

Summers v. Earth Island Institute: Its Implications for Future Standing Decisions

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In *Summers v. Earth Island Institute*,¹ the U.S. Supreme Court in a 5-4 decision written by Justice Antonin Scalia rejected the concept of organizational standing based upon the statistical probability that some members of a plaintiff organization will likely be harmed in the near future by the defendant's future actions.² The Court held that the plaintiff organizations failed to establish that they would suffer an "imminent" injury necessary for standing to sue in federal courts because they could not prove the specific places and times when their members would be harmed in the future by the defendant government's allegedly illegal policy of selling fire-damaged timber without public notice and comment.³ By contrast, Justice Stephen Breyer's dissenting opinion in *Summers* would have applied a "realistic threat" test to determine if some members of the organization were likely to be harmed in the future by the defendant government's actions even if it were impossible to determine when and where those members would be harmed by those actions.⁴

Additionally, the *Summers* decision arguably placed a higher standing burden on plaintiffs who challenge the government's alleged violation of a mandatory procedural requirement. In footnote seven of *Lujan v. Defenders of Wildlife (Defenders)*,⁵ Justice Scalia's majority opinion stated 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 to sue in federal courts.⁶ Seventeen years after the *Defenders* decision, Justice Scalia's *Summers* majority opinion did not overrule the analysis in *Defenders*' footnote seven, but his opinion arguably suggested that the Court was tightening the circumstances where it would relax the imminence standing requirement in cases where a plaintiff organization alleges that its members will be harmed in the future by the government's alleged violation of procedural requirements, but the plaintiff can provide no specific allegations about where and when those violations may occur.⁷

The lower courts are just beginning to grapple with the standing implications of *Summers*. This Article first reexamines the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit's 2006 decision in *Natural Resources Defense Council v. EPA (NRDC II)*,⁸ which was the strongest lower court decision before *Summers* upholding substantive probabilistic standing. Because the plaintiffs' evidence was of an inherently statistical and probabilistic nature, *NRDC II* is arguably distinguishable from *Summers*, a case where the probabilistic claims by the plaintiffs were relatively weak and where a future suit by the plaintiffs might present better evidence involving an actual injury.⁹

Author's Note: I thank Michael Solimine for his comments. All errors or omissions are my responsibility. Sections of this Article are based in part on my previous article, 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). However, my interpretation of the impact of the Summers opinion on the validity of the NRDC II decision has changed somewhat.

1. 129 S. Ct. 1142, 39 ELR 20047 (2009).
2. *Id.* at 1151-53 (majority opinion). Justice Antonin Scalia's majority opinion was joined by Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas, and Samuel Alito. *Id.* at 1146. Justice Stephen Breyer's dissenting opinion was joined by Justices John Paul Stevens, David Souter, and Ruth Bader Ginsburg. *Id.*
3. *Id.* at 1150-53.
4. *Id.* at 1155-58 (Breyer, J., dissenting).
5. 504 U.S. 555, 22 ELR 20913 (1992).

6. 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 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. *Id.* at 572 n.7 (1992); for more discussion, see Bradford C. Mank, *Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1, 35-36 (2005) [hereinafter Mank, *Global Warming*], and 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, 1716 (2008) [hereinafter Mank, *States Standing*].
7. See *infra* Part II.A.
8. 464 F.3d 1, 6-7, 36 ELR 20181 (D.C. Cir. 2006); see *infra* Part III.
9. See *infra* Part III.

Summers' restrictive approach to standing is likely to have its greatest impact in the U.S. Court of Appeals for the Ninth Circuit, which has long applied a more liberal approach in procedural standing cases than the D.C. Circuit.¹⁰ The Ninth Circuit's approach to procedural standing is important because 70% of all federal public lands are located in that circuit, and, as a result, there are many procedural challenges to federal land management decisions in that circuit.¹¹ Two federal district court decisions in the Ninth Circuit in 2009 disagreed as to what extent *Summers* had implicitly overruled the Ninth Circuit's standing precedent in procedural rights cases. One district court concluded that *Summers* had implicitly overruled the Ninth Circuit's recognition of procedural standing even when harm is not imminent, but it is not clear that the court needed to address *Summers*, because the evidence that the plaintiff presented in that case was so weak that it was arguably insufficient to meet even the Ninth Circuit's liberal standing test in procedural rights cases.¹² Another district court, however, concluded that *Summers* was not "clearly irreconcilable" with the Ninth Circuit's standing decisions and that the Ninth Circuit's procedural standing cases involving general procedural challenges or requests for information relating to national or regional regulations that did not depend on site-specific issues could be distinguished from *Summers*, which required plaintiffs to address site-specific impacts.¹³ While *Summers* is an important standing case, it may be possible for lower courts in some cases to distinguish its facts where a plaintiff's case is either inherently statistical in nature or involves a procedural challenge to national or regional regulations or environmental assessments.

I. A Brief Introduction to Procedural Rights Standing

A. The Three Part-Constitutional Standing Test

Article III of the U.S. Constitution does not specifically require that a plaintiff filing suit in federal court demonstrate "standing" to sue, but it does limit the role of the federal judiciary to "cases" and "controversies."¹⁴ The Supreme Court has interpreted Article III to bar suits in federal courts seeking advisory opinions regarding hypothetical disputes that might occur someday. The Court in *Defenders* summarized prior cases and refined the Court's three-part standing test

requiring a plaintiff suing in a federal court to prove that he has suffered: (1) an actual or imminent concrete injury-in-fact, rather than a hypothetical or speculative injury; that is (2) traceable to the defendant's challenged actions; and that is (3) capable of redress by a favorable judicial decision.¹⁵

In some circumstances, a threatened injury may constitute an imminent injury sufficient to meet the injury test for standing if the harm is likely to occur in the relatively near future. In *Babbitt v. United Farm Workers National Union*,¹⁶ the Court stated: "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."¹⁷ The *Defenders* Court's imminent injury test is similar to *Babbitt*'s approach to threatened injuries.¹⁸ The imminent injury test, however, fails to provide a clear standard for defining what is a sufficient probability of a risk to a plaintiff or how quickly it must result to the plaintiff to meet the imminence prong of the standing test.¹⁹ For instance, the Ninth Circuit has interpreted the imminent standing test to include an increased risk of harm.²⁰ The Ninth Circuit's approach to the imminence test is arguably implicitly overruled by the subsequent *Summers* decision.²¹

B. Procedural Standing

The Supreme Court has applied a more relaxed standing test for plaintiffs who assert that the government has violated a procedural right guaranteed in a statute.²² In footnote seven of *Defenders*, Justice Scalia's majority opinion stated that plaintiffs who may suffer a concrete injury resulting from a procedural violation by the government are entitled to a more relaxed application of the redressability and the immediacy standing requirements, because remedying the procedural violation by, for example, providing for additional public notice and comment, may not change the substantive

10. See *infra* Parts I.B and IV.A.

11. Carl Tobias, *Natural Resources and the Ninth Circuit Split*, 28 ENVTL. L. 411, 412 (1998) ("[A]n astounding seventy percent of the federal public lands in the entire United States are within the Ninth Circuit's purview."); see also Adrienne Smith, *Standing and the National Environmental Policy Act: Where Substance, Procedure, and Information Collide*, 85 B.U. L. REV. 633, 643 (2005) ("The D.C. Circuit and the Ninth Circuit handle the majority of NEPA cases . . .").

12. See *infra* Part IV.B.

13. See *infra* Part IV.C.

14. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 22 ELR 20913 (1992).

15. *Id.*; Mank, *Global Warming*, *supra* note 6, at 23-24.

16. 442 U.S. 289 (1979).

17. *Id.* at 298 (internal quotation marks omitted) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)); see also *Valley Forge Christian Coll. v. Ams. Union for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (reasoning that a threatened injury may satisfy standing requirement); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp. (Gaston Copper)*, 204 F.3d 149, 160, 30 ELR 20369 (4th Cir. 2000) (en banc) ("The Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III standing requirements.").

18. See *Defenders*, 504 U.S. at 560-61.

19. See Bradford Mank, *Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?*, 34 COLUM. J. ENVTL. L. 1, 39 (2009) [hereinafter Mank, *Future Generations*]; Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665, 685 (2009) [hereinafter Mank, *Standing and Statistical Persons*].

20. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151, 31 ELR 20246 (9th Cir. 2000) (interpreting "imminent" standing test to include an increased risk of harm).

21. See *infra* Part IV.A.

22. Mank, *Future Generations*, *supra* note 19, at 35-39.

decision by the government.²³ Justice Scalia limited footnote seven standing to those plaintiffs who are most likely to suffer concrete injury from the government's procedural error. According to footnote seven, a plaintiff who lives near a proposed dam has standing to challenge the government's alleged failure to follow statutory procedures requiring an environmental assessment pursuant to the National Environmental Policy Act (NEPA)²⁴ of the dam's potential effects, but "persons who live (and propose to live) at the other end of the country from the dam" do not have "concrete interests affected" and therefore do not have standing to challenge a procedural violation.²⁵

A plaintiff normally must establish standing by showing that it is "likely" that a concrete injury that he has personally suffered from actions traceable to the defendant's actions will be redressed by a favorable judicial decision.²⁶ A plaintiff, however, claiming that the government has violated a procedural requirement need not prove that the government's actions will cause him imminent harm, or that a judicial remedy requiring the government to comply with mandated procedural requirements will actually prevent the government from building the proposed project or taking the proposed action that would cause him some concrete harm if the government acts.²⁷ For example, a NEPA plaintiff is entitled to a remedy requiring the government to follow NEPA's procedural requirements even if it is uncertain that a judicial order requiring the government to conduct an environmental impact statement (EIS) pursuant to NEPA will lead the government to change its substantive decision to build a dam.²⁸

In *Massachusetts v. EPA*,²⁹ the Court endorsed a very relaxed approach to whether a remedy is sufficient for a plaintiff alleging a procedural violation by stating that procedural rights litigants only needed to demonstrate "some possibility" that their requested remedy would redress a procedural injury: "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."³⁰ In *Massachusetts*, the Court rejected the argument by the U.S. Environmental Protection Agency (EPA) that the petitioners had to prove that U.S. courts could remedy the global problem of climate change, and instead determined that the petitioners satisfied the redressability portion of the standing

test, because a court order requiring EPA to regulate emissions from new vehicles could "slow or reduce" global climate change.³¹ The *Massachusetts* decision's use of the "some possibility" test for redressability appears to be applicable to all procedural plaintiffs.³² The *Summers* decision did not change the relaxed approach to redressability for procedural rights plaintiffs, but the decision may have tightened the imminence requirement for such plaintiffs.³³

Prior to *Massachusetts* and *Summers*, the courts of appeals disagreed about the burden of proof a procedural rights plaintiff must meet to demonstrate that she is likely to be harmed by the Agency's action.³⁴ For example, the D.C. Circuit uses a stringent "substantial probability" test, but the Ninth Circuit applies a more lenient "reasonable probability" test.³⁵ The Supreme Court bears much of the blame for this confusion, because the *Defenders* decision did not clearly explain in footnote seven the degree to which redressability and immediacy requirements for standing are waived or relaxed in procedural rights cases, the plaintiff's burden of proof to establish standing in a procedural rights case, or how to define what is a procedural right.³⁶ For example, in the dam hypothetical, the

31. *Massachusetts*, 549 U.S. at 525; see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 675.

32. *Massachusetts*, 549 U.S. at 517-18; Mank, *States Standing*, *supra* note 6, at 1727 (arguing the "some possibility" standard in *Massachusetts* applies to all procedural plaintiffs).

33. See *infra* Part II.A.

34. Compare Fla. Audubon Soc'y v. Bentsen (Florida Audubon), 94 F.3d 658, 665-72, 27 ELR 20098 (D.C. Cir. 1996) (applying strict four-part test for standing in procedural rights case, including requiring a procedural rights plaintiff to demonstrate a particularized injury, that "a particularized environmental interest of theirs that will suffer demonstrably increased risk," and that it is "substantially probable" that the agency action will cause the demonstrable injury alleged by the plaintiff), with *Citizens for Better Forestry v. U.S. Dept. of Agric.*, 341 F.3d 961, 972, 33 ELR 20263 (9th Cir. 2003) (rejecting *Florida Audubon's* standing test for procedural rights plaintiffs and stating that such plaintiffs "need only establish 'the reasonable probability of the challenged action's threat to [their] concrete interest'"), and *Committee to Save the Rio Hondo v. Lucero* (Rio Hondo), 102 F.3d 445, 447-52 (10th Cir. 1996) (disagreeing with *Florida Audubon's* "substantial probability" test for procedural rights plaintiffs and instead adopting a test that plaintiff must establish an "increased risk of adverse environmental consequences" from the alleged failure to follow NEPA). See generally Mank, *Global Warming*, *supra* note 6, at 45-63 (discussing split in circuits about how to apply footnote seven standing test in NEPA cases); Mank, *States Standing*, *supra* note 6, at 1720 (same); Zachary D. Sakas, *Footnotes, Forests, and Fallacy: An Examination of the Circuit Split Regarding Standing in Procedural Injury-Based Programmatic Challenges*, 13 U. BALT. J. ENVTL. L. 175, 192-204 (2006) ("The Ninth and Seventh Circuits have held that a plaintiff need not have a claim that is site-specific, while the D.C., Eighth, and Eleventh Circuits have created a stricter standing doctrine where a site-specific injury is necessary [in procedural injury challenges to programmatic rules]"); Blake R. Bertagna, "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, 461-64 (2006) (discussing split between Ninth and D.C. Circuits on procedural standing test); Smith, *supra* note 11, at 643-51 (same).

35. Compare *Florida Audubon*, 94 F.3d at 665-72, with *Citizens for Better Forestry*, 341 F.3d at 972.

36. See Brian J. Gatchel, *Informational and Procedural Standing After Lujan v. Defenders of Wildlife*, 11 J. LAND USE & ENVTL. L. 75, 92-108 (1995) (criticizing footnote seven in *Defenders* for failing to explain to what extent immediacy and redressability standing requirements are relaxed or eliminated for procedural rights plaintiffs); Mank, *Global Warming*, *supra* note 6, at 36-37 & n.244 (same and citing commentators); Mank, *States Standing*, *supra* note 6, at 1718-20 (same); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 208, 225-26 (1992) (same); Christopher T. Burt, *Procedural Injury Standing After Lujan v. Defenders of Wildlife*, 62 U. CHI. L. REV. 275, 285 (1995) ("*Lujan's* procedural injury dicta

23. *Defenders*, 504 U.S. at 572 n.7; Mank, *Global Warming*, *supra* note 6, at 35-36; Mank, *States Standing*, *supra* note 6, at 1716; *supra* note 6 and accompanying text.

24. 42 U.S.C. §§4321-4370f, ELR STAT. NEPA §§2-209.

25. *Defenders*, 504 U.S. at 572 n.7; *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, *Citizen Suits and the Future of Standing in the 21st Century: From Lujan to Laidlaw and Beyond: Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL'Y F. 247, 257 (2001); Mank, *States Standing*, *supra* note 6, at 1716.

26. *Defenders*, 504 U.S. at 560-61.

27. *Id.* at 572 n.7; Mank, *Global Warming*, *supra* note 6, at 35-36 & n.240.

28. *Defenders*, 504 U.S. at 572 n.7; Mank, *Global Warming*, *supra* note 6, at 35-36 & n.240.

29. 549 U.S. 497, 37 ELR 20075 (2007).

30. *Id.* at 518 (emphasis added); see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 674.

immediacy requirement arguably should be eliminated for plaintiffs, because they have no control over how quickly the government will build the dam, but the *Defenders* decision never expressly addresses that issue.³⁷ Nor did footnote seven provide any clear guidelines about to what extent courts are to relax or eliminate redressability requirements for procedural rights plaintiffs.³⁸ As is discussed below, it is not clear to what extent either *Massachusetts* or *Summers* clarified procedural standing issues.

C. “Reasonable Concerns” Standing in Avoided Recreational Activities Cases

In addition to procedural rights cases, there is another area where the Court has relaxed standing requirements in certain cases. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc. (Laidlaw)*,³⁹ which was decided nine years before *Summers*, the Court in an opinion by Justice Ruth Bader Ginsburg implicitly adopted a probabilistic standing analysis whenever a plaintiff alleges that he avoids recreational activities because of “reasonable concerns” about pollution.⁴⁰ In *Laidlaw*, the plaintiffs alleged that they avoided

recreational activities in a river because of the defendant’s illegal discharge of toxic mercury into the river.⁴¹ Despite the plaintiffs’ failure to prove that the defendant’s mercury discharges caused harm to the environment or their health, the *Laidlaw* decision concluded that the plaintiffs’ affidavits demonstrating that they had avoided recreational use of a river because of their “reasonable concerns” about the mercury’s impact on their health was sufficient for standing.⁴² Justice Scalia, however, in his dissenting opinion, which was joined by Justice Clarence Thomas, argued that a plaintiff to establish standing must usually prove that both he and the environment have suffered an actual injury rather than mere concerns about possible future injuries.⁴³

The *Laidlaw* decision did not require the plaintiffs to prove that they or the environment had suffered an actual injury or were likely to suffer an imminent injury in the future, but only required the plaintiffs to demonstrate for standing that they had reasonable concerns motivating them to alter their recreational activities.⁴⁴ The Court declared that in environmental cases “the relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff.”⁴⁵ The plaintiffs had established an adequate injury for Article III standing, because their reasonable concerns about the harmfulness of the defendant’s mercury discharges resulted in their avoiding recreational use of the river.⁴⁶ The Court equated the plaintiffs’ avoided recreational activities or diminished aesthetic enjoyment of the river as the concrete injury without any proof of actual harm to them or the environment.⁴⁷ Because their avoided recreational activities or their lessened aesthetic enjoyment of the river was an adequate concrete injury for the plaintiffs to establish standing, the Court did not address the more perplexing issue of whether the mercury pollution was sufficiently injurious to the plaintiffs or the environment to establish a “concrete” injury for standing.⁴⁸

Implicitly, the *Laidlaw* decision evaluated the probability of harm in determining that the plaintiffs’ fears were reasonable concerns and not “improbable.”⁴⁹ The Court observed that mercury is “an extremely toxic pollutant” and that

is not without its problems, however. At best, it is vague and provides little guidance for prospective plaintiffs and the lower courts.”); Smith, *supra* note 11, at 641 (same).

37. Gatchel, *supra* note 36, at 93-94, 99-100; Douglas Sinor, *Tenth Circuit Survey: Environmental Law*, 75 DENV. U. L. REV. 859, 880 (1998).

38. Gatchel, *supra* note 36, at 100-06, 108; Sinor, *supra* note 37, at 880 (criticizing footnote seven because it “is confusing and raises more questions than it answers”); Mank, *States Standing*, *supra* note 6, at 1719.

39. 528 U.S. 167, 30 ELR 20246 (2000).

40. *Id.* at 181-83; Robin Kundis Craig, *Removing “The Cloak of a Standing Inquiry”: Pollution Regulation, Public Health, and Private Risk in the Injury-in-Fact Analysis*, 29 CARDOZO L. REV. 149, 181-82 (2007); Mank, *Future Generations*, *supra* note 19, at 40-41. *But see* Michelle Fon Anne Lee, *Surviving Summers*, 37 ECOLOGY L.Q. 381, 393-95 (2010), (arguing that *Laidlaw* is not a “probabilistic” case). Lee disagrees with my characterization of *Laidlaw* as a “probabilistic” case because “*Laidlaw* is clear in holding that the harm alleged was actual, not merely imminent; plaintiffs had already suffered the recreational and aesthetic harm that resulted from their reluctance to use their waterway.” *Id.* at 393-95 & nn. 81 and 90. My work, however, has recognized that *Laidlaw* in part treated the plaintiffs’ aesthetic and recreational injuries as present concrete injuries. *See, e.g.*, 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, 101 (2010) [hereinafter Mank, *Summers*]:

The Court treated the loss or diminishment of the plaintiffs’ recreational or aesthetic enjoyment of the river as the concrete injury. Because the diminished recreational or aesthetic enjoyment of the river was a sufficient concrete injury to the plaintiffs, the Court avoided the more difficult question of whether the mercury pollution was harmful enough to the plaintiffs to constitute a concrete injury.

(emphasis added and footnotes omitted); Mank, *Standing and Statistical Persons*, *supra* note 19, at 685-86, 742 (same). Lee argues that the *Laidlaw* decision was not concerned with the probability of an injury that had already occurred, but instead with the reasonableness of the plaintiffs’ concerns in avoiding use of a polluted river. She writes: “Since plaintiffs were alleging a harm that had already occurred, the injury was in no way ‘probabilistic.’ Rather, the court’s discussion of probability went to the issue of the reasonableness of plaintiffs’ reactions.” Lee, *supra*, at 395. The problem with her analysis is that the Court had to implicitly consider the probability of future harm in assessing the “reasonableness” of the plaintiffs’ concerns even though the Court tried to characterize the injury as an actual concrete injury that had already occurred when the plaintiffs ceased to engage in recreational activities in the river because of *Laidlaw*’s mercury pollution. Thus, the Court implicitly considered future harm even though it ostensibly tried to define the injury as an actual concrete injury that had already occurred. By focusing only on what the *Laidlaw* decision explicitly stated, Lee misses the Court’s implicit probabilistic reasoning. The Court may have avoided explicitly acknowledging the proba-

bilistic implications of its decision to avoid a contentious standing issue that the Court had never addressed and that raises many difficult questions about when a court should recognize standing for future harms. *See generally* Mank, *Future Generations*, *supra* note 19, at *passim* (discussing the varying approaches of the Court and foreign jurisdictions to the problem of whether anyone has standing to represent future generations that may be harmed by the actions of the present generation).

41. *Laidlaw*, 528 U.S. at 181-83; *see also* Craig, *supra* note 40, at 181; Mank, *Future Generations*, *supra* note 19, at 40-41.

42. *Laidlaw*, 528 U.S. at 181-85; *see also* Craig, *supra* note 40, at 181-83; Mank, *Future Generations*, *supra* note 19, at 40-41.

43. *Laidlaw*, 528 U.S. at 198-201 (Scalia, J., dissenting).

44. *Id.* at 183-85; *see* Craig, *supra* note 40, at 181; Mank, *Future Generations*, *supra* note 19, at 40-41. *But see Laidlaw*, 528 U.S. at 198-201 (Scalia, J., dissenting) (arguing that plaintiffs should have to prove that defendant’s activities actually harmed the environment).

45. *Laidlaw*, 528 U.S. at 181.

46. *Id.* at 183-85.

47. *Id.*

48. Craig, *supra* note 40, at 181-83; Mank, *Standing and Statistical Persons*, *supra* note 19, at 686.

49. *See Laidlaw*, 528 U.S. at 183-85. For a fuller discussion explaining *Laidlaw*’s implicit probabilistic analysis, see footnote 40.

“repeatedly, Laidlaw’s discharges exceeded the limits set by the permit” in concluding that the plaintiffs’ avoidance of recreational uses was grounded in a reasonable probability of harm from the mercury.⁵⁰ The *Summers* decision’s rejection of probabilistic standing is at least philosophically at odds with *Laidlaw*’s reasonable concerns test, although it is possible to distinguish the factual circumstances of the two cases.⁵¹

As an example of how *Laidlaw* is inconsistent with the subsequent *Summers* decision, the two cases adopted significantly different interpretations of the Court’s prior decision in *City of Los Angeles v. Lyons*.⁵² Justice Ginsburg analyzed *Lyons* in a manner strikingly similar to Justice Breyer’s subsequent dissent in *Summers*, using the term “realistic threat” to encapsulate the standing approach in *Lyons*.⁵³ Justice Ginsburg observed: “In *Lyons*, we held that a plaintiff lacked standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a *realistic threat* from the policy.”⁵⁴ She added: “In the footnote from *Lyons* cited by the dissent, we noted that ‘the reasonableness of Lyons’ fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct,’ and that his ‘subjective apprehensions’ that such a recurrence would even take place were not enough to support standing.”⁵⁵ Justice Ginsburg’s reasoning that “the reasonableness of Lyons’ fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct”⁵⁶ is essentially an implicit probabilistic analysis, because the term “likelihood of a recurrence” incorporates a probabilistic framework of analysis. The *Laidlaw* decision still applies in factually similar cases where a plaintiff stops recreating in a specific area because of a reasonable fear of pollution, but *Summers* rejected probabilistic standing in cases where an organization argues that some of its members are likely to be injured in the future by the government’s actions, but the plaintiff cannot specify when and where those harms will occur.⁵⁷

II. *Summers* Rejects Probabilistic Standing and Possibly Limits Procedural Standing?

The litigation that culminated in the *Summers* 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 federal land in the Sequoia National Forest.⁵⁸ Several environmental organizations then filed suit in federal district court seeking an injunction to prevent the Service from implementing new regulations that exempted salvage sales of less than 250 acres from the notice, comment, and appeal process that the U.S. Congress had required the Service to apply for “more significant land management decisions” and to challenge other regulations that did not apply to Burnt Ridge.⁵⁹ After the district court granted a preliminary injunction against the Burnt Ridge salvage-timber sale, the plaintiffs and the Service settled their dispute over that project.⁶⁰ Although the government contended that the plaintiffs lacked standing to challenge other salvage sales once they settled the Burnt Ridge Project case, the district court decided the plaintiffs’ broader challenges to the Service’s policies regarding salvage sales by invalidating five of the Service’s regulations and entering a nationwide injunction against their application.⁶¹ The Ninth Circuit concluded that the plaintiffs’ challenges to regulations not at issue in the Burnt Ridge Project were not yet ripe for adjudication, but affirmed the district court’s conclusion that two regulations that were applicable to the Burnt Ridge Project were illegal and, therefore, upheld the nationwide injunction against the application of those two regulations.⁶²

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 ceased to meet the injury portion of the standing test when they settled the Burnt Ridge Project dispute.⁶³ The Court reasoned that the plaintiffs had initially satisfied the injury requirement when they submitted an affidavit alleging that organization member Ara Marderosian had repeatedly visited the Burnt Ridge site, that he had imminent plans to visit the site again, and that the government’s actions would harm his aesthetic interests in viewing the flora and fauna at the site.⁶⁴ Justice Scalia concluded, however, that the settlement had resolved Marderosian’s injury and that none of the other affidavits submitted by the plaintiffs alleged that the Service’s application of the challenged regulations was causing a particular organization member an imminent injury at a specific site.⁶⁵ One affiant for the plaintiffs, Jim Bensman, asserted that he had visited a large number of national parks during his lifetime, that he had suffered injury in the

50. *Id.* at 176, 181-83; Mank, *Standing and Statistical Persons*, *supra* note 19, at 686.

51. See Mank, *Summers*, *supra* note 40, at 134-35.

52. 461 U.S. 95 (1983).

53. Compare *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1155-56, 39 ELR 20047 (2009) (Breyer, J., dissenting) (arguing that in *Lyons* the Court would have found standing had the plaintiff shown “a realistic threat” of future harm due to reoccurrence of the challenged activity (quoting *Lyons*, 461 U.S. at 107 n.7 (emphasis omitted))), with *Laidlaw*, 528 U.S. at 184 (stating that the Court found no standing in *Lyons* because the plaintiff could not prove a “realistic threat” of harm from the policy); see also *infra* Part II.C. (discussing Justice Breyer’s dissent in *Summers*).

54. *Laidlaw*, 528 U.S. at 184 (emphasis added).

55. *Id.* (alteration in original) (quoting *Lyons*, 461 U.S. at 108 n.8).

56. *Id.*

57. See *infra* Part II.A.

58. *Summers*, 129 S. Ct. at 1147-48.

59. *Id.* See generally Forest Service Decision Making and Appeals Reform, Pub. L. No. 102-381, §322, 106 Stat. 1374, 1419 (1992), reprinted in 16 U.S.C. §1612 note (2006) (requiring 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”).

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

61. *Id.*

62. *Id.*

63. *Id.* at 1149-50.

64. *Id.* at 1149.

65. *Id.* at 1149-51.

past from development on Service land, and that he planned to visit several unnamed national forests in the future.⁶⁶ The Court rejected his affidavit as insufficient for standing, because Bensman 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.⁶⁷ In terms of the Court's standing test, Bensman failed to prove that he was likely to suffer an imminent injury from the Service's salvage sales at a specific time and location.⁶⁸

Justice Scalia's majority opinion rejected the concept of probabilistic standing based on the probability that some members of an organization will be harmed in the future.⁶⁹ The Sierra Club had alleged in the complaint that it has more than 700,000 national members, and, accordingly, that it was probable that the Service's implementation of the challenged regulations would harm at least one of its members in the near future.⁷⁰ The Court rejected the plaintiffs' probabilistic standing argument, because it concluded that an organizational plaintiff must demonstrate standing by identifying specific members who are being injured and will be imminently injured at a particular time and location rather than mere speculation that some of its members will probably be injured in the near future by a challenged activity.⁷¹ Justice Scalia argued: "While it is certainly possible—perhaps even *likely*—that one individual [who belongs to a plaintiff organization] will meet all of these [standing] criteria, that speculation does not suffice."⁷²

Justice Scalia rejected the argument in Justice Breyer's dissenting opinion that affiant Bensman's allegations in his affidavit met the "realistic threat" standing test in *Lyons*:

The allegations here present a weaker likelihood of concrete harm than that which we found insufficient in *Lyons* where a plaintiff who alleged that he had been injured by an improper police chokehold sought injunctive relief barring use of the hold in the future. We said it was "no more than conjecture" that Lyons would be subjected to that chokehold upon a later encounter. Here we are asked to assume not only that Bensman will stumble across a project tract unlawfully subject to the regulations, but also that the tract is about to be developed by the Forest Service in a way that harms his recreational interests, and that he would have commented on the project but for the regulation. Accepting an intention

to visit the National Forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact.⁷³

The *Summers* Court arguably placed a higher standing burden on procedural rights plaintiffs. The *Summers* decision applied a possibly limiting interpretation to footnote seven, stating: "Only a 'person who has been accorded a procedural right to protect *his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy."⁷⁴ The *Summers* decision acknowledged that footnote seven recognized the authority of Congress to loosen the redressability requirement for standing, but emphasized that procedural rights plaintiffs still had to meet the same concrete injury requirement demanded of all litigants in federal courts. Justice Scalia stated:

It makes no difference that the procedural right has been accorded by Congress. That can loosen the strictures of the redressability prong of our standing inquiry—so that standing existed with regard to the Burnt Ridge Project, for example, despite the possibility that Earth Island's allegedly guaranteed right to comment would not be successful in persuading the Forest Service to avoid impairment of Earth Island's concrete interests. Unlike redressability, however, the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.⁷⁵

It is possibly significant that Justice Scalia in *Summers* observed that procedural rights plaintiffs are entitled to relaxed redressability requirements, but did not refer to relaxed standards for immediacy. Nevertheless, the *Summers* decision did not explicitly overrule the relaxed imminence test established in footnote seven of *Defenders*.

B. Justice Anthony Kennedy's Concurring Opinion

In a short concurring opinion, Justice Kennedy explained that he joined the majority opinion because a plaintiff can challenge the alleged violation of a procedural right only if the plaintiff can demonstrate a separate concrete injury arising from that violation and that the plaintiffs in the case had failed to prove such a concrete injury.⁷⁶ He asserted that, "this 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.'"⁷⁷ Justice Kennedy concluded that the statute at issue did not include an express citizen suit provision "indicat[ing that] Congress intended to identify or confer some interest separate and apart from a procedural right."⁷⁸ His opinion left open the possibility that he might accept probabilistic stand-

66. *Id.* at 1150.

67. *Id.* ("There may be a chance, but is hardly a likelihood, that Bensman's wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations.")

68. *See id.* at 1150-53.

69. *See id.* at 1151-53; Mank, *Standing and Statistical Persons*, *supra* note 19, at 749-50.

70. *Summers*, 129 S. Ct. at 1154 (Breyer, J., dissenting) (internal quotation marks omitted) (quoting Corrected Complaint for Declaratory and Injunctive Relief app. at 34, *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994 (E.D. Cal. 2005) (No. CIV F-03-6386 JKS)) (listing the membership size of the various plaintiff organizations).

71. *Id.* at 1152. Justice Scalia acknowledged that an organization does have 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) (all organization members are affected by release of membership lists)).

72. *Id.* (emphasis added).

73. *Id.* at 1150 (citations omitted).

74. *Id.* at 1151 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7, 22 ELR 20913 (1992) (emphasis added in *Summers*)).

75. *Id.*

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

77. *Id.* (quoting *Defenders*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)).

78. *Id.*

ing in some circumstances if Congress enacted a statute that clearly defined when a probabilistic injury constitutes a concrete harm to a particular class of plaintiffs.

C. Justice Breyer's Dissenting Opinion: Proposing a "Realistic Threat" Test for Probabilistic Organizational Standing

In his dissenting opinion, Justice Breyer adopted language from *Lyons* in proposing a "realistic threat" test for determining when an injury is sufficient for standing.⁷⁹ He contended that the plaintiffs, who represented more than 700,000 members in the United States, had standing because at least some of their members were likely to be affected by the government's allegedly illegal salvage-timber sales in the future.⁸⁰ Justice Breyer asserted that the majority had conceded that the plaintiff organizations had demonstrated that "they have members who have used salvage-timber parcels in the past," but that the majority had denied the substantial probability that some members of these organizations would be harmed by the Service's future salvage sales by adopting an overly restrictive definition of what is an imminent injury.⁸¹

Justice Breyer proposed that the Court adopt a realistic threat definition of what constitutes an imminent or likely future injury.⁸² Although acknowledging that the Court had "sometimes" used the term "imminent" as a test in its standing decisions, he contended that the majority opinion had wrongly used the term "imminent" to prohibit standing in contrast to prior decisions that had used that term to reject standing only when the alleged harm was "merely 'conjectural' or 'hypothetical' or otherwise speculative."⁸³ Justice Breyer contended that the majority's use of the imminent test to deny standing was unsuitable if a plaintiff has "already been subject to the injury it wishes to challenge," as it had in the case at issue, and "there is a realistic likelihood that the challenged future conduct will, in fact, recur and harm the plaintiff."⁸⁴ Justice Breyer relied on *Lyons*' standing test of whether a plaintiff has demonstrated that he faces "'a realistic threat' that reoccurrence of the challenged activity would cause him harm 'in the reasonably near future.'"⁸⁵ Justice Breyer argued that the Court's prior standing decisions demanded only that a plaintiff establish that he faces a realistic threat of injury and did not oblige a plaintiff to demonstrate "identification requirements more stringent than the word 'realistic' implies."⁸⁶ Thus, while 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 members of the plaintiff organizations would likely be harmed in the reasonably near future by the Service's salvage sales and, accordingly, that the plaintiffs had satisfied its standing requirements.⁸⁷

Justice Breyer contended that the Court had implicitly used a probabilistic or realistic approach to standing in several other areas of law. He asked:

Would courts deny standing to a holder of a future interest in property who complains that a life tenant's waste of the land will almost inevitably hurt the value of his interest—though he will have no personal interest for several years into the future? Would courts deny standing to a landowner who complains that a neighbor's upstream dam constitutes a nuisance—even if the harm to his downstream property (while bound to occur) will not occur for several years? Would courts deny standing to an injured person seeking a protection order from future realistic (but nongeographically specific) threats of further attacks?⁸⁸

He argued that the Service's "thousands of further salvage-timber sales" were as likely to harm the plaintiffs as the common-law or protection order examples he had just cited and, therefore, that the *Summers* plaintiffs had standing under the *Lyons*' realistic threat test.⁸⁹

Justice Breyer contended that the majority opinion had demanded more information about when and where the Service's actions would harm the plaintiffs in the future than was necessary to meet a realistic threat approach to standing. He asserted that "a threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates."⁹⁰ Justice Breyer observed that in *Massachusetts* the Court had allowed a plaintiff challenging an alleged procedural rights violation to achieve standing even though many of the alleged harms from climate change would not occur for decades. "We recently held that Massachusetts has standing to complain of a procedural failing, namely, EPA's failure properly to determine whether to restrict carbon dioxide emissions, even though that failing would create Massachusetts-based harm which (though likely to occur) might not occur for several decades."⁹¹ The scope of the *Massachusetts* decision, however, is in some doubt,

79. *Id.* at 1155-58 (Breyer, J., dissenting).

80. *Id.* at 1153-55.

81. *Id.* at 1154-56.

82. *Id.* at 1155-56.

83. *Id.* at 1155 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 22 ELR 20913 (1992)); see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 668.

84. *Summers*, 129 S. Ct. at 1155-56 (Breyer, J., dissenting); see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 752.

85. *Summers*, 129 S. Ct. at 1156 (Breyer, J., dissenting) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 107 n.7, 108 (1983)).

86. *Id.*

87. *Id.* at 1156-58; Mank, *Standing and Statistical Persons*, *supra* note 19, at 752-53.

88. *Summers*, 129 S. Ct. at 1156 (Breyer, J., dissenting). There may be an explanation for why the Court might allow standing in the common-law cases cited by Justice Breyer, but not in a "public law" case like *Summers*. Justice Breyer's approach to standing is rooted in a "public-law" conception of standing that seeks to prevent the Executive Branch from ignoring congressional directives in statutes addressing matters of public concern, including public health and the environment, by allowing liberal use of citizen suits to enforce the law. By contrast, Justice Scalia's more limited approach to standing arguably is grounded in a private-law or common-law view of the judiciary, which limits courts to adjudicating disputes involving concrete injuries that would be largely if not entirely recognizable to common-law English judges. See generally Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 484 (2008) (discussing citizen suit statutes that give citizens with some concrete injury the right to enforce the public right to a clean environment or safe products).

89. *Summers*, 129 S. Ct. at 1156-57 (Breyer, J., dissenting).

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

91. *Id.*

because it is unclear whether the decision's lenient approach to standing for future injuries applies only to state plaintiffs or all plaintiffs asserting procedural rights.⁹² Justice Breyer's dissenting opinion in *Summers* was joined by only four of the five members of the *Massachusetts* majority because Justice Kennedy, who was in the majority in *Massachusetts*, sided with the majority in *Summers*.⁹³ Thus, it is not clear that a majority of the Court agrees with Justice Breyer's interpretation that *Massachusetts* at least implicitly accepted probabilistic standing for nonstate plaintiffs asserting procedural rights. It is possible that a future Court majority that is more sympathetic to probabilistic or procedural standing than the current majority might cite *Massachusetts* as a precedent to broaden standing in the manner Justice Breyer advocates in his *Summers*' dissenting opinion. A future Court opinion might even be able to expand the rights of procedural rights plaintiffs without explicitly overruling *Summers* by cabining the decision to its facts.

Justice Breyer concluded that there was a realistic threat that Bensman would be affected in the future by the Service's thousands of planned salvage-timber sale projects that would be exempt from normally required procedural rules, especially public notice and comment.⁹⁴ He maintained that Bensman had demonstrated a strong likelihood that he would be harmed in the future by the Service's salvage sales based on evidence in his affidavit that he had visited 70 National Forests, toured some of them hundreds of times, and planned to make many more expeditions in the future.⁹⁵ Responding to the majority opinion's reasoning that Bensman's affidavit failed to meet standing requirements because he could not prove that he would be harmed by a salvage sale at a particular site and time, Justice Breyer answered with an analogy, stating: "To know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where it is bound to arrive. The law of standing does not require the latter kind of specificity."⁹⁶

Justice Breyer's dissenting opinion provided strong arguments that Bensman in particular and the plaintiff organizations in general faced a "realistic threat" of harm from the Service's salvage sales. While the Court's long-standing prohibition against issuing advisory opinions counsels against federal courts hearing hypothetical cases that may never happen, Justice Breyer made a compelling case that the likelihood that the Service's salvage sales without public comment would harm Bensman or some other member of the plaintiff organizations was at least as great as the common-law or protection order examples he cited as easy standing cases for the

courts. If, as Justice Scalia conceded in his majority opinion, it is likely that at least one member of the plaintiff organizations is likely to meet all standing criteria, there is little reason to deny standing just because a court does not know with specificity which member will be harmed in advance, as Justice Breyer argued with his snow in New England analogy.

III. *Natural Resources Defense Council v. EPA (NRDC II)*

The D.C. Circuit's 2006 decision in *Natural Resources Defense Council v. EPA (NRDC II)*⁹⁷ was the lower court case before *Summers* most strongly supporting a theory of substantive probabilistic standing.⁹⁸ There was considerable statistical and risk assessment evidence in *NRDC II* demonstrating that the government's exemption of methyl bromide pollution from an otherwise required ban on ozone-destroying chemicals would cause two to four lifetime skin cancer cases among Natural Resources Defense Council's (NRDC's) membership of approximately 500,000 persons.⁹⁹ There was far stronger evidence that the defendant's actions would harm the plaintiffs in *NRDC II* than in either *Summers* or *Laidlaw*, which involved aesthetic and recreational injuries. Yet, if the *NRDC II* case had been decided after *Summers*, the *NRDC II* court arguably should have denied standing, because it is impossible to know which members of the plaintiff organization would develop skin cancer. Because recreational activities were not at issue in *NRDC II*, the relaxed *Laidlaw* framework does not apply. It is possible that a future court facing facts similar to *NRDC II* might distinguish *Summers* on the ground that the statistical evidence in *NRDC II* was the best possible and that no better evidence could be available in the future. By contrast, a future plaintiff who actually hikes on a site where the Service is conducting a salvage sale would have better evidence than Bensman proffered in *Summers*. Justice Breyer's proposed realistic threat of injury test would support standing if a case with similar facts as *NRDC II* arose in the future, because the statistical evidence predicting future serious injury to members of the plaintiff organization was strong.

A. *Natural Resources Defense Council v. EPA (NRDC I)*

In *Natural Resources Defense Council v. EPA (NRDC I)*,¹⁰⁰ the plaintiff NRDC challenged a final rule issued by EPA that exempted for the year 2005 "critical" agricultural uses of the otherwise banned chemical methyl bromide, which

92. See Mank, *States Standing*, *supra* note 6, at 1746-47 (discussing uncertainties about whether standing analysis in *Massachusetts* applies only to states or to all plaintiffs). Some portion of *Massachusetts* appears to apply to all procedural plaintiffs, 549 U.S. 497, 517-18, 37 ELR 20075 (2007), but the definition and scope of what are procedural rights is uncertain. See Mank, *States Standing*, *supra* note 6, at 1727 (arguing the "some possibility" standard in *Massachusetts* applies to all procedural plaintiffs); *id.* at 1747-52 (arguing the definition and scope of procedural rights exception is uncertain).

93. *Massachusetts*, 549 U.S. at 501 (listing the majority as including Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer).

94. *Summers*, 129 S. Ct. at 1157 (Breyer, J., dissenting).

95. *Id.*

96. *Id.*

97. 464 F.3d 1, 36 ELR 20181 (D.C. Cir. 2006).

98. See Mank, *Future Generations*, *supra* note 19, at 47-48; Mank, *Standing and Statistical Persons*, *supra* note 19, at 705-07.

99. *NRDC II*, 464 F.3d at 7, 11.

100. 440 F.3d 476, 36 ELR 20051 (D.C. Cir. 2006) (rejecting standing), *withdrawn by NRDC II*, 464 F.3d 1, 36 ELR 20181 (D.C. Cir. 2006) (holding the NRDC had standing because two to four of their members would likely get skin cancer from the government's exemptions for methyl bromide, a chemical that destroys ozone).

destroys stratospheric ozone.¹⁰¹ The NRDC asserted that the rule violated U.S. treaty obligations under the 1987 Montreal Protocol, which requires signatory nations to phase out and eventually ban chemicals that destroy stratospheric ozone,¹⁰² and also violated provisions of the Clean Air Act (CAA)¹⁰³ that implement the Protocol.¹⁰⁴ The NRDC argued that the exemptions in the final rule were more than necessary to meet with authentically critical U.S. uses.¹⁰⁵

The NRDC contended that its members had suffered an injury sufficient for standing because the EPA's exemptions would increase its members' risk of developing skin cancer or cataracts as the exempted methyl bromide would destroy some stratospheric ozone, which protects human beings by absorbing most dangerous ultraviolet radiation from the sun so that dangerously high levels never reach the surface of the earth.¹⁰⁶ To support its standing allegations, the NRDC submitted an affidavit from Dr. Sasha Madronich, who stated that "it is reasonable to expect more than 10 deaths, more than 2,000 non-fatal skin cancer cases, and more than 700 cataract cases to result from the 16.8 million pounds of new production and consumption allowed by the 2005 exemption rule."¹⁰⁷ EPA conceded that the NRDC had standing and did not challenge Dr. Madronich's assumptions.¹⁰⁸

Despite the EPA's concession that the NRDC had standing to sue, the D.C. Circuit in *NRDC I* utilized its sua sponte authority to review standing as an essential jurisdictional issue and concluded that the NRDC did not have standing to petition the court to review the final rule, because the annualized risk to members of the NRDC was too slight to constitute an injury for standing purposes.¹⁰⁹ In determining the risk of injury to the NRDC's members, the *NRDC I* court made a series of assumptions about the data in Dr. Madronich's affidavit that the court later acknowledged were wrong when it granted a rehearing in the case, including the

court's assumption that Dr. Madronich had estimated the number of deaths from methyl bromide exemptions over the a period of 145 years, rather than the lifetimes of current NRDC members.¹¹⁰ The *NRDC I* court reasoned that "with ten more skin cancer deaths in 145 years, the probability of fatality from EPA's rule comes to 1 in 4.2 billion per person per year."¹¹¹ The court then concluded that the risk of death among the NRDC's 490,000 members was "infinitesimal," one death in approximately 12,000 years.¹¹² Furthermore, the court determined that "other risks" to the NRDC's members were "similarly small," including "a 1 in 21 million chance of contracting non-fatal skin cancer and a 1 in 61 million chance of getting a cataract over the next 145 years."¹¹³ The court held that the injury was insufficient to meet the D.C. Circuit's substantial probability standing test because an injury must be more than a "non-trivial" chance of injury.¹¹⁴

More broadly, the *NRDC I* court criticized the concept of probabilistic standing. The court stated:

Among those which fit least well are purely probabilistic injuries. Environmental or public health injuries, for example, may have complex etiologies that involve the interaction of many discrete risk factors. The chance that one may develop cancer can hardly be said to be an "actual" injury—the harm has not yet come to pass. Nor is it "imminent" in the sense of temporal proximity.¹¹⁵

Rejecting the more permissive approach to probabilistic standing in the U.S. Court of Appeals for the Second Circuit, the U.S. Court of Appeals for the Fourth Circuit, and the Ninth Circuit, the court concluded, "the law of this circuit is that an increase in the likelihood of harm may constitute injury in fact only if the increase is sufficient to 'take a suit out of the category of the hypothetical.'"¹¹⁶

B. NRDC II

Subsequently, the *NRDC I* panel withdrew its original decision, granted the plaintiff's motion for a rehearing of the case, and ultimately issued a significantly different decision in *NRDC II*. The NRDC petitioned for a rehearing because the *NRDC I* decision had miscalculated the risk of the methyl bromide exemption by incorrectly presuming that the harms "were spread over 145 years" instead of correctly

101. *Id.* at 478-80; see 40 C.F.R. §82.4(p) (2008); *Protection of Stratospheric Ozone: Process for Exempting Critical Uses From the Phaseout of Methyl Bromide*, 69 Fed. Reg. 76982, 76990 (Dec. 23, 2004) (exempting certain "critical uses" of methyl bromide for 2005); Mank, *Future Generations*, *supra* note 19, at 47; Mank, *Standing and Statistical Persons*, *supra* note 19, at 702.

102. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-10, 1522 U.N.T.S. 29; see also Cassandra Sturkie & Nathan H. Seltzer, *Developments in the D.C. Circuit's Article III Standing Analysis: When Is an Increased Risk of Future Harm Sufficient to Constitute Injury-in-Fact in Environmental Cases?*, 37 ELR 10287, 10291 (Apr. 2007).

103. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

104. See 42 U.S.C. §7671c(h) (2006) ("[EPA] shall promulgate rules for reductions in, and terminate the production, importation, and consumption of, methyl bromide under a schedule that is in accordance with, but not more stringent than, the phaseout schedule of the Montreal Protocol Treaty as in effect on October 21, 1998."); see also Mank, *Future Generations*, *supra* note 19, at 47; Mank, *Standing and Statistical Persons*, *supra* note 19, at 702; Sturkie & Seltzer, *supra* note 102, at 10291.

105. *NRDC I*, 440 F.3d at 480; see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 702; Sturkie & Seltzer, *supra* note 102, at 10292.

106. *NRDC I*, 440 F.3d at 481-82; see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 702; Sturkie & Seltzer, *supra* note 102, at 10292.

107. *NRDC I*, 440 F.3d at 481; see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 702-03; Sturkie & Seltzer, *supra* note 102, at 10292.

108. Sturkie & Seltzer, *supra* note 102, at 10292 n.89 ("In its merits brief, EPA stated that it 'believes that Petitioner has satisfied the requirements for Article III standing.'"); Mank, *Standing and Statistical Persons*, *supra* note 19, at 703.

109. *NRDC I*, 440 F.3d at 483-84; see also Craig, *supra* note 40, at 200-01; Mank, *Future Generations*, *supra* note 19, at 47; Mank, *Standing and Statistical Persons*, *supra* note 19, at 703; Sturkie & Seltzer, *supra* note 102, at 10292-93.

110. *NRDC II*, 464 F.3d 1, 3, 36 ELR 20181 (D.C. Cir. 2006); see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 705; Sturkie & Seltzer, *supra* note 102, at 10294.

111. *NRDC I*, 440 F.3d at 481; see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 703; Sturkie & Seltzer, *supra* note 102, at 10292.

112. *NRDC I*, 440 F.3d at 481-82; see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 703; Sturkie & Seltzer, *supra* note 102, at 10292.

113. *NRDC I*, 440 F.3d at 482 n.8; see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 703; Sturkie & Seltzer, *supra* note 102, at 10292.

114. *NRDC I*, 440 F.3d at 483 (quoting Mountain States Legal Found. v. Glickman (Mountain States), 92 F.3d 1228, 1235, 26 ELR 21596 (D.C. Cir. 1996)); see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 703; Sturkie & Seltzer, *supra* note 102, at 10292-93.

115. *NRDC I*, 440 F.3d at 483; see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 703; Sturkie & Seltzer, *supra* note 102, at 10293.

116. *NRDC I*, 440 F.3d at 483-84 (quoting *Mountain States*, 92 F.3d at 1234-35); see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 704; Sturkie & Seltzer, *supra* note 102, at 10293.

focusing on the lifetime harms to its current members.¹¹⁷ Because of methyl bromide's short atmospheric lifetime, the NRDC appropriately asserted that almost all the harms resulting from the exemption would occur during the lifetimes of human beings, including its members, alive at the time of the suit and, accordingly, that the court should have based its calculations on lifetime risk rather than annual risks it falsely assumed.¹¹⁸ The NRDC contended that the *NRDC I* decision's estimate of a one-in-4.2 billion risk of death for each person widely underestimated the actual risk of death or serious illness, which was approximately 1 in 100,000, or roughly five of its 490,000 members.¹¹⁹ NRDC argued that a risk of death or serious illness for five of its members was sufficient injury for standing.¹²⁰ In opposing the NRDC's petition for a rehearing, the EPA acknowledged that the *NRDC I* court erred in utilizing an annualized risk estimate spread over 145 years and should have applied a lifetime risk analysis; however, the agency also argued that the risk was not "almost 40,000" greater, as the NRDC contended.¹²¹ The *NRDC II* decision granted the petition for rehearing and withdrew its previous opinion because "in their respective petition for and opposition to rehearing, NRDC and EPA offered new information that has led us to change our view of the standing issue."¹²²

In *NRDC II*, the court was more sympathetic to the plaintiff's probabilistic standing argument, stating:

Although this claim does not fit comfortably within the Supreme Court's description of what constitutes an "injury in fact" sufficient to confer standing—such injuries must be "actual or imminent, not 'conjectural' or 'hypothetical,'"—we have recognized that increases in risk can at times be "injuries in fact" sufficient to confer standing.¹²³

The court, however, cautioned that "this category of injury may be too expansive."¹²⁴ Acknowledging that the courts of appeals had disagreed about the validity of probabilistic standing claims, the court concluded that it did not have to "answer" that controversial issue in its case.¹²⁵

The *NRDC II* decision concluded that NRDC had standing because the methyl bromide exemptions would substan-

tially increase their members' lifetime risk of developing skin cancer.¹²⁶ The court accepted evidence from an EPA expert that the best measure of risk from ozone depletion is lifetime risk and not the annualized risk methodology erroneously adopted in *NRDC I*.¹²⁷ The *NRDC II* court reasoned that the lifetime risk that an individual will develop nonfatal skin cancer as a result of the EPA's 2005 methyl bromide exemptions is either about one in 200,000, according to the expert representing the intervenor Methyl Bromide Industry Panel of the American Chemistry Council, or one in 129,000 relying upon the EPA expert's analysis.¹²⁸ Accordingly, the *NRDC II* decision concluded that this uncontradicted evidence established that two to four members of NRDC's roughly half-million members would develop skin cancer during their lifetimes as a result of EPA's rule and, furthermore, that two to four lifetime cases of skin cancer among NRDC's members was a sufficient injury for NRDC to have standing.¹²⁹ The *NRDC II* decision is the strongest lower court decision approving probabilistic standing because of the undisputed statistical and risk analysis evidence that two to four members of the plaintiff organization would likely develop skin cancer during their lifetimes.¹³⁰

C. NRDC II After Summers

The author's initial reaction to *Summers* was that the decision implicitly overruled all probabilistic standing decisions in the lower courts, such as *NRDC II*, because Justice Scalia's majority opinion in *Summers* was so hostile to the concept of probabilistic standing.¹³¹ Yet, there are important factual differences between *Summers* and *NRDC II* that might make it possible to distinguish the two cases for standing purposes. The *NRDC II* case is different from *Summers* because the *NRDC II* plaintiffs presented the best possible statistical and risk evidence that is available now and very probably into the distant future.

By contrast, better evidence was possible in *Summers*. Plaintiff Marderosian had standing because he repeatedly visited the Burnt Ridge site. By contrast, Bensman, the remaining affiant, seemed likely to visit an affected site in the future because of the sheer number of his visits to national parks and the large number of salvage sales by the Service without public comment, but he had no actual injuries and could not show where he would be harmed in the future during his frequent journeys to national parks. In the future, the *Summers*' plaintiffs could wait to file suit until they found

117. Petition for Rehearing or Rehearing En Banc at 8-9, *NRDC II*, 464 F.3d 1, 36 ELR 20181 (D.C. Cir. 2006) (No. 04-1438) [hereinafter NRDC Petition]; see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 704; Sturkie & Seltzer, *supra* note 102, at 10293.

118. NRDC Petition, *supra* note 116, at 9; see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 704-05; Sturkie & Seltzer, *supra* note 102, at 10293.

119. NRDC Petition, *supra* note 116, at 9-10; see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 705; Sturkie & Seltzer, *supra* note 102, at 10293.

120. NRDC Petition, *supra* note 116, at 10-11; see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 705; Sturkie & Seltzer, *supra* note 102, at 10293-94.

121. Respondent EPA's Opposition to NRDC's Petition for Rehearing or Rehearing En Banc at 6, *NRDC II*, 464 F.3d 1, 36 ELR 20181 (D.C. Cir. 2006) (No. 04-1438); see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 705; Sturkie & Seltzer, *supra* note 102, at 10293-94.

122. *NRDC II*, 464 F.3d at 3; see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 705; Sturkie & Seltzer, *supra* note 102, at 10294.

123. *NRDC II*, 464 F.3d at 6; see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 705; Sturkie & Seltzer, *supra* note 102, at 10294.

124. *NRDC II*, 464 F.3d at 6; see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 706; Sturkie & Seltzer, *supra* note 102, at 10294.

125. *NRDC II*, 464 F.3d at 6-7; see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 706; Craig, *supra* note 40, at 201.

126. *NRDC II*, 464 F.3d at 5-7; see also Craig, *supra* note 40, at 201; Mank, *Future Generations*, *supra* note 19, at 47; Mank, *Standing and Statistical Persons*, *supra* note 19, at 693.

127. *NRDC II*, 464 F.3d at 7; see also Craig, *supra* note 40, at 201; Mank, *Future Generations*, *supra* note 19, at 48; Mank, *Standing and Statistical Persons*, *supra* note 19, at 693.

128. *NRDC II*, 464 F.3d at 7; see also Mank, *Standing and Statistical Persons*, *supra* note 19, at 671-72; Sturkie & Seltzer, *supra* note 102, at 10294.

129. *NRDC II*, 464 F.3d at 7; see also Craig, *supra* note 40, at 201; Mank, *Future Generations*, *supra* note 19, at 48; Mank, *Standing and Statistical Persons*, *supra* note 19, at 670.

130. *NRDC II*, 464 F.3d at 7; Mank, *Standing and Statistical Persons*, *supra* note 19, at 670.

131. Mank, *supra* note 51 at 40, at 123, 132-34, 137-38.

another plaintiff like Marderosian who had undisputed injuries. It is possible that some members of the *Summers* majority were hostile to the plaintiffs' claim that standing should be granted based on the probability that the Service's actions would harm Bensman in the future because the plaintiffs probably could sue in the future using a plaintiff like Marderosian, who had actually been harmed by the Service's salvage sale in a particular forest where the plaintiff engaged in recreational activities.

Conversely, the evidence in *NRDC II* was inherently statistical.¹³² Even if an NRDC member contracted skin cancer in the future, he could not prove that it resulted from extra ultraviolet radiation caused by the 2005 methyl bromide releases, because there is no way to prove with today's science which ultraviolet rays entered the atmosphere because a particular batch of methyl bromide destroyed a certain patch of stratospheric ozone. Thus, *NRDC II* is different from *Summers* in the sense that there is no possibility that the evidence could become clearer in the future than it is today. One can only say, for example, that one of every 100,000 or 200,000 NRDC members will be harmed by the 2005 methyl bromide exemptions, but a plaintiff can never prove which of the NRDC members who develop skin cancer during their lifetime did so because of the 2005 exemptions. Accordingly, a future court might be able to distinguish a case factually similar to *NRDC II* from *Summers*, although it is also possible that a court might rely on *Summers* to reject or overrule every case involving probabilistic standing regardless of its facts. Even better, if the Supreme Court were in the future to adopt Justice Breyer's realistic threat standing test, then courts could use that test to decide which cases involving statistical probabilities of harm are worthy of standing.

IV. Summers' Possible Impact on Ninth Circuit Standing Doctrine

The Ninth Circuit has adopted a liberal interpretation of footnote seven procedural standing.¹³³ The Ninth Circuit's approach to procedural standing is especially important because of the large amount of federal public lands in the Circuit.¹³⁴ Accordingly, the restrictive *Summers* decision, which reversed a Ninth Circuit decision, may have a significant impact in implicitly overruling other Ninth Circuit standing jurisprudence.¹³⁵ It may be possible, however, to save some Ninth Circuit standing decisions by distinguishing cases that involve procedural challenges to the initial promulgation of a national or regional planning or management rule that are not affected by site-specific issues from cases like *Summers* that depend on site-specific challenges to the application of a rule.¹³⁶

A. The Ninth Circuit's "Reasonable Probability" Test

In 2003, the Ninth Circuit in *Citizens for Better Forestry v. U.S. Dept. of Agriculture (Citizens I)*¹³⁷ reaffirmed its relaxed "reasonable probability" of injury test for procedural standing plaintiffs and explicitly rejected the D.C. Circuit's more stringent "substantial probability" standing test.¹³⁸ *Citizens I* stated:

In the Ninth Circuit, environmental plaintiffs "seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs, . . . can establish standing "without meeting all the normal standards for . . . immediacy." Rather, they "need only establish 'the reasonable probability of the challenged action's threat to [their] concrete interest.'"¹³⁹

The plaintiffs Citizens for Better Forestry (Citizens), a coalition of environmental groups, complained that the U.S. Department of Agriculture (USDA) and the Service failed to comply with procedural requirements of NEPA and the Endangered Species Act (ESA)¹⁴⁰ before promulgating a 2000 national forest management policy (2000 Plan Development Rule).¹⁴¹ The National Forest Management Act (NFMA)¹⁴² requires the USDA and other government agencies to establish a three-tiered approach to regulations

132. In a student note published after the initial draft of this Article was submitted to the *Environmental Law Reporter*, Lee independently reached a similar conclusion that it is possible to distinguish *NRDC II* and *Summers* because "the injury alleged in *NRDC II* is more truly 'probabilistic' than that in *Summers*." Lee, *supra* note 40, at 408. Like the author, Lee independently reasoned that the decision "in *Summers* relies on the assumption that it would have been possible for plaintiffs to bolster their claim of imminent injury by naming an injured individual." *Id.* By contrast, in *NRDC II*, "At the moment when the challenged agency policy would be carried out, the identities of the injured people would remain inherently unknowable." *Id.* One difference between her analysis and mine is that she assumes that the identity of the injured in *NRDC II* will eventually "finally be identified, [although] the time for injunctive relief would be long past." This Article, however, would argue that we may never be sure which members of the NRDC developed skin cancer because of methyl bromide or as a result of other causes. While arguing that there is a good intellectual rationale for distinguishing "truly probabilistic" cases like *NRDC II* from *Summers*, Lee concludes that it is more likely that the "unequivocal" language in *Summers* requiring organizations to "name their affected members" will lead courts to bar suits similar to *NRDC II*. *Id.* at 409. The author understands her concern that courts will interpret *Summers* to prohibit all suits by organizations alleging that unidentified members of their organization are at an increased risk of future injury, but it is also possible that future courts will limit *Summers* to its facts or that the Supreme Court in the future will adopt the approach to standing in Justice Breyer's dissenting opinion in *Summers*. See *infra* Part II.C. Lee also shares Prof. Heather Elliott's concern that citizen suits by organizations with large numbers of members make it too easy for them to bring suits as private attorneys general in possible contradiction to democratic theory. Lee, *supra* note 40, at 409 (discussing Elliott, *supra* note 38, at 504-05 & n.222). I have addressed and partially disagreed with Professor Elliott's concerns in a prior article. See Mank, *Standing and Statistical Persons*, *supra* note 19, at 721-32.

133. See *infra* Part IV.A.

134. See Tobias, *supra* note 11, at 412.

135. See *infra* Part IV.B.

136. See *infra* Part IV.C.

137. 341 F.3d 961, 33 ELR 20263 (9th Cir. 2003).

138. *Id.* at 969, 972-74 (rejecting four-part standing test in *Florida Audubon*); Mank, *Global Warming*, *supra* note 6, at 45-63 (discussing and contrasting "reasonable probability" standing in the Ninth and Tenth Circuits with "substantial probability test" in D.C. Circuit); Sakas, *supra* note 34, at 193-98 (discussing standing issues in *Citizens I*).

139. *Citizens I*, 341 F.3d at 972 (internal citations omitted); Mank, *Global Warming*, *supra* note 6, at 56-63 (discussing the Ninth Circuit's relaxed standing requirements in NEPA cases); Matthew William Nelson, *NEPA and Standing: Halting the Spread of "Slash-and-Burn" Jurisprudence*, 31 U.C. DAVIS L. REV. 253, 273-76 (1997) (same).

140. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

141. *Citizens I*, 341 F.3d at 965.

142. 16 U.S.C. §§1600-1687, ELR STAT. NFMA 2-16. §§2-16.

and plans for the management of the National Forests, with (1) national uniform regulations issued by the USDA that set parameters for wildlife, timber, and water usage and conservation; (2) regional land and resource management plans (LRMPs) that define these parameters for particular regions; and (3) local site-specific plans that set forth specific requirements on defined tracts of land.¹⁴³ The district court held it did not have jurisdiction over the plaintiff's suit because: "(i) Citizens failed to demonstrate a reasonable probability that the Rule threatened their concrete interests as their complaint was directed to neither a site-specific project nor a particular forest plan, and thus they lack standing; and (ii) Citizens failed to show any imminent injury and thus their claims are not ripe."

Reversing the district court's decision, the Ninth Circuit concluded that the government committed a procedural violation against Citizens' members when the USDA failed to provide them with an opportunity to comment during each stage in the NEPA rulemaking process, which involved separate national, regional, and local phases.¹⁴⁴ The Ninth Circuit had previously held that environmental plaintiffs are definitely harmed if they are denied the opportunity for public comment and participation that NEPA requires to promote informed agency decisionmaking and to determine if significant environmental harms exist that necessitate an intensive EIS rather than a more cursory environmental assessment.¹⁴⁵ Because Citizens had demonstrated through numerous affidavits that its members recreate in many national forests and that the government had failed to consider their members' views on the impact of the rule on national forests as a whole, the Ninth Circuit concluded that the plaintiffs met the Circuit's geographical proximity standing test and that "Citizens need not assert that any specific injury will occur in any specific national forest that their members visit."¹⁴⁶ *Citizens I* concluded that there was a reasonable probability that the plaintiffs would be harmed by substantive changes in the 2000 rule compared to the existing 1982 rule.¹⁴⁷ For example, the 2000 rule's weakening of protections for forest species would harm members of the plaintiff organization that currently observe those species when some of those species will disappear from the forests as a result of the 2000 rule's changes. The Ninth Circuit concluded that there was a reasonable probability of harm to the plaintiff even though the changes in the 2000 national rule would only indirectly harm the plaintiffs and the actual direct harm would not take place until the Service and the USDA promulgated regional LRMPs and site-specific local rules that implemented the policy changes in the 2000 national rule.¹⁴⁸

The Ninth Circuit's claim that Citizens did not need to show specific injuries to members who use particular forests may seem at odds with the subsequent *Summers* decision, but, as is discussed below, it may be possible to distinguish the Ninth Circuit's decision on the grounds that its case involved facts in which the initial national programmatic rulemaking was procedurally flawed by the government's failure to provide an opportunity for public comment.¹⁴⁹ The Ninth Circuit rejected the government's argument that the plaintiffs should wait to file suit until the rule was applied at a specific site and harmed their members at that site. The *Citizens I* decision responded: "[I]f the agency action only could be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review. To the extent that the plan pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge."¹⁵⁰

In procedural standing cases, the Ninth Circuit's analysis in *Citizens I* is sound. If the government commits a procedural error in issuing a national or regional programmatic rule or environmental assessment, any person who uses or recreates in lands affected by that rule should be able to challenge it even though the actual harm may not be imminent. A flawed national or regional programmatic rule or environmental assessment sets the stage for future government actions, and it is essential that a plaintiff be able to challenge any procedural errors before the statute of limitations expires. Footnote seven's relaxation of the imminence requirement is appropriate to enable review of procedural errors that establish national or regional rules that may result in site-specific substantive harm only many years in the future, after the expiration of the statute of limitations for the national or regional rule.

Even if the *Citizens I* decision properly relaxed the imminence requirement, there is still a question of whether the Ninth Circuit's "reasonable probability" standard or the D.C. Circuit's "substantial probability" test is more suitable for procedural standing cases. The Ninth Circuit's "reasonable probability" standing test for procedural rights plaintiffs is linguistically similar to the "realistic threat" test proposed in Justice Breyer's dissenting opinion in *Summers*. Accordingly, it might seem that the Ninth Circuit's "reasonable probability" standard is inconsistent with the *Summers*' decision. Indeed, one district court in the Ninth Circuit has concluded that *Summers* implicitly overruled the Ninth Circuit's approach to standing in procedural rights cases.¹⁵¹ Conversely, another district court in the Ninth Circuit has concluded that the "reasonable probability" test is still valid after *Summers* in cases where a plaintiff challenges an alleged general procedural error by the government in issuing national or regional planning or management rules that do

143. See *Citizens I*, 341 F.3d at 965-66 (discussing 16 U.S.C. §1604); *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 632 F. Supp. 2d 968, 970 (same); Sakas, *supra* note 34, at 188 (discussing the three tiers of forest management plans).

144. *Citizens I*, 341 F.3d at 970-71.

145. *Id.*

146. *Id.* at 971.

147. *Id.* at 972-75.

148. *Id.* at 973-75 (disagreeing with and factually distinguishing *Florida Audubon*, 94 F.3d 658, 665-72, 27 ELR 20098 (D.C. Cir. 1996) (applying strict substantial probability test in procedural standing cases)).

149. See *infra* Part IV.C.; see also Sakas, *supra* note 34, at 195-97, 205 (discussing Ninth Circuit's reasoning in *Citizens I* that plaintiffs may challenge procedural flaws with national rule without demonstrating site-specific harm).

150. *Citizens I*, 341 F.3d at 973-74.

151. See *infra* Part IV.B.

not depend upon individual site-specific circumstances and is, thus, factually distinguishable from *Summers*.¹⁵²

B. Ashley Creek Properties, L.L.C. v. Timchak

In *Ashley Creek Properties, L.L.C. v. Timchak* (*Ashley Creek*), the U.S. District Court for the District of Idaho argued that *Summers* “overruled the Ninth Circuit’s standard allowing for a finding of procedural injury even when the harm is not ‘imminent.’”¹⁵³ Plaintiff Ashley Creek Properties, L.L.C. (*Ashley Creek*) challenged the expansion of J.R. Simplot Company’s (Simplot’s) Smoky Canyon Mine located on federal land in southeast Idaho.¹⁵⁴ Simplot sought approval from the Service and the U.S. Bureau of Land Management to expand the Smoky Canyon Mine to provide continuing phosphate supply to its Pocatello fertilizer plant. The federal defendants approved the expansion after completing an EIS pursuant to NEPA¹⁵⁵ over objections by Ashley Creek and others that the mine would cause selenium pollution.¹⁵⁶

Ashley Creek made two arguments about how the allegedly inadequate EIS harmed its interests. First, Ashley Creek contended that the EIS failed to consider the possibility of mining phosphate from undeveloped lands in Idaho that it leased to Simplot but to which it retained royalty rights instead of obtaining the material from Smoky Canyon Mine.¹⁵⁷ Additionally, Ashley Creek asserted that the EIS failed to consider the potential harm that the selenium pollution from Smoky Canyon Mine could cause to these leased lands.

The government defendants filed a motion to dismiss on the grounds that plaintiff Ashley Creek did not meet Article III standing requirements.¹⁵⁸ The district court quoted *Defenders* in observing that in procedural rights cases, including NEPA challenges, the appropriate standard for standing is whether “the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.”¹⁵⁹ The district court next summarized the Ninth Circuit’s “relaxed” standing test in procedural rights cases:

The Circuit has repeatedly held that plaintiffs enforcing a procedural right need not demonstrate the harm is imminent Further, the Circuit has also held that plaintiffs need only establish causation in procedural rights cases “with reasonable probability,” and “need not demonstrate

that the ultimate outcome following proper procedures will benefit them.”¹⁶⁰

According to the district court in *Ashley Creek*, the *Summers* decision “implicitly overruled Circuit precedent in procedural rights cases.”¹⁶¹ Because *Summers* required even procedural rights plaintiffs to demonstrate that they have a concrete and imminent injury, the district court concluded:

The Supreme Court therefore overruled the Ninth Circuit’s standard allowing for a finding of procedural injury even when the harm is not “imminent.” A procedural injury must be imminent, and not merely part of vague, “some day” intentions to use an area that will suffer environmental harm. The *Summers* opinion did not, however, affect the Circuit’s requirement that plaintiffs establish a geographic nexus to the site of alleged harm. Nor did it specifically overrule Circuit precedent regarding the relaxed standards for causation and redressability in cases of procedural injury.¹⁶²

The district court concluded that Ashley Creek’s allegations about the harm that the government’s approval of mining at Smoky Canyon Mine might cause to Ashley Creek’s leased lands “may have established a sufficient procedural injury through the geographic nexus between Ashley Creek’s possible income on mining leases and the alleged environmental harm at the Smoky Canyon Mine” as procedural standing law stood “[u]nder the pre-*Summers* framework.”¹⁶³ In light of *Summers*, however, the district court held the plaintiff’s allegations failed to meet the imminence portion of the standing test because “[t]he possibility . . . that Ashley Creek may some day be restricted from receiving income due to the environmental harm caused by expansion of the Smoky Canyon Mine simply is not imminent for two reasons.”¹⁶⁴ The district court first observed that it was highly uncertain that Simplot would ever mine any of the eight leases at issue, and, therefore, that it was only speculative whether Ashley Creek would ever be entitled to receive royalty income from the leases. Additionally, the court reasoned “there is no indication that the Forest Service will curtail phosphate mining in the future due to ‘cumulative levels’ of selenium pollution.”¹⁶⁵ The court concluded:

Ashley Creek fails the imminence requirement set forth in *Summers*. In sum, “[t]here may be a chance, but is hardly a likelihood,” that selenium pollution at the Smoky Canyon Mine will trigger environmental restrictions that imminently injure Ashley Creek’s ability to reap economic benefits from its future interests in nearby, undeveloped leases.¹⁶⁶

Because it was highly speculative about whether the mining at Smoky Canyon Mine would ever harm Ashley Creek,

152. See *infra* Part IV.C.

153. *Ashley Creek Properties, L.L.C. v. Timchak*, 649 F. Supp. 2d 1171, 1178 (D. Idaho 2009) (citing *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1113 n.13, 33 ELR 20130 (9th Cir. 2002)). The district court subsequently denied Ashley Creek’s motion for reconsideration that argued that the district court had misconstrued *Summers*. *Id.* at 1180-81.

154. *Id.* at 1173.

155. See 42 U.S.C. §4332.

156. *Ashley Creek*, 649 F. Supp. 2d at 1173.

157. *Id.* at 1173-75, 1179-80.

158. *Id.* at 1173, 1175-76.

159. *Id.* at 1176 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8, 22 ELR 20913 (1992)).

160. *Id.* (quoting *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1113, 33 ELR 20130 (9th Cir. 2002)) (citations omitted).

161. *Id.* at 1177.

162. *Id.* at 1178 (citations omitted).

163. *Ashley Creek*, 649 F. Supp. 2d at 1179.

164. *Id.*

165. *Id.*

166. *Id.* at 1179-80 (quoting *Summers*, 129 S. Ct. 1142, 1150, 39 ELR 20047 (2009)).

the district court might have been able to dismiss the suit for lack of standing even under the Ninth Circuit's liberal pre-*Summers* "reasonable probability" standard for procedural rights decisions. Accordingly, it is not clear that the district court needed to address whether *Summers* implicitly overruled the Circuit's procedural rights standing decisions. By contrast, the district court decision in the next section was far more deferential to Ninth Circuit precedent, although it acknowledged that *Summers* raised serious questions about that precedent.

C. Citizens for Better Forestry v. U.S. Dep't of Agric.

In *Citizens for Better Forestry v. U.S. Dep't of Agric. (Citizens for Better Forestry)*,¹⁶⁷ the District Court for the Northern District of California in 2009 addressed whether the *Summers* decision had implicitly overruled the Ninth Circuit's "reasonable probability" standing test for procedural rights plaintiffs, including the 2003 *Citizens I* decision.¹⁶⁸ In the district court case, the plaintiffs, Citizens for Better Forestry (Citizens), and other environmental groups alleged that government agencies, including the defendant USDA, had failed to comply with procedures required by NEPA and the ESA when they promulgated a 2008 regulation governing the development of management plans for forests within the National Forest System, which amended the 2000 rule previously challenged in *Citizens I*.¹⁶⁹

The district court initially observed that "in *Citizens I*, the Ninth Circuit held that Citizens had standing to assert claims identical in all relevant respects to those here."¹⁷⁰ Thus, whether Citizens had standing to challenge the 2008 rule depended upon whether the standing portion of the *Citizen I* decision is still good law after *Summers*.¹⁷¹ The USDA argued that *Summers* had implicitly overruled the Ninth Circuit's lenient approach to standing in *Citizen I* and that the plaintiff may not challenge any procedural irregularities associated with the 2008 rule until they can challenge a site-specific plan approved under an LRMP that was developed or revised according to the 2008 rule.¹⁷² The *Citizens for Better Forestry* court responded that it was bound by the Ninth Circuit's rule that a district court should overrule the Circuit's precedent only "where a subsequent Supreme Court decision has 'undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.'"¹⁷³ The district court concluded that

the Ninth Circuit's *Citizens I* decision was distinguishable from and hence not clearly irreconcilable with *Summers*:

The Court is bound to follow the Ninth Circuit's decision in *Citizens I* unless *Summers* is clearly irreconcilable with that decision. And, as Citizens points out, the challenge at issue in *Summers* is distinguishable in important respects from the challenge at issue here and in *Citizens I*. *Summers* involved a substantive challenge to regulations that exempted certain projects from procedural requirements that would ordinarily apply. The plaintiffs in *Summers* could not possibly suffer the procedural injury that was the basis of their standing until the regulations were actually applied to specific projects. Once the dispute over the Burnt Ridge Project was settled, the *Summers* plaintiffs were left with a hypothetical future procedural injury that was insufficient to confer standing. In contrast, the present case involves a challenge, not to the substance of any particular regulation, but to the Forest Service's failure to follow proper procedures when promulgating the 2008 Rule. Citizens has already suffered the procedural injury that forms the basis of its standing; it was injured by the USDA's failure to take a hard look at the environmental consequences of its action. Unlike in *Summers*, where the injury was the deprivation of Earth Island Institute's opportunity to provide comments on and subsequently appeal a specific decision, here the injury will not become more concrete when the Rule is applied to an LRMP [land and resource management plan] or a site-specific plan.¹⁷⁴

Additionally, the district court found that Citizens' members had filed "numerous detailed declarations" stating their plans to visit specific sites within the National Forest System in the future.¹⁷⁵

While the declarations of Citizens' members in *Citizens for Better Forestry* may have been more detailed than Bensman's affidavit in *Summers*, the district court acknowledged that these declarations did not specify where and when they would actually be injured by the government's application of the amended portions of the 2008 rule. The district court conceded that *Summers* could be interpreted to require a plaintiff to demonstrate how a procedural violation specifically affects the plaintiff's recreational use and aesthetic enjoyment of a particular portion of a national forest, but it contended that the plaintiff's challenge asserted a general harm from the 2008 amendments that is distinct from any potential future site-specific harm. The court stated:

It is true that the *Summers* Court's discussion of procedural injury could be interpreted as prohibiting a challenge based on such an injury unless the plaintiff has concrete plans to visit a specific site that faces the threat of imminent harm as a direct result of the regulation tainted by procedural defects. However, it is not clear that the Supreme Court intended for such a rule to apply when, as here, the procedural injury in question will never be directly linked to a site-specific project. The overarching nature of the plan development rule

167. 632 F. Supp. 2d 968, 975-80 (N.D. Cal. 2009).

168. 341 F.3d 961 (9th Cir. 2003).

169. *Citizens for Better Forestry*, 632 F. Supp. 2d at 970-73 (discussing history of government's forest management regulations). The validity of the 2000 rule was never resolved because after the *Citizens I* decision granted Citizens standing to challenge the rule, the USDA in 2002 announced its intent to issue a new rule and then *Citizens I* was dismissed pursuant to stipulation after remand. *Id.* at 972, 982 n.1.

170. *Id.* at 974, 978.

171. *Id.* at 974-76.

172. *Id.* at 975.

173. *Id.* at 975-76 (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003)).

174. *Id.* at 978-79.

175. *Id.* at 979.

makes it impossible to link the procedural injury at issue here to any particular site-specific project, whether now or in the future. Waiting to adjudicate the validity of the Rule until an LRMP [land and resource management plan] is revised under it and a site-specific plan is later approved under that LRMP would not present the court with any greater a “case or controversy” with respect to the already-completed procedural violation than exists today. Rather, such an approach would insulate the procedural injury from judicial review altogether. If *Citizens* is forced to delay seeking redress for its procedural injury until a site-specific plan is approved under a revised LRMP, it would face a statute of limitations defense. The government might also argue that the procedural injury is not sufficiently tied to the project to confer standing. Moreover, it would be a waste of the government’s resources if it were to revise an LRMP and approve a site-specific plan, only to have both declared invalid because the 2008 Rule pursuant to which the LRMP was created was procedurally defective.¹⁷⁶

The *Citizens for Better Forestry* court concluded that *Citizens I* was not clearly irreconcilable with *Summers*, that *Citizens I*’s standing analysis remained valid, and, therefore that the plaintiffs in its case had standing pursuant to *Citizens I*.¹⁷⁷

The *Citizens for Better Forestry* court’s approach to standing was reasonable in light of the Ninth Circuit’s “clearly irreconcilable” standard for overruling its precedent. By contrast, the *Ashley Creek* decision erred in failing to even mention the Ninth Circuit’s clearly irreconcilable test for when a Supreme Court case implicitly overrules circuit precedent. Furthermore, the *Ashley Creek* decision should have addressed in depth whether the plaintiff in its case failed to meet the Ninth Circuit’s existing “reasonable probability” standard for procedural standing before the district court considered the potential impact of *Summers* on the Circuit’s standing test. The *Citizens for Better Forestry* decision more appropriately followed precedent regarding the role of district courts in overruling Ninth Circuit precedents that are implicitly called into question by a Supreme Court decision than the *Ashley Creek* decision.

Even courts outside the Ninth Circuit that are not bound by the “clearly irreconcilable” standard should carefully consider the *Citizens for Better Forestry* court’s distinction between *Summers* as involving site-specific regulations that require a plaintiff to make specific allegations to justify standing and *Citizens I* as a case involving broad national or regional management or planning regulations or NEPA environmental assessments that only necessitate a plaintiff to make general allegations that they use public lands affected by the rule to satisfy standing.¹⁷⁸ The distinction between site-specific challenges like *Summers* and procedural challenges to the initial promulgation of broader national or regional planning or management regulations or NEPA assessments provides a plausible basis for limiting the scope of *Summers*. In chal-

lenges to the general procedural validity of a rule or NEPA assessment, especially one that sets national or regional criteria, courts may not need to require a plaintiff to address how the rule might be applied in the future to a site-specific situation if the national or regional rule is establishing an illegal procedural process for agency decisionmaking and the plaintiff demonstrates that its members use or recreate on land within the geographical scope of the rule.

As the Ninth Circuit in *Citizens I* and the district court in *Citizens for Better Forestry* suggested, a plaintiff should be able to challenge the procedural validity of a national or regional rule or national or regional programmatic EIS that affects how the agency manages or will in the future set site-specific rules for lands that they use for recreational purposes without waiting until the government has taken a site-specific action that specifically harms the plaintiff if there is a “reasonable probability” that such harm will occur to the plaintiff in the near future.¹⁷⁹ For example, the *Summers* case would have been different if the plaintiffs in 2003 had initially challenged the Service’s amended rule excluding salvage-timber sales of 250 acres or less from notice and comment as being procedurally flawed in its initial promulgation. For example, if the Earth Island plaintiffs had alleged in their complaint that the Service had failed to follow notice-and-comment procedures in issuing the initial rule, rather than subsequently challenging the “application” of the rule to future site-specific forest sales, then the Court should have found that the plaintiffs had standing to sue.¹⁸⁰ If a plaintiff cannot bring a general procedural challenge to a national or regional rule or environmental assessment, then the statute of limitations might expire before anyone could challenge a procedurally flawed national or regional rule that affects the promulgation of future site-specific rules or decisions.¹⁸¹ In some circumstances, it may be debatable about whether a case involves site-specific or general allegations, and courts may have to wrestle with the issue of whether *Summers*’ restrictive standing analysis or *Citizens for Better Forestry*’s reasoning controls.

179. In addition to standing, there may be the issue of whether a suit challenging, for instance, a forest management plan is ripe for judicial review. See *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 28 ELR 21119 (1998) (holding suit challenging forest plan was not ripe until government took site-specific actions). The Ninth Circuit in *Citizens I* distinguished between substantive challenges to forest management plans that are not ripe until there is site-specific harm and procedural challenges, especially under NEPA, where a case is ripe when the procedural violation occurs. *Citizens I*, 341 F.3d at 976-78. In *Summers*, the Ninth Circuit concluded that the two regulations applicable to the Burnt Ridge Project were ripe for review even if the other challenged regulations were not, but the Supreme Court found it unnecessary to address the issue of ripeness once it found that the plaintiffs failed to meet the standing test. 129 S. Ct. 1142, 1148, 1153 (2009). Because the Supreme Court in *Summers* did not address the issue of ripeness, the district court in *Citizens for Better Forestry* did not disturb the Ninth Circuit’s conclusion in *Citizens I* that the 2000 rule was ripe for review. *Citizens for Better Forestry*, 632 F. Supp. 2d at 979-80. Except for this footnote, this Article does not address the issue of ripeness, which can be separate from the issue of standing.

180. See *Summers* at 1147-48.

181. *Citizens for Better Forestry*, 632 F. Supp. 2d at 979.

176. *Id.*

177. *Id.*

178. *Id.* at 979.

V. Conclusion

It is not clear to what extent *Summers* changed the Court's standing jurisprudence. While Justice Scalia's majority opinion condemned the plaintiffs' theory of probabilistic organizational standing, the Court did not overrule the "reasonable concerns" test in *Laidlaw* that implicitly accepted a probabilistic standing analysis.¹⁸² Additionally, it is uncertain how the Court would address a case with facts similar to *NRDC II*.¹⁸³ The plaintiffs' argument for probabilistic standing in *Summers* was relatively weak, because a plaintiff in the future might be able to present direct evidence of harm from the Service's salvage sales without the need to rely on any probabilistic evidence about whether Bensman or other members of the plaintiff organizations might be injured in the future. By contrast, the plaintiffs in *NRDC II* presented the best possible statistical evidence about the likelihood that EPA's actions would cause skin cancer to its members, and it will probably remain scientifically impossible in the future to decide which members of the NRDC developed skin cancer from the 2005 methyl bromide exceptions as opposed to other causes. Because of limits in scientific knowledge, a plaintiff in a case like *NRDC II* can only provide statistical evidence and can never prove which specific individuals are harmed by the release of methyl bromide. There are good reasons to distinguish a strong case of probabilistic standing like *NRDC II* from a weak case like *Summers*.

Additionally, it is not clear to what extent the *Summers* decision changed the lenient standing test for procedural rights plaintiffs set forth in footnote seven of *Defenders*. *Summers* did not explicitly overrule footnote seven. Nevertheless, the *Summers* opinion reemphasized that procedural rights plaintiffs must demonstrate that the defendant has caused them a concrete injury. Furthermore, *Summers* may have implicitly tightened footnote seven's relaxation of the "imminence" requirement. *Summers* demanded that plaintiffs establish standing by showing precisely where and when they are or will be injured by the government's alleged procedural violation. The "realistic threat" test advocated in Justice Breyer's dissenting opinion in *Summers* would have been more consistent with the relaxed test for imminence in footnote seven.

One must not overstate the impact of *Summers* on standing law, as the district court in *Ashley Creek* unfortunately did. The district court in *Citizens for Better Forestry* correctly reasoned that a plaintiff who argues that the promulgation of a rule has caused him a general procedural or informational injury, especially in the initial promulgation of a national or regional planning or management rule, does not need to show the site-specific injury demanded in *Summers*, because plaintiffs should be able to challenge a procedurally flawed national or regional rule that sets the table for the issuance of future local rules. If a plaintiff cannot challenge the procedural errors the government makes in issuing an initial national or regional rule, it may not be able to obtain the environmental information that NEPA requires the government to produce or have the opportunity to comment on the criteria upon which future rules depend before the statute of limitations expires. A contrary approach could allow the government to game regulations by deliberately issuing national or regional regulations without required procedural safeguards and then preventing challenges to those regulations by waiting to issue site-specific regulations only after the statute of limitations had expired to challenge the broader underlying regulation. Although an important standing decision, future courts may limit *Summers*' standing analysis to factual circumstances where a plaintiff files a procedural challenge to the government's application of a site-specific rule and, accordingly, it is appropriate to demand that the plaintiff establish when and where he or she will be harmed. By contrast, courts should not apply *Summers*' standing analysis to procedural challenges to the initial promulgation of national or regional management or planning rules that establish a framework for future local rules or to NEPA challenges that allege that the government has failed to provide sufficient information about a project that would cause concrete harm to the plaintiff if the government actually builds the project.

182. See *supra* Part I.C.

183. See *supra* Part III.