IN THE SUPREME COURT OF THE UNITED STATES

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PRISCILLA SUMMERS, ET AL. :

Petitioners :

v. : No. 07-463

EARTH ISLAND INSTITUTE, ET :

AL. :

- x

Washington, D.C.

Wednesday, October 8, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

MATT KENNA, ESQ., Durango, Colo.; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 07-463, Summers v. Earth Island Institute.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE PETITIONERS

MR. KNEEDLER: Mr. Chief Justice, and may it please the Court:

The Ninth Circuit's affirmance of a nationwide injunction in this case is contrary to bedrock principles of Article III standing, of the availability and scope of judicial review under the Administrative Procedure Act, and the granting of equitable relief. As this case was decided by the district court and as it comes to this Court, it involves a stand-alone challenge to two regulations that govern the procedures to be followed by the Forest Service in deciding whether to approve individual site-specific activities in national forests.

The two regulations provide that site-specific actions that are excluded from either an environmental impact requirement or even an EA under NEPA are also not subject to special noticing and

comment and administrative appeal provisions applicable to the Forest Service. The Ninth Circuit sustained the district court's nationwide injunction as to those procedural regulations standing alone, not as part of a challenge to a specific site-specific activity.

The court did so, moreover, on the basis of an affidavit from one member of one of the organizations who could not begin to establish standing under this Court's decisions by showing an imminent injury by virtue of harm to a site-specific activity; and the Court affirmed the nationwide injunction applicable to all forests with respect to all projects listed in ten categories identified by the district court, including national forests and projects that don't even -- that are not even included within that one declarant's generalized interests in certain natural forests.

For the multiple combination -- combination of multiple reasons, we think the Ninth Circuit's decision cannot stand.

First, as with respect to standing, the one declaration on which both the district court and the court of appeals rely is the declaration of Mr. Bensman, which is reproduced in the petition appendix. And on page 70A and 71A are the only allegations of -- that go to injury at all with respect to the particular

regulations at issue here from paragraph 15 on to -- the bottom of 71A on, those are allegations concerning other regulations that are no longer at issue.

JUSTICE BREYER: Standing itself, I mean, it's a little unusual. Suppose -- I mean, Congress here has passed a statute and the statute specifically aims at a class of litigants. And it says to the class of litigants, if you are a member of it, we are telling you what we want the agency to do and that is to promulgate a certain appeal procedure.

Now, if you are a member of the class that frequently litigates and you frequently take advantage of that procedure, why aren't you heard as a litigant, at least enough for Article III? And we know as far as prudential standing is concerned, Congress wanted to give you standing, so I think would it take care of that.

Are you saying no matter -- that just normal litigants in the courts who reappear time and time again in certain kinds of cases, don't have standing to challenge a procedural rule, if Congress under Article III and Congress specifically tells them they can?

MR. KNEEDLER: Congress has not specifically said that they may challenge --

JUSTICE BREYER: Let's imagine that Congress

did, Congress did say: By the way, lawyers who have handled 17 tort cases in the last year where the value has been more than $500,000 and who will sign an affidavit saying they intend to continue in that branch may appeal from the court's promulgation of the following general rule, dah, dah, dah. And that Constitution prohibits Congress from doing that?

MR. KNEEDLER: Well, first of all, I don't think it could be lawyers. It has to be a party.

JUSTICE BREYER: Right. Those who -- fine, forget that, yeah.

MR. KNEEDLER: I think there would be substantial doubt that Congress could do that, because let me explain why, and this goes to a point that Justice Scalia was making in the prior argument.

Procedural wrong is not Article III injury. The injury in this case comes from the application of the regulation in a specific site-specific --

JUSTICE BREYER: You mean Article III and at Westminster -- at Westminster, when Westminster, whatever they had, they must have had some procedural rules, and sometimes they had general procedural rules -- I don't know what the history is; I could look it up. But I would be amazed if the lawyers at that time or the clients who had certain cases were not

permitted to challenge those rules as contrary to some other rules.

Do we know the answer to that?

MR. KNEEDLER: Well, if -- if Congress --

JUSTICE SCALIA: In a particular case, I suppose.

JUSTICE BREYER: No, no, no. Generally. Because you have a special procedure, here's what you can generally challenge our rules.

MR. KNEEDLER: Well, if I could make, again, several points. Congress has not passed such a statute. And there may be room in particular situations for Congress to pass a special statute that would identify particular interests that could then be taken into account in terms of whether Article III standing would be established.

JUSTICE BREYER: Okay, then your answer is, if Congress says you can do it, have a general challenge to people who generally appear, your answer is if Congress says they could do it, Article III doesn't stop them?

MR. KNEEDLER: No, I -- what I said, that would be a different question.

JUSTICE BREYER: Ah. What's the answer to that different question?

MR. KNEEDLER: Well, it might depend on a particular -- it might depend on a particular case. In the Whitman case the court says that the statutes providing for direct review of regulations eliminate prudential limitations on ripeness in that case, but they wouldn't eliminate the bedrock principle of standing. It would be necessary to show a threatened injury. Now, it --

JUSTICE SOUTER: Mr. Kneedler, don't we have to assess the need for -- for showing a specific threatened injury on a -- on a somewhat elastic standard in a case like this? Because the claim is made on the other side that if we do not allow, if we do not find standing to challenge the regulation per se, there are going to be a number of specific instances which in practical terms can never be challenged when that regulation is applied.

There were one or two instances, as I recall, of cases in which on your theory there could be no challenge because the announcement of the action was made on the very date that the action was taken. So that if we do not find sufficient elasticity and standing to allow a challenge to the regulation on behalf of people of the sort that Justice Breyer described, there will, in fact, be a preclusion of any

challenge to a lot of specific actions.

What's your answer to that?

MR. KNEEDLER: Several answers if I may. In the declaration on which standing was based in this case, that claim is not made. And that is the only declaration that was made -- that was submitted before the district court entered its judgment. There was an argument made like that after, after the fact.

JUSTICE SOUTER: Assume for the sake of argument that it is made in this case.

MR. KNEEDLER: Okay. Then --

JUSTICE SOUTER: What should you respond?

MR. KNEEDLER: It is conceivable in a particular case that a person who -- who claims to be injured by that could sue to prevent that injury, but it would not be a challenge to the regulation as regulation. It would be because specific, threatened, site-specific activities in which there would not be notice given in advance or there wouldn't be -- wouldn't be time, threatened to injure them. It would again be a challenge to the application --

JUSTICE SOUTER: But your response to that is going to be, I presume, that in fact, absent a specific activity before the court, the -- the challenge is not ripe. So that if you are going to stick to your

position elsewhere in this case, they are going to fail in that enterprise.

MR. KNEEDLER: And -- and -- and that may -- that may well be right, but that would be a separate question.

JUSTICE SCALIA: I don't understand -- I don't understand your response. If -- if someone has an interest in -- in stopping a particular action that would be governed by -- by -- by this general regulation, surely that person could -- and is -- is -- is threatened proximately by that action, that person could certainly bring an action seeking to stop the action on the ground that this regulation is invalid.

MR. KNEEDLER: That was my -- that was my -- and that was my point.

JUSTICE SCALIA: And that would govern that particular action, but it would also be -- be precedent for invalidating the regulation in other cases. I -- presumably other courts would -- would similarly say that the regulation is invalid.

MR. KNEEDLER: Right. And that was the point I was trying to make. And if I -- if I could explain -- if I could explain the same point --

JUSTICE STEVENS: May I ask -- may I ask this one follow-up question, because I want to be sure I

understand your position. Supposing the plaintiff in his declaration cites three or four cases in which the action was taken so promptly they didn't have notice in order to object. And then he says but so -- they -- all this was too fast for me. Now I want to -- want to do just what the plaintiffs are trying to do in this case. Would he have standing then?

MR. KNEEDLER: I -- I -- if there was -- if there was a category of cases in which that was likely to happen. Most of the -- most of the -- he may well have standing in that situation to challenge maybe an upcoming -- it's an unusual APA suit because -- because only final agency action can be challenged, but conceivably a threatened final agency action --

JUSTICE STEVENS: You would agree that with that scenario he would have standing if his only injury in this is exactly the same as the plaintiff in this case?

MR. KNEEDLER: No. The injury would come from the threatened on-the-ground activity, not the actual --

JUSTICE SOUTER: He doesn't know that in advance. That is the premise of Justice Stevens's question, and it is the premise of mine. There -- the point is being made by them that this happened so fast

that the threat has been realized before they could respond to it.

MR. KNEEDLER: If -- if I -- if I could make a broader point here because there -- there may be certain categories, certain instances in which that might happen, but it is -- it is the exception, not the rule. And -- and the --

JUSTICE SOUTER: I will -- I will assume for sake of argument it is the exception, not the rule.

MR. KNEEDLER: But --

JUSTICE SOUTER: Let's assume we have got the exceptional case. Would there be standing?

MR. KNEEDLER: In -- in the exceptional case there probably would be standing.

JUSTICE SOUTER: So that if in Justice Stevens's hypo one could show that there had been three or four or five instances of action so fast it was impossible to challenge it, there would with that as a predicate be standing to challenge the regulation as these people are trying to challenge it?

MR. KNEEDLER: Not -- no, and that -- and that was the point I was --

JUSTICE SOUTER: Okay.

MR. KNEEDLER: -- not -- not in the way they are trying to challenge it, because they are trying to

challenge it across the board.

JUSTICE SOUTER: Tell us how they could challenge it, then? Tell us the right way?

MR. KNEEDLER: What they would have to do is bring a -- a -- on a -- a particular national forest where a particular person visited and visited a particular area and there has been a pattern of particular activities that occurred without his knowing, he -- he -- in that situation he might well have standing to challenge a similar --

JUSTICE SOUTER: Well, if it's the forest next door that he is worried about and they have not tried a -- a -- a kind of quickie lumbering action in the forest next door before, he would not be able to challenge it.

MR. KNEEDLER: That's correct. The -- the -- standing has to focus on the particular site-specific place where the individual has visited and if there is a repeated pattern of a similar type of activity that he doesn't know about and maybe --

JUSTICE GINSBURG: Mr. Kneedler, why -- why -- why is that so? I am reading this ARA statute, and it seems to give people a right to notice, an opportunity to comment, and to undertake an administrative appeal.

Why isn't this statute that says, interested public, you have those rights, you have essentially a right to a seat at the table, why isn't this statute like FOIA, like the statute that the Court considered in the Atkins case, in the FEC case involving information about APAC?

These were people who said: We are concerned about saving our forests. That's why Congress said that before these actions occur, there should be notice to the interested public, comment, and we are being cut out from that seat at the table. It doesn't do us any good after the project has been authorized. We want to be there when the decision is made to take action.

MR. KNEEDLER: If I could respond in several ways. First of all, the due process clause imposes limitations on agency action, but that doesn't mean that -- that somebody can go into court and challenge agency procedures as violative of the due process clause until there is a specific proceeding going on and -- and completed in which there has been a violation.

JUSTICE GINSBURG: But this statute says says before there is a specific action you have a right to notice, comment, and administrative procedures.

MR. KNEEDLER: There is no indication at all

in the passage of that statute that Congress meant to confer a judicially enforceable right to obtain those without complying with the usual APA provisions for judicial review.

JUSTICE GINSBURG: Maybe he has no --

JUSTICE SCALIA: Suppose the statute says anybody in the country can sue to stop a violation of the due -- due process clause. Would that statute be valid?

MR. KNEEDLER: No. You -- you would have to -- you would have to show a particular injury and --

JUSTICE SCALIA: The Article III requirements cannot be eliminated by Congress?

MR. KNEEDLER: That is -- that is correct. And -- and there is no indication at all that in this statute, which was just intended to modify the Forest Service's intent to change its internal decision-making processes -- and Congress wanted to restrict what -- what the Forest Service was going to do -- that it thereby meant to change the fundamental nature of the agency's own internal regulations which would not --

JUSTICE GINSBURG: Why is that different from FOIA? I mean there anybody can request anything. You don't have to show anything beyond -- well, you only have to show curiosity. You say: The statute gives me

a right to ask for this information.

MR. KNEEDLER: Well -- and the -- the Forest Service has -- has procedures for notifying people of -- of proposed projects that were in fact invoked in this case, and we point this out in our brief. There are really two separate types of procedures.

One is the so-called Schedule Of Proposed Actions, which includes all the actions in which there would be a decision memo issued by the Forest Service, which includes at least all of the projects that respondents are claiming should be -- should be covered. That is published quarterly. It -- it is available on the web. It is also available in person. One of Respondents' declarants here on behalf of the Sierra Club says that by using that so-called SOPA, that schedule, he reviews every project in all 11 national forests in California. There is also, in addition to the SOPA -- and will submit comments when necessary.

In addition to the SOPA, the Forest Service has what are called scoping regulations which -- in which every on-the-ground project is looked at to see whether it needs -- there needs to be NEPA compliance through an EA or an EIS, but also what is the nature of public participation that is required.

In that scoping process the Forest Service,

the -- the local personnel at the Forest Service, will look to see who is interested in the particular project. The way this works on the ground is an organization like the Sierra Club through its declarant in the -- in the joint appendix will have somebody monitoring this SOPA, the Schedule of Proposed Events, and will say: I see that you have a -- a certain project listed. I am interest in that. Please notify me when you are about to take action to thin this -- this area or restore this burned area. Please notify me.

When that happens, the Forest Service then sends out a letter, a so-called scoping letter, asking for comments. So this is not a situation in which the -- the organizations of the declarants in this case have been excluded. To the contrary, these are all people who pay very, very close attention to what the Forest Service is doing.

The one declarant on which the court of appeals relied for standing on page 71a of the -- of the petition appendix, he specifically refers -- the only specific projects he refers to are timber projects, and the injunction here goes much broader than timber projects -- but he said that for example, in the Allegheny National Forest they put out scoping comments for a series of 20 timber sales. He knew about those

timber sales and he was able to comment on them. And the -- the declarants on whom the standing was based to challenge the Burnt Ridge Project, which is no longer in this case, in that case the Forest Service -- and this is in the administrative record -- sent out 1,300 letters to people who had expressed an interest in that project before it was undertaken. Mr. Marderosian, who also monitors forest projects --

JUSTICE KENNEDY: Could any one of those have brought suit?

MR. KNEEDLER: Anyone -- anyone who claimed to have used that area could have brought suit. Some of the -- some of those -- some of the people -- people submit comments.

JUSTICE KENNEDY: But I mean -- but the letter alone, I don't know what the criteria were for the addresses.

MR. KNEEDLER: Those were people who had expressed an interest in the -- in the project.

JUSTICE KENNEDY: Oh, okay. Okay.

MR. KNEEDLER: And Mr. Marderosian submitted a 23-page comment to the Forest Service with respect to the Burnt Ridge Project, and that is the other declarant. These are people whose profession or avocation -- serious avocation is following the Forest

Service. So this is not an instance in which -- in which notice is not generally furnished.

I would like to make the same point I was making about standing in connection with the -- with the Administrative Procedure Act as well. Section 702 of the -- of the APA says that a person who is aggrieved by agency action is -- may seek judicial review thereof. The -- the agency action that is subject to judicial review has to be the agency action that causes the injury. The procedural regulation does not cause the injury. It is the on-the-ground activity, the site-specific decision -- the action, the agency action approving the site-specific action that causes the injury. That is what the person is entitled to judicial review on.

JUSTICE GINSBURG: Then you are saying that this statute is just unenforceable, because the statute is supposed to operate before the project?

MR. KNEEDLER: It's -- it's -- it's by no means unenforceable. In the Burnt Ridge Project that was at issue in this -- in this case, the plaintiffs challenged the Burnt Ridge Project when it was completed on a number of grounds, that it was not properly categorically excluded from NEPA, that it didn't comply with the forest plan, but also that it had been approved

without complying with the -- with the ARA appeals procedures.

CHIEF JUSTICE ROBERTS: And that was before the project was undertaken?

MR. KNEEDLER: Yes. An injunction, a preliminary injunction was obtained, and tellingly, and I think this is also instructive for ripeness purposes, there was a PI issued but not because of a violation of the -- of the ARA; the district court concluded there was a likelihood of success on some of these other objections, substantive objections to the project, not procedural objections --

JUSTICE BREYER: Ah, but --

MR. KNEEDLER: -- and enjoined it and then the Forest Service went through the project and the -- and the plaintiffs dropped their challenge.

JUSTICE BREYER: And I am pursuing this, but I'm actually having a hard time with this. Suppose -- suppose Congress passes a statute; the statute says every citizen of the United States has a right to receive notice of a certain set of Forest Service actions. Everybody. We want everybody who wants it to have notice.

Now, if somebody really wants that notice and they don't get it, can they sue?

MR. KNEEDLER: At some point that would begin to look like FOIA, yes. But --

JUSTICE BREYER: Yes. Sorry.

MR. KNEEDLER: But --

JUSTICE BREYER: In any case, I'm trying to make it look like FOIA.

MR. KNEEDLER: But --

JUSTICE BREYER: That's just what I am trying to do, and you say yes, they probably could, at least if you are just supposed to get a piece of paper that says "Notice." Now suppose Congress says, if you can show you are the kind of person who regularly asks and needs such notices, and if a regulation is promulgated interpreting this statute, you can challenge that reg prior to enforcement. Now does that violate Article III?

MR. KNEEDLER: I believe it -- I believe it probably does, unless you can show that there is an imminent --

JUSTICE BREYER: Suppose they did this. Suppose they said each agency has the legal power to promulgate regs interpreting FOIA as to when you get the thing, and when you don't, and moreover people who are regular FOIA requesters can challenge those regs prior to enforcement; what about that one?

MR. KNEEDLER: Conceivably. But I -- what -- what I --

JUSTICE BREYER: I am looking for a principle that is going to help me.

MR. KNEEDLER: Congress has not done that here and this is why I wanted to shift to the APA, because this is subject to review under the general standards of the APA. Even if we can assume that there would be Article III standing to challenge a threatened -- a threatened, another one in a series of similar projects like off-road vehicle use or something which might occur before someone would be able to -- to -- to challenge it, that doesn't apply to timber projects and other things that take much longer to plan.

JUSTICE SCALIA: Mr. Kneedler, I don't even agree with you that a -- that a citizen-wide notice provision confers standing, because it's close to the APA.

MR. KNEEDLER: No, I didn't say --

JUSTICE SCALIA: Close -- close to the FOIA. In FOIA, an individual citizen demands a certain document which the law entitles that person to. This is a concrete deprivation --

MR. KNEEDLER: Right.

JUSTICE SCALIA: Of something concrete.

And --

MR. KNEEDLER: I didn't -- I didn't -- I didn't mean to concede that there would be standing.

JUSTICE SCALIA: Well, I thought you were doing it. And I certainly don't --

MR. KNEEDLER: No, because you are right. And here the agency's procedures allow somebody to request to be put on the mailing list about a particular project. And that's the way you make it -- make it known and in fact that happened here. And also the one declarant -- it's perhaps instructive, the only other kind of notice other than this sort of situation where a person says I want to be notified when a particular project is going -- is going to take place, the only other form of notice is publication in a local newspaper of record that each national forest has which shows that this is -- that this notice provision is localized with respect to people who are going to be aware of what's going on in the forest and who are following it. But the declarant Mr. Bensman, when -- for another purpose is noticing or is pointing out this publication requirement in a local newspaper, says that his organization doesn't want to subscribe to local newspapers, that would be too much of a burden for them to have to follow what is going on in newspapers.

That's the -- that's the only kind of additional notice the statute ever provides for. The other kind of notice is the notice you get if you previously expressed an interest in the project, in which you basically demanded something along the FOIA lines that Justice Scalia was referring to.

But again, back to -- back to the -- you call it ripeness, you call it the proper subject of judicial review as this Court said in National Wildlife Federation, based on section 702 of the APA, ordinarily a regulation may be challenged only when it has been reduced to manageable proportions by a concrete application of the regulation to the individual's particular circumstances. It's the application to the person's circumstances that gets challenged. In this context, it would be the application of the regulation that says there is no right of appeal in connection with the approval of a site-specific activity. If you think the project was approved in violation of the ARA because you weren't given a right -- after you got your notice you weren't given a right to appeal, then you could challenge that in court on the ground that it was approved without following the agency's procedures.

CHIEF JUSTICE ROBERTS: Your friend on the other side says that that doesn't make too much sense

because the issue in every case is going to be the same, a purely legal issue, and so waiting for the application doesn't make any sense.

MR. KNEEDLER: Well, I don't think it is a purely legal issue. The Respondents concede that not all projects are subject to this statute, and the district court --

JUSTICE GINSBURG: The question is where do you draw the line?

MR. KNEEDLER: And that -- that's why it can't be purely a legal question. As soon as you -- and the district court acknowledged that environmentally insignificant projects are not covered by the act, and so that requires them an as-applied determination as to whether a particular type of project or even the particular project is one that is -- that is covered by the act. And not only that --

JUSTICE GINSBURG: I thought that you said the government's position is that the line is to be drawn for cases that don't require either an EIS or an EA. Those -- in those cases you don't have to do this notice, comment, appeal thing. And I thought the other side is saying, no, that's the wrong place to draw the line. It would be the same thing in every case, from the government's point of view, no environmental impact

statement, no environmental assessment required, no notice and comment. And they are saying you put the line in the wrong place.

MR. KNEEDLER: But -- but that doesn't answer where the line ought to be. And even if the government is wrong as to a particular project, that means the line has to be somewhere else. It may be that certain kinds of timber projects should be subject to appeal but that doesn't mean that some other road maintenance project should be subject to appeal.

If I may reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Kneedler.

Mr. Kenna.

ORAL ARGUMENT OF MATT KENNA,

ON BEHALF OF THE RESPONDENTS

MR. KENNA: Mr. Chief Justice, and may it please the Court.

This facial challenge to the Appeals Reform Act regulations could have been brought outside the context of the Burnt Ridge Project, as long as we had shown that it had been applied to a project and continued to be applied to the plaintiffs on an ongoing basis.

JUSTICE SCALIA: What if there -- what if

there was not a regulation on this subject, but the agency, by its constant practice, applies a certain procedure in all of these cases, would you have it -- the power in the abstract to challenge the agency's consistent application of a certain procedure?

You could certainly do it in a particular case, if the agency did something that was unlawful, you could certainly challenge it? But let's assume you don't have a particular case, you just object to the fact that in all of its cases the agency is doing this thing that is wrong.

Will you have standing to challenge that?

MR. KENNA: The question of rightness in standing need to be treated a little differently for that. As far as the rightness question I think it would be a much more difficult case than here, but I would think could you do that.

JUSTICE SCALIA: You would have standing?

MR. KENNA: You would have to show, as Your Honor is indicating --

JUSTICE SCALIA: Your complaint is I don't like the way the agency behaves?

MR. KENNA: Not on that pure basis. No. You would have to show that -- or we would have to show some concrete harm from where it's been applied.

JUSTICE SCALIA: Why do you make a difference with respect to the regulation? Why does the mere fact that this agency lawlessness happens to be reflected in a regulation, why does that suddenly alter the standing calculation? You either have been harmed or you haven't been harmed.

MR. KENNA: Justice Scalia, I don't think it changes the standing calculation. I think it does change the rightness and final agency action especially question somewhat, makes it much more clear. But we don't rely on procedural injury here. Even though I think there is potentially room for it along the lines of Freedom of Information Act.

CHIEF JUSTICE ROBERTS: The Ninth Circuit relied on it at least as an alternative ground, correct?

MR. KENNA: Well, I think what the Ninth Circuit did was similar to what the court did recently in the Winkelman v. Parma School District case where most of the discussion was about the procedural harms that the parents of the autistic school children were suffering. There was only one brief sentence tying it to the concrete harm, but it did tie it to the concrete harm. And I think that's what the Ninth Circuit did here. And certainly the district court very much went into tying the procedural harm to the on the ground

harm, and that's what it based its decision on.

CHIEF JUSTICE ROBERTS: Counsel, to read just one sentence to you from the National Wildlife Federation case, because I think it's the biggest hurdle you face. It's on page 15 of the government's brief. It says: "A regulation is not ordinarily consider the type of agency action ripe for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions and it's factual components flushed out by some concrete action applying the regulation to the claimant's situation."

It seems like a high hurdle for you to surmount.

MR. KENNA: Mr. Chief Justice, I think that needs to be read in combination with the footnote 2 to that decision, which says of course if you have a regulation applying a particular measure across the board --

CHIEF JUSTICE ROBERTS: That's the Abbott Labs exception, isn't it? I don't think anybody suggests that that is applicable here.

MR. KENNA: No, I don't think that's the -- I think the Abbott labs exception is an exception to where the plaintiff cannot show that the regulation has been applied to its situation yet.

CHIEF JUSTICE ROBERTS: But that's when his primary conduct is nonetheless going to be affected?

MR. KENNA: Right.

CHIEF JUSTICE ROBERTS: You know, the drug companies have to do something. Well, they don't -- you know, they have to do it before they can -- they don't have to wait until they are sent to jail to say that their conduct has been affected.

MR. KENNA: Yes. But I think where as here the regulation has been applied to the plaintiffs on an ongoing basis, it's conceded that it was applied thousands of times nationwide.

CHIEF JUSTICE ROBERTS: But you have not pointed to a particular fact under any of these affidavits when it was applied to any of the plaintiffs. In what the National Wildlife Federation case said, "Some concrete action applying the regulation to the claimant's situation. "

MR. KENNA: We have the Burnt Ridge Project itself. And then once we have shown standing, it becomes a matter of mootness.

CHIEF JUSTICE ROBERTS: You haven't shown any standing with respect to the Burnt Ridge Project on an ongoing basis because that has been settled. It's outweighed -- it's out the door.

MR. KENNA: Right. I think the court's initial standing analysis is at the time the complaint is filed.

CHIEF JUSTICE ROBERTS: So it's in for a penny, in for a pound. If you show standing with respect to discreet action D, you can challenge A, B, and C?

MR. KENNA: No, Your Honor, I would respectfully say that the focus is on the beginning. And then as the -- as this Court said last term in Davis v. FEC, then it becomes a matter of mootness, and between that case and the Laidlaw case, that is a lower hurdle. So once we had the standing -- and the Marderosian declaration is worth looking at, because it talks about harm from the Burnt Ridge Project itself, which the government concedes, as well as from application of the regulations to be denied notice, comment and appeal throughout the Sequoia National Forest.

JUSTICE SOUTER: I think you never completed your answer in commenting on the National Wildlife Federation statement with reference to footnote 2. What is it that footnote 2 tells us in light of which we must read what the Chief Justice quoted?

MR. KENNA: Well, the footnote 2 says, of

course, if you have a particular regulation applied to a particular -- to a category of circumstances across the board, of course you may challenge it. And I think --

JUSTICE SCALIA: Is that all it says? No, I think it speaks of categories across the board that affect -- that immediately, concretely affect the person complaining of the regulation, which is the case in these areas where you have a regulation requiring drug companies to have certain -- on pain of criminal penalty to print certain things on labels. That immediately affects them.

I think that is what footnote 2 is about, not about -- not about any regulation that is across the board. That wouldn't make any sense.

Where is footnote 2. Let's read it.

(Laughter.)

MR. KENNA: There is many cases where it was not an effect on primary conduct yet a facial challenge was permitted. In fact, this Court has never rejected before a facial challenge to a regulation that is published in the Code of Federal Regulations where it has been applied on an ongoing basis.

So, in Sullivan v. Zebley, it was child disability benefits, it was a benefit referring regulation, which said we see no reason to force as

applied challenges instead of a facial challenge.

You have Thomas v. Union Carbide, which was not a regulation telling Union Carbide how it had to manufacture its pesticides, but rather how it would affect arbitration -- it's arbitration when it got into disputes, which is like National Park's case, which was held unright not because of that fact, but because it had not yet been applied.

When you look at all of these cases that rejects facial challenge where either the regulation has been applied and has not -- and then the court gets to the question of whether it affects primary conduct.

JUSTICE BREYER: The problem they are asking you on this -- it was at least a problem for me -- I think it's tough on rightness is because the government is saying here: Look, you want to challenge it outside the context of a particular action that you don't like. Well, there's never going to be an action, never going to be such an action that we are going to take that you won't find out about, that you will not be able to challenge in that context if you are really hurt. There isn't one. You can't name one that's ever been or imagine one that ever will be, okay?

Now, is that so?

MR. KENNA: No, Justice Breyer, that's not

so. The joint appendix at page 101 discusses an instance where Mr. Bensman did not get notice at all.

The issue with --

JUSTICE BREYER: You see where they are going next. And if you -- suppose that the thing you just told me, too, has problems or suppose it's pretty hard to find one, then the -- why this has never been decided and why it's difficult. Because I would start with Abbott Labs and say there are three considerations. How easy is it now to solve the legal problem? Here? Perfectly easy. Nothing's going to change.

Factor two, how likely is it that they will work with this legal rule and change it around here? Zero.

But three, what kind of harm is it going to cause to the plaintiff if you were to deny him relief now? And they are saying here that's also zero or next to zero. So what do you do if the factor that cuts one way is zero and the factor that cuts the other way is zero, or near zero?

Now, I have to admit I have never seen a case on that. I don't know if there has been one before, and I don't know exactly what to do. And if you can go read the appendix, maybe I can escape the zero.

MR. KENNA: Well, I think even apart from

the appendix, even apart from the assertion that there are -- the fact that there are certain actions that will receive no notice, I think the fact of the matter is we did what the court has instructed us to do, and that is we brought a facial challenge in a concrete example with the Burnt Ridge timber sale project. Now, it's passed. Now it becomes a question of mootness, and I think the mootness question is easier to solve because the Court has said that it's a lesser hurdle than standing, and we have shown through the Bensman declaration that it's continuing to be applied to the plaintiffs on an ongoing basis, that they suffer harm by not being able to get these procedures which caused them on-the-ground harm because the forest is not protected as well as it would be with it.

CHIEF JUSTICE ROBERTS: Counsel, I now have footnote 2, and it refers, as you say, to a particular measure that applies across the board to all individual classifications. It goes on to say, which is final, "and has become ripe for review in the manner we discussed in the text." Then we say, or Justice Scalia says, "it can of course be challenged under the APA by a person adversely affected. And although that may have the effect when they get a general decision invalidating a program, it says that a quite different from

permitting a generic challenge to all aspects of the program as though that itself constituted a final agency action."

So you still have to become ripe for review in the manner discussed, which was the sentence that I read to you earlier, and the challenge can only be brought by a person adversely affected. I don't see how footnote 2 undermines the sentence I have read to you at all.

MR. KENNA: Well, in that footnote, it's saying it's quite different from permitting a generic challenge to all aspects of the land-withdrawal review program. And I think that was the problem in Ohio Forestry, where you had this broad program left with facts to sort through and apply, but the opinion in Ohio Forestry said, of course, though, if the plan had cut out someone's right to object to trees being cut, that would be the kind of action that would be challengeable. And so I think what that later part is talking about, in National Wildlife is saying, this isn't the kind of action we allow challenges to. It's not final agency action. It's not --

CHIEF JUSTICE ROBERTS: Well, it says -- it says, if it's become ripe for review in the manner discussed in text. In other words, if it has been

applied to a particular individual adversely affected then, quote, "a person adversely affected may bring a challenge. " And I don't -- that seems to me to be a restatement of the sentence I read you earlier.

MR. KENNA: But that gets us to the standing question. And here the Marderosian declaration showed he was affected both with regard to the Burnt Ridge Project and other projects on the Sequoia National Forest. We have the Bensman declaration that talks about how he was harmed in his local forest from not being able to comment on timber sales, and we have the subsequent declarations.

And I would also point out in the Lujan v. Defenders case, both in the note 8 and Justice Kennedy's concurrence, there's a discussion about how, in Robertson v. Methow Valley, for instance, a standing declaration didn't even need to be raised because it was obvious that, in that case, that the plaintiffs were amongst the injured because they were a local group in their local forest.

You know, here we have an assertion uncontroverted by the government that these are being applied on every forest on an ongoing basis -- it's stipulated to that. To contend that the Sierra Club is not injured, especially in light of the declarations

that we've submitted --

CHIEF JUSTICE ROBERTS: That would be like in footnote 2, the general program. Yes, they are saying these types of activities we don't do the notice and comment and appeal. That's the general program. But you have to wait until it's applied to a particular individual who is adversely affected.

MR. KENNA: Well, all I can say, Your Honor, is I thought we did that by bringing it in the context of the Burnt Ridge sale and then it's a matter of --

JUSTICE GINSBURG: If you had had a ruling on where you draw the line in the Burnt Ridge case, then that would have been precedent for all these other cases, but it was settled, right, so you didn't get a determination?

MR. KENNA: Yes, Your Honor, we never brought an as-applied challenge to these regulations in the context of the Burnt Ridge sale.

JUSTICE GINSBURG: But you are seeking a different line. And, by the way, I don't know what the line is that you are seeking. But the government says if you don't need an EA, then you don't have to give notice, comment, et cetera. What would be your standard for when you need notice and comment?

MR. KENNA: Well, it's right in the language

of the Appeals Reform Act. There are two parts that are important. One is, it says, "a proposed decision implementing a forest plan shall be made subject to notice and comment." And then section C states that "any decision approving such an action shall be subject to appeal." So you have two elements: That there is a decision approving something and it implements a forest plan.

Now, that's the way it worked under the Forest Service before the Appeals Reform Act was passed and what Congress meant to keep in place substantively with a different procedure through the ARA. So a Christmas tree permit, for instance, an original Christmas tree permit is exempt, not because it's insignificant. We've never conceded, and that's what the whole merits were about, that it's --

JUSTICE SCALIA: You need a permit to have a Christmas tree? Where is this?

(Laughter.)

MR. KENNA: I'm sorry, Your Honor. So if you want to go and cut your own Christmas tree --

JUSTICE SCALIA: I know what you're talking about.

MR. KENNA: You know, I get one every year. I just go down to the local Kreger's hardware store; I

pay my $7 to the clerk. There's no exercise of discretion, and you can you go and cut your own tree. Now, that is exempt, not because it's environmentally insignificant, which, you know, it probably is in most cases, but because there is no decision approving it. And that's the way it has always worked, and that's where we think the line needs to be drawn, although, of course, the merits were not raised by the government here.

CHIEF JUSTICE ROBERTS: You cut down a tree in the national forest without approval?

(Laughter.)

MR. KENNA: I did get the permit, Your Honor.

CHIEF JUSTICE ROBERTS: Oh.

(Laughter.)

MR. KENNA: I think the other kinds of cases that are useful to look at are, for instance, Blum v. Yaretsky for standing, and that was the nursing home case where nursing home residents that had been denied -- they had been sent to lesser nursing home facilities, they were on assistance -- challenged the way in which that was being handled. And the Court said, you know, the historical basis for these plaintiffs is that they have been denied their -- they have been in these

situations and it's perfectly likely that they are going to be in again. Another case would be the Northeastern Florida Chapter of Contractors v. Jacksonville case, which I am afraid we did not put in our brief, but that was where victims of reverse discrimination had been regular bidders on construction contracts, and they were held to have standing because it was obvious they were going to suffer these harms again and there was not even a discussion of the declarations. Here, we --

JUSTICE SCALIA: That's not unusual. I mean, standing looks not just to harm that has already been suffered but to harm that is imminent. And if these people are regular bidders and they say, you know, I'm likely to bid on this next project, that's fine. But these people are -- you don't know any specific project. They are just people interested in forests throughout the United States.

MR. KENDALL: Well --

JUSTICE SCALIA: That's quite different from saying, "I am about to suffer harm, imminent harm, to me." I don't see anything -- you know, anything except in the case that was settled that has that kind of a connection.

MR. KENNA: Well, Justice Scalia, I would suggest that the way those two cases I discussed the

plaintiffs were treated is similar to here, where you have members who -- it's uncontroverted that they are constantly using the national forests and commenting on forest appeals. And we have a reference to 20 specific timber sales. They weren't mentioned by name, but it's always been this Court's jurisprudence to elevate form -- I mean, elevate substance over form -- so it's not a creative pleading exercise that can either get you in or out of standing; it's a commonsense inquiry.

JUSTICE SCALIA: Tell me the two cases again that you are relying on for this.

MR. KENNA: Blum v. Yaretsky, and that we cite in our brief; and then Northeastern Florida Chamber of Contractors v. Jacksonville. That's a 1993 case.

JUSTICE SCALIA: And what's that? What's the cite for it?

MR. KENNA: 508 U.S. 656 1993.

Now, getting back to the ripeness issue in particular, as we go through the list of cases, it seems that the facial challenges have always been permitted in situations similar to this. The key question is, has it been applied? So National Parks Conservation Association hasn't been applied. No prediction that it might be applied, therefore not ripe. Thomas v. Union Carbide, I think, is particularly instructive because

there the case preceding that was held unripe because there had not yet been an arbitration under the federal insecticide law. But by the time the case came to the Court, there had been an arbitration that had passed, and on that basis the Court said yes, this is a ripe controversy because here it's been applied, and there was no finding of mootness even though that arbitration was done, and that's the same situation that we have here.

JUSTICE BREYER: Can I go back to standing for a minute.

MR. KENNA: Yes, Your Honor.

JUSTICE BREYER: You may have looked this up and may have found something here.

Suppose an organization that has a purely ideological interest, so it can't get into Federal court, nonetheless can go before an agency; but they are not going to get into Federal court. Now, suppose that agency then has a reg that they think is lawful and makes their life more difficult. I guess that the fact that they suffer a procedural injury would not get them into court. They are already somebody who doesn't; they don't. So I can imagine cases saying that.

Contrast that with the case with a person who has a very concrete specific injury, a terrible

allergy to chemical X, and they often litigate that there is too much chemical X, and now they are before an agency and they frequently complain about chemical X, but they don't have a particular case, but they will often be there. Now, the agency promulgates a procedural regulation that hurts those people who normally have a concrete injury. All right? There I wonder if that purely procedural injury cannot serve as a basis for standing.

Now, do the cases ask -- so I am contrasting the two kinds of questions, and I wonder what you found in the cases as to the second kind, as opposed to the first kind; and you are free to answer this as one word "nothing; go look it up yourself, which is a fair comment.

(Laughter.)

MR. KENNA: Well, Justice Breyer, you know, of course our case is not that typical because we think we have on the --

JUSTICE BREYER: You think you are like the second?

MR. KENNA: Right. I think there is room under the -- so the FEC v. Atkins cases is the informational injury case. Then there is the Havens case which stated that groups that sought to fight

redlining in loaning for -- discriminatorily loaning in neighborhoods had organizational standing, not representational as we claim here through our members, but actual representation in and of themselves. And I think when you combine those cases together, I think there is some room for that finding that there is that injury.

But I would -- I would point out here that the -- we don't claim it, and even though the court of appeals, again, talks quite a bit about it, it ultimately tied it back. And even if it didn't do a job that this Court found to be sufficient, I think the focus really has to be on the district court, as that is what originally looked at the declarations and did a very good job of discussing the on-the-ground injuries suffered combined with procedural injuries.

JUSTICE SCALIA: Can I ask you about Northeastern Florida? I have dug that out. I don't think it -- it supports what you say. In its complaint what was going on here is that there was a -- a minority business preference adopted by the City of Jacksonville, and some contractors who were not minorities sued saying that this was in -- in violation of the Constitution.

And what happened -- what the Court said about standing was in its complaint petitioner alleged

that many of its members regularly bid on and perform construction works. Now, if it had stopped there it might fit your case, but then it went on to say, "and that they would have bid on designated set-aside contracts but for the restrictions imposed."

As I read the case there were designated contracts, of which they said we would have bid on them but we didn't because of this -- what the case involved was the assertion by the city that you don't have standing unless you can show you would have been awarded the contract. And we said, no, no, you don't have to be awarded it, but if indeed you were -- you would have been a bidder in that contract but for this law, that's enough for standing.

So that's not this case.

MR. KENNA: But I think the record supports the same kind of assertion. So, for instance, if you look at Tim Bensman's declaration at page 71a of the petition appendix, it says how on those timber sales he would have commented and appealed them if he was given the opportunity, and he would like to go back there if he could preserve the quality of those areas that he visited.

CHIEF JUSTICE ROBERTS: And where is "there"? He would like to go back where?

MR. KENNA: He would like to go back to the areas in -- where those 20 timber sales are, some of which he had been to before and would like to return to. And I -- and the supplemental declarations, when this came up again and the government pressed, because they asked for more specifics, those specifics were provided.

And so, for instance, at the joint appendix at page 90 you have Eric Wiberg using the Weiser River drainage and talking about he wasn't going to get notice of that. Only because he happened to be personally familiar with the area was he able to communicate his views to the Forest Service, and it actually ended up changing what the Forest Service did because he just happened to find out and he happened to know it. So that's a specific --

CHIEF JUSTICE ROBERTS: This isn't one of those after-submitted declarations, is it?

MR. KENNA: That -- that latest one I referred to is. Yes, Your Honor.

CHIEF JUSTICE ROBERTS: Well, don't we generally not look at after-submitted declarations in determining standing?

MR. KENNA: Your Honor, I don't think that is correct. I think the Court can look at any documents in the record which show standing at the time of the

suit.

CHIEF JUSTICE ROBERTS: So if you -- if yesterday you submitted a declaration, we would look at that?

MR. KENNA: Well, the cases that the government provided for rejecting declarations were offers submitted to this Court or certainly an appellate court and I agree that is more problematic, or it would have been more problematic if the district court had excluded the documents and said it's not going to look at them. We would be looking at an abuse of discretion standard as was at issue in Lujan v National Wildlife Federation. But certainly when a, an appellate court takes up a record from a district court it is entitled to look at all the evidence submitted and especially when it's a case like standing -- or an issue like standing where it's a constitutional question that is important and you may look at all the circumstances -- there is no reason to reject a later filed declaration.

But again, we don't rely on those alone. We think it's the totality of everything that supports --

CHIEF JUSTICE ROBERTS: The later filed, where along the district court proceedings were they filed?

MR. KENNA: They were submitted -- after the

judgment setting aside the regulations, there was litigation over the government's stay motion pending appeal.

CHIEF JUSTICE ROBERTS: So if you lose that again, you figure, well, I've got some more -- I can get some more declarations. The reason we don't look at after-submitted declarations is because there has to be under the normal rule, an end to litigation at a particular time. It seems to me this would be an endless process. You know, every time the district court identifies a particular flaw, you would say okay, here's a declaration, and then they say, well, here's another basis, well, here's another declaration. I'm not sure that that's what our cases sanction.

MR. KENNA: Well, the -- the district court didn't find a flaw. It found that we had standing. It was -- the government reiterated its standing argument in the context of the stay. This essentially opened the door by arguing again, "hey, you have no standing," in addition to "we should get a stay because of the equities." And so it seems perfectly appropriate in that circumstance to submit additional declarations. We didn't just file them out of the blue because we thought --

CHIEF JUSTICE ROBERTS: You filed them after

judgment, right?

MR. KENNA: We did. But they -- I think also the issue is there's been the many decisions of the Court which say, you know, standing after the fact isn't going to do you any good. And what I think it's important to keep clear here is that the declarations were later filed, but they referred to events going on before the judgment came down.

So, we have declarations at the time of the complaint, very specific; the government concedes they are very specific; they talked about both the Burnt Ridge sale and the regulation. We have the Bensman declaration at the time of the merits consideration, which showed the case was not moot, that he was still being subjected to these regulations and being denied notice and comment. And then we have additional declarations after the fact of the government -- I'm sorry of the district court's decision, which buttressed all of the above.

And it seems appropriate under that circumstance in light of the statements by the Court that I discussed in the Defenders case and elsewhere, that standing is a practical inquiry, that standing should be found in such circumstances.

JUSTICE GINSBURG: Do you want to say a word

about the Ninth Circuit making a law for the entire nation, on a controversial question that normally the court would just rule for its own area?

MR. KENNA: Well, I think there is a difference, Your Honor, between setting aside a regulation under the Administrative Procedure Act and what would normally be some sort of nationwide injunction such as where you had, say, challenged a local timber -- local forest service district for not analyzing NEPA correctly, and the Court not only set aside that action but said, and "oh, by the way anywhere else in the country that's doing it like this, you are enjoined, too."

I think it's a very different question where you have a regulation that's being challenged under the APA. And it's always been the Court's assumption that setting aside a regulation, which the APA commands a district court to do, also using its discretion, means that it is set aside without geographic limitation. And so I think, you know, the Ninth Circuit may have said a bit much to saying it was compelled by the text of the APA but I do believe the district court properly weighed the Mendoza interests.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. KENNA: Thank you, Your Honors.

CHIEF JUSTICE ROBERTS: Mr. Kneedler, you have three minutes.

REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER,
ON BEHALF OF THE PETITIONERS

MR. KNEEDLER: Several points, Mr. Chief Justice.

First, the Burnt Ridge Project illustrates the way that we think an issue like this should be resolved and shows why the sentence from National Wildlife Federation that you quoted, Mr. Chief Justice, disposes of the case, and that is that a regulation -- particularly a procedural regulation whose only relevance is in an agency proceeding for approving a site-specific activity -- that can only be challenged in connection with that site-specific activity. That's what the sentence in National Wildlife Federation was driving at; that is what Section 702 says; when you can challenge the agency action that aggrieves you and that is consistent with what the Court said in National Wildlife Federation, that a -- a court should intervene only when and to the extent that someone is harmed. This regulation can only harm someone in connection with --

JUSTICE STEVENS: That is not what it says. It says this is our ordinary practice it doesn't say

it's the limit on our practice.

MR. KNEEDLER: He was talking about injunction. I was talking about --

JUSTICE STEVENS: I thought you were talking about --

MR. KNEEDLER: -- ripeness under the APA but it ties in -- it ties into the injunctive relief if I just could address that for a moment.

Injunctive relief is -- is discretionary and Section 702 of the APA says nothing in the statute limit a court's ability to deny relief on appropriate equitable grounds. And this is best illustrated by the -- suppose a regulation was challenged by the defendant in a criminal conviction and the plaintiff says the regulation is invalid on its face. The APA says set it aside, but surely the district court dismissing that indictment would not be setting aside the regulation on a nationwide basis. The effect of a declaratory judgment even one rendered in the course of dismissing an indictment, if you call that a declaration, is -- is governed by the law of judgments, not by -- not by a court reaching out and extending its ruling to people and forests and projects that are not before -- not before the Court.

And the Burnt Ridge Project shows the way in

which this could be challenged. A particular project where there was not an appeal, if someone wants to object to the project on that ground or any other ground, he -- he can challenge that project, and there may be other grounds on which that project might be invalid which is an additional reason not to anticipate a legal defect but to -- but to wait until it's applied.

The final thing I wanted to say is about the claim of procedural injury and that this might be like FOIA or something like this. I think it's instructive that the -- that the ARA is not written in terms of conferring rights on individuals. It's a direction to the Forest Service to prepare a -- to establish an appeal mechanism, in other words, do what the agency normally does to establish procedures for administering things. There is certainly nothing in the text that suggests that it was intended to confer the extraordinary sort of right of immediate access to the court for purely procedural grounds. It was just meant to fine-tune the agency's own internal administrative procedures, which Section 706 of the APA makes clear can only be challenged in a challenge to the final agency action in which the procedures are applied.

CHIEF JUSTICE ROBERTS: Thank you Mr. Kneedler. The case is submitted.

(Whereupon, at 12:07 p.m., the case in the above-entitled matter was submitted.)

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