

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PRISCILLA SUMMERS, ET AL. :

4 Petitioners :

5 v. : No. 07-463

6 EARTH ISLAND INSTITUTE, ET :

7 AL. :

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9 Washington, D.C.

10 Wednesday, October 8, 2008

11

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

15 APPEARANCES:

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

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

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1 P R O C E E D I N G S

2 (11:06 a.m.)

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

6 Mr. Kneedler.

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER

8 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE BREYER: Let's imagine that Congress

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

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

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

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

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

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

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

3 Do we know the answer to that?

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

5 JUSTICE SCALIA: In a particular case, I
6 suppose.

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

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

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

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

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

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

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

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

1 challenge to a lot of specific actions.

2 What's your answer to that?

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

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

11 MR. KNEEDLER: Okay. Then --

12 JUSTICE SOUTER: What should you respond?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. KNEEDLER: But --

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

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

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

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

23 JUSTICE SOUTER: Okay.

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

1 challenge it across the board.

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

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

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

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

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

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

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

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

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

25 MR. KNEEDLER: There is no indication at all

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

5 JUSTICE GINSBURG: Maybe he has no --

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

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

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

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

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

1 a right to ask for this information.

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

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

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

25 In that scoping process the Forest Service,

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

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

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

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

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

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

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

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

20 JUSTICE KENNEDY: Oh, okay. Okay.

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

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

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

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

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

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

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

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

13 JUSTICE BREYER: Ah, but --

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

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

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

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

3 JUSTICE BREYER: Yes. Sorry.

4 MR. KNEEDLER: But --

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

7 MR. KNEEDLER: But --

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

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

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

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

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

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

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

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

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

24 MR. KNEEDLER: Right.

25 JUSTICE SCALIA: Of something concrete.

1 And --

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

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

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

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

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

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

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

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

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

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

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

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

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

11 If I may reserve the balance of my time.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr.
13 Kneedler.

14 Mr. Kenna.

15 ORAL ARGUMENT OF MATT KENNA,
16 ON BEHALF OF THE RESPONDENTS

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

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

25 JUSTICE SCALIA: What if there -- what if

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

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

12 Will you have standing to challenge that?

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

18 JUSTICE SCALIA: You would have standing?

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

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

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

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

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

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

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

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

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

12 It seems like a high hurdle for you to
13 surmount.

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

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

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

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

3 MR. KENNA: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

15 Where is footnote 2. Let's read it.

16 (Laughter.)

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

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

1 applied challenges instead of a facial challenge.

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

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

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

24 Now, is that so?

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

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

3 The issue with --

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

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

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

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

25 MR. KENNA: Well, I think even apart from

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

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

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

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

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

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

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

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

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

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

1 that we've submitted --

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

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

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

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

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

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

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

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

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

19 (Laughter.)

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

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

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

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

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

12 (Laughter.)

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

15 CHIEF JUSTICE ROBERTS: Oh.

16 (Laughter.)

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

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

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

18 MR. KENDALL: Well --

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

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

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

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

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

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

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

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

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

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

12 MR. KENNA: Yes, Your Honor.

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

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

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

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

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

16 (Laughter.)

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

20 JUSTICE BREYER: You think you are like the
21 second?

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

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

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

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

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

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

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

15 So that's not this case.

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

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

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

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

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

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

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

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

1 suit.

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

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

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

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

25 MR. KENNA: They were submitted -- after the

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

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

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

25 CHIEF JUSTICE ROBERTS: You filed them after

1 judgment, right?

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

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

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

25 JUSTICE GINSBURG: Do you want to say a word

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

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

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

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 MR. KENNA: Thank you, Your Honors.

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

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

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

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

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

1 it's the limit on our practice.

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

4 JUSTICE STEVENS: I thought you were talking
5 about --

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

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

25 And the Burnt Ridge Project shows the way in

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

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

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

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