussing that the Endangered Species Act does not establish an injury in “any person” when the statute is violated); *Wilderness Soc’y*, 622 F.3d at 1259; *Am. Canoe*, 389 F.3d at 539.

affirmative right to information,<sup>409</sup> the Ninth Circuit in *Wilderness Society* was probably correct to conclude that Congress must be explicit in granting the public the right to certain information if it intends to create an informational injury and informational standing.<sup>410</sup> While giving plaintiffs informational standing might assist Congress in enforcing notice and appeal provisions, it was not unreasonable for the Ninth Circuit to require more explicit rights conferring language when determining whether plaintiffs have Article III standing.<sup>411</sup> Based on his concurring opinions in *Lujan* and *Summers*, both of which demanded that Congress more explicitly define the injuries for citizen suit standing, Justice Kennedy probably would have agreed with the *Wilderness Society* decision.<sup>412</sup> The decision suggested that Congress must use explicit language to establish public informational standing rights and that general notice and appeal provisions in a statute designed to promote public participation do not create a right to informational standing.<sup>413</sup> As a result, Justice Kennedy probably would have disagreed with the majority in *American Canoe*, which held that the monitoring and public information requirements in the Clean Water Act are sufficiently clear to demonstrate that Congress intended to create a public right to information establishing standing rights.<sup>414</sup> Instead, Justice Kennedy would have likely agreed with Sixth Circuit Judge Kennedy's dissenting view that only explicit congressional authorization can confer informational standing rights.<sup>415</sup>

### CONCLUSION

In its recent *Wilderness Society* decision, the Ninth Circuit addressed the difficult question of when a statute may establish a right to informa-

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<sup>409</sup> See *Akins*, 524 U.S. at 24–25.

<sup>410</sup> See *Wilderness Soc'y*, 622 F.3d at 1259.

<sup>411</sup> See *id.* at 1258–60.

<sup>412</sup> See *Summers*, 555 U.S. at 500 (Kennedy, J., concurring in part and concurring in the judgment); *Lujan*, 504 U.S. at 579–81 (Kennedy, J., concurring in part and concurring in the judgment); *Wilderness Soc'y*, 622 F.3d at 1259.

<sup>413</sup> See *supra* notes 300–394 and accompanying text.

<sup>414</sup> Compare *Wilderness Soc'y*, 622 F.3d at 1259 (holding that Congress's purpose for the statute was not to create a right to information but to allow public opportunity for comment), with *Am. Canoe*, 389 F.3d at 542 (holding that lack of information caused an injury "beyond common concern for obedience to law" and therefore established an injury sufficient for standing).

<sup>415</sup> See *Am. Canoe*, 389 F.3d at 550 (Kennedy, J., concurring in part and concurring in the judgment in part and dissenting in part); *supra* notes 177–181, 362–394 and accompanying text.

tional standing.<sup>416</sup> The D.C. Circuit and the Sixth Circuit previously reached different conclusions about whether environmental statutes promoting public participation or requiring environmental assessments create a right to informational standing.<sup>417</sup> The Sixth Circuit broadly interpreted informational standing requirements by relying upon *Akins*, even though the rights provided in the Clean Water Act differed from the statute at issue in *Akins*.<sup>418</sup> By contrast, in *Wilderness Society*, the Ninth Circuit interpreted *Summers*'s narrowing of procedural rights standing as implicitly narrowing standing rights in general, and concluded that general notice and appeal provisions that do not establish an explicit informational right are insufficient to establish informational standing.<sup>419</sup>

The *Wilderness Society* decision and the *American Canoe* decision indirectly raise the broader question of when Congress may modify common law injury, or even Article III constitutional standing, requirements for a concrete injury.<sup>420</sup> In turn, that question raises broader separation of powers issues.<sup>421</sup> Justice Kennedy's concurring opinion in *Lujan*, which he recently echoed in his concurring opinion in *Summers*,<sup>422</sup> represents the ideological middle ground on this issue.<sup>423</sup> His vote is likely to be the key vote in future cases unless the Court's current ideological composition changes.<sup>424</sup> Since both his concurring opinions in *Lujan* and in *Summers* sought explicit congressional language defining types of injuries sufficient for standing, it is also likely that Justice Kennedy would demand explicit language defining informational injuries.<sup>425</sup> Thus, he would likely agree with the Ninth Circuit in *Wilderness Society* that general language establishing appeal and notice rights is insufficient to create a public right to information, unlike the explicit rights-

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<sup>416</sup> See *Wilderness Soc'y*, 622 F.3d at 1259–60; *supra* notes 300–354 and accompanying text.

<sup>417</sup> Compare *supra* notes 200–237 and accompanying text (examining the D.C. Circuit's decisions in several standing cases), with *supra* notes 242–277 and accompanying text (examining the Sixth Circuit decision regarding standing in *American Canoe*).

<sup>418</sup> See *supra* notes 238–299 and accompanying text.

<sup>419</sup> See *Wilderness Soc'y*, 622 F.3d at 1256–58; *supra* notes 300–354 and accompanying text.

<sup>420</sup> See *Wilderness Soc'y*, 622 F.3d at 1259; *Am. Canoe*, 389 F.3d at 542–46; *supra* notes 362–394 and accompanying text.

<sup>421</sup> See *supra* notes 36–48, 145–150, 362–394 and accompanying text.

<sup>422</sup> See *supra* notes 182–186 and accompanying text.

<sup>423</sup> See *supra* notes 362–394 and accompanying text.

<sup>424</sup> See *supra* notes 69–76, 177–181 and accompanying text.

<sup>425</sup> See *supra* notes 362–394 and accompanying text.

conferring language at issue in *Akins*.<sup>426</sup> Because he typically demands explicit language from Congress to modify traditional common law standing requirements for a concrete injury, Justice Kennedy probably would have agreed with Judge Kennedy's dissenting opinion in *American Canoe*.<sup>427</sup>

While the decision in *Wilderness Society* relied on the implications of *Summers* to limit *Akins* and informational standing, the Ninth Circuit would have been better advised to examine Justice Kennedy's concurring opinions in *Lujan* and *Summers* as a guide to the Supreme Court's approach to when Congress may confer standing rights.<sup>428</sup> According to Justice Kennedy, Congress has some discretion to establish standing rights beyond traditional common law standing requirements for a concrete injury as long as it carefully defines the injury and the class of persons entitled to sue.<sup>429</sup> Justice Kennedy, however, also recognized that Article III limits Congress's authority to grant standing to "any person" to challenge the government's failure to observe its legal obligations.<sup>430</sup>

While its decision in *Wilderness Society* was a defeat for environmental groups seeking to expand informational standing rights, the Ninth Circuit's reasoning left open the possibility that Congress could explicitly grant informational standing rights to the public, as it did in *Public Citizen* and *Akins*.<sup>431</sup> The Ninth Circuit reached the right result in requiring explicit congressional authorization for informational standing, even though it should have focused on Justice Kennedy's approach to standing rights instead of Justice Scalia's.<sup>432</sup> Despite Justice Scalia's philosophical reservations about citizen suit statutes and congressional interference with the executive branch's Article II authority,<sup>433</sup> Justice Kennedy's concurring opinions in *Lujan* and *Summers* suggest that Congress has significant authority to expand citizen suit standing as long as it carefully defines the statutory injuries.<sup>434</sup>

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<sup>426</sup> See *supra* notes 300–415 and accompanying text.

<sup>427</sup> See *supra* notes 177–181, 238–299, 407–415 and accompanying text.

<sup>428</sup> See *supra* notes 362–415 and accompanying text.

<sup>429</sup> See *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment); *supra* notes 362–394 and accompanying text.

<sup>430</sup> See *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment); *supra* notes 362–394 and accompanying text.

<sup>431</sup> See *Wilderness Soc'y*, 622 F.3d at 1259 (discussing that Congress chose not to confer a right to information, while leaving open the possibility that such a right could be conferred); *supra* notes 93–150, 300–354 and accompanying text.

<sup>432</sup> See *supra* notes 304–358, 395–415 and accompanying text.

<sup>433</sup> See *supra* notes 145–150 and accompanying text.

<sup>434</sup> See *supra* notes 362–415 and accompanying text.