

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

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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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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

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 -- affirmed the nationwide injunction
12 applicable to all forests with respect to all projects
13 listed in ten categories identified by the district court,
14 including national forests and projects that don't even -
15 that 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 pages 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: Well, which one -- let's

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

8 MR. KNEEDLER: Well, I -- 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: And I -- 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, in
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. Could --

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. How are --

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: But may I ask just this one --
25 Mr. Kneedler, may I ask this one follow-up question, because I

1 want to be sure I understand your position. Supposing the
2 plaintiff in his declaration cites three or four cases in
3 which the action was taken so promptly they didn't have
4 notice in order to object. And then he says but so - they
5 -- all this was too fast for me. Now I want to -- want to
6 do 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: But 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 can
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: Well, let's -- let's -- I will
9 -- I will assume for sake of argument it is the exception,
10 not the rule.

11 MR. KNEEDLER: But --

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

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

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

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

24 JUSTICE SOUTER: Okay.

25 MR. KNEEDLER: -- not -- not in the way they

1 are trying to challenge it, because they are trying to
2 challenge it across the board.

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

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

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

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

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

1 administrative appeal.

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

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

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

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

1 MR. KNEEDLER: There is no indication at all
2 in the passage of that statute that Congress meant to
3 confer a judicially enforceable right to obtain those
4 without complying with the usual APA provisions for
5 judicial review.

6 JUSTICE GINSBURG: Maybe he has no --

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

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

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

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

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

1 have to show curiosity. You say: The statute gives me
2 a right to ask for this information.

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

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

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

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

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

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

1 for a series of 20 timber sales. He knew about those
2 timber sales and he was able to comment on them. And
3 the -- the declarant on whom the standing was based to
4 challenge the Burnt Ridge Project, which is no longer in
5 this case, in that case the Forest Service -- and this
6 is in the administrative record -- sent out 1,300
7 letters to people who had expressed an interest in that
8 project before it was undertaken. Mr. Marderosian, who
9 also monitors forest projects --

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

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

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

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

21 JUSTICE KENNEDY: Oh, okay. Okay.

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

1 avocation -- serious avocation is following the Forest
2 Service. So this is not an instance in which -- in
3 which notice is not generally furnished.

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

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

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

1 with the forest plan, but also that it had been approved
2 without complying with the -- with the ARA appeals
3 procedures.

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

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

14 JUSTICE BREYER: Ah, but --

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

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

25 Now, if somebody really wants that notice

1 and they don't get it, can they sue?

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

4 JUSTICE BREYER: Yes. So all right --

5 MR. KNEEDLER: But --

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

8 MR. KNEEDLER: But --

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

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

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

1 to enforcement; what about that one?

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

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

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

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

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

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

25 MR. KNEEDLER: Right.

1 JUSTICE SCALIA: Of something concrete.

2 And --

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

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

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

1 to have to follow what is going on in newspapers.

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

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

25 CHIEF JUSTICE ROBERTS: Your friend on the

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

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

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

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

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

1 the government's point of view, no environmental impact
2 statement, no environmental assessment required, no
3 notice and comment. And they say you put the
4 line in the wrong place.

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

12 If I may reserve the balance of my time.

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

15 Mr. Kenna.

16 ORAL ARGUMENT OF MATT KENNA

17 ON BEHALF OF THE RESPONDENTS

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

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

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

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

13 Will you have standing to challenge that?

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

19 JUSTICE SCALIA: You would have standing?

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

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

24 MR. KENNA: Not on that pure basis. No.
25 You would have to show that -- or we would have to show

1 some concrete harm from where it's been applied to the --

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

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

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

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

1 into tying the procedural harm to the on the ground
2 harm, and that's what it based its decision on.

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

13 How do you -- it seems like a high hurdle for
14 you to surmount.

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

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

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

1 been applied to its situation yet.

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

4 MR. KENNA: Right.

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

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

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

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

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

1 out the -- it's out the door.

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

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

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

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

1 MR. KENNA: Well, the footnote 2 says, of
2 course, if you have a particular regulation applied to a
3 particular -- to a category of circumstances across the
4 board, of course you may challenge it. And I think --

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

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

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

17 (Laughter.)

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

24 So, in Sullivan v. Zebley, it was child
25 disability benefits. It was a benefit referring

1 regulation, which said we see no reason to force as
2 applied challenges instead of a facial challenge.

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

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

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

25 Now, is that so?

1 MR. KENNA: No, Justice Breyer, that's not
2 so. The joint appendix at page 101 discusses an
3 instance where Mr. Bensman did not get notice at all.

4 The issue with the schedule --

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

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

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

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

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

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

1 a program, it says that a quite different from
2 permitting a generic challenge to all aspects of the
3 program as though that itself constituted a final agency
4 action."

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

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

24 CHIEF JUSTICE ROBERTS: Well, it says -- it
25 says, if it's become ripe for review in the manner

1 discussed in text. In other words, if it has been
2 applied to a particular individual adversely affected
3 then, quote, "a person adversely affected may bring a
4 challenge. " And I don't -- that seems to me to be a
5 restatement of the sentence I read to you earlier.

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

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

22 You know, here we have an assertion
23 uncontroverted by the government that these are being
24 applied on every forest on an ongoing basis -- it's
25 stipulated to that. To contend that the Sierra Club is

1 not injured, especially in light of the declarations
2 that we've submitted --

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

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

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

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

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

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

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

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

20 (Laughter.)

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

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

25 MR. KENNA: You know, I get one every year.

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

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

13 (Laughter.)

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

16 CHIEF JUSTICE ROBERTS: Oh.

17 (Laughter.)

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

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

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

19 MR. KENDALL: Well --

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

25 MR. KENNA: Well, Justice Scalia, I would

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

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

13 MR. KENNA: Blum v. Yaretsky, and that we
14 cite in the -- in our brief; and then Northeastern Florida
15 Chamber of Contractors v. Jacksonville, which is a 1993
16 case.

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

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

20 Now, getting back to the ripeness issue in
21 particular, as we go through the list of cases, it seems
22 that the facial challenges have always been permitted in
23 situations similar to this. The key question is, has it
24 been applied? So National Parks Conservation
25 Association hasn't been applied. No prediction that it

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

12 JUSTICE BREYER: Can I go back to standing
13 for a minute. I thought that --

14 MR. KENNA: Yes, Your Honor.

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

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

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

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

18 (Laughter.)

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

22 JUSTICE BREYER: You think you are like the
23 second?

24 MR. KENNA: Right. I think there is room
25 under the -- so the FEC v. Atkins cases is the

1 informational injury case. Then there is the Havens
2 case which stated that groups that sought to fight
3 redlining in loaning for -- discriminatorily loaning in
4 neighborhoods had organizational standing, not
5 representational as we claim here through our members,
6 but actual representation in and of themselves. And I
7 think when you combine those cases together, I think
8 there is some room for that finding that there is that
9 injury.

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

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

1 And what happened -- what the Court said
2 about standing was in its complaint petitioner alleged
3 that many of its members regularly bid on and perform
4 construction works. Now, if it had stopped there it
5 might fit your case, but then it went on to say, "and
6 that they would have bid on designated set-aside
7 contracts but for the restrictions imposed."

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

17 So that's not this case.

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

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

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

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

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

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

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

25 MR. KENNA: Your Honor, I don't think that

1 is correct. I think the Court can look at any documents
2 in the record which show standing at the time of the
3 suit.

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

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

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

25 CHIEF JUSTICE ROBERTS: The later filed,

1 where along the district court proceedings were they
2 filed?

3 MR. KENNA: They were submitted -- after the
4 judgment setting aside the regulations, there was
5 litigation over the government's stay motion pending
6 appeal.

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

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

1 didn't just file them out of the blue because we
2 thought --

3 CHIEF JUSTICE ROBERTS: You filed them after
4 judgment, right?

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

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

23 And it seems appropriate under that
24 circumstance in light of the statements by the Court
25 that I discussed in the Defenders case and elsewhere,

1 that standing is a practical inquiry, that standing
2 should be found in such circumstances.

3 JUSTICE GINSBURG: Do you want to say a word
4 about the Ninth Circuit making a law for the entire
5 nation, on a controversial question that normally the
6 circuit just rules for its own area?

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

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

1 the Mendoza interests.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 MR. KENNA: Thank you, Your Honors.

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

6 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

7 ON BEHALF OF THE PETITIONERS

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

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

1 with --

2 JUSTICE STEVENS: That is not what it says.
3 It says this is our ordinary practice it didn't say
4 it's the limit on our practice.

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

7 JUSTICE STEVENS: I thought you were talking
8 about --

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

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

1 and forests and projects that are not before -- not
2 before the Court.

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

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

1 action in which the procedures are applied.

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

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

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