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REVISITING THE LYONS DEN: Summers v. Earth Island Institute’s Misuse of Lyons’s “Realistic Threat” of Harm Standing Test†

Bradford Mank†

In Summers v. Earth Island Institute, 129 S. Ct. 1142 (2009), the majority and dissenting opinions disagreed about how to apply the “realistic threat” test set forth in City of Los Angeles v. Lyons, 461 U.S. 95, 107 (1983). According to Justice Scalia’s majority opinion in Summers, the plaintiff organizations did not have standing to obtain injunctive relief because they failed to prove that their members were likely in the near future to hike on government land on which the Forest Service conducted allegedly illegal sales of timber without public notice and comment and that the facts alleged by the plaintiffs were weaker than the “conjecture” rejected as insufficient for standing in Lyons. By contrast, Justice Breyer’s dissenting opinion in Summers argued that there was a “realistic threat” of future harm to the plaintiffs under the Lyons test. This Article re-examines Lyons. The Article also discusses Supreme Court and lower court decisions that have applied the Lyons test or distinguished that case. The Article concludes that there was a realistic threat of harm justifying injunctive relief in Summers if Lyons and its progeny are correctly understood.


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INTRODUCTION

To file suit in federal courts, Article III of the U.S. Constitution requires that a plaintiff must demonstrate “standing” by establishing that the defendant’s actions have caused him an actual or imminent injury, and not merely a speculative or hypothetical injury that might occur someday.1 In the U.S. Supreme Court’s 2009 decision, Summers v. Earth Island Institute,2 Justice Antonin Scalia rejected the concept of organizational standing based upon the statistical probability that some of an organization’s members will likely be harmed in the near future by a defendant’s allegedly illegal actions.3 He argued that the probability that members of several environmental groups would be harmed in the future by the United States Forest Service’s allegedly illegal salvage sales of fire-damaged timber “present[ed] a weaker likelihood of concrete harm than that which we found insufficient in [City of Los Angeles v.] Lyons.”4 In Lyons, a plaintiff who “alleged that he had been injured by an improper” chokehold by officers of the Los Angeles Police Department “sought injunctive relief barring [the] use of the [choke]hold in the future.”5 The Lyons Court concluded that Lyons did not have standing to seek injunctive relief because there was “no more than conjecture” that Lyons would be subjected to that chokehold if he were ever to be stopped or arrested in the future by the Los Angeles police.6 Similarly, the Summers Court held that the plaintiff organizations failed to prove their members were likely to suffer an “imminent” injury required for standing because they could not prove where and when their specific members would be harmed in the future by the government’s allegedly illegal timber sales.7

On the other hand, Justice Stephen Breyer’s dissenting opinion in Summers argued that the plaintiff organizations had satisfied Lyons’s “realistic threat” test for determining when an injury is sufficient for standing.8 He contended there was a realistic probability that one of the tens

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3. Id. at 1150–53. Justice Scalia’s majority opinion was joined by Chief Justice Roberts and Justices Thomas and Alito. Id. at 1146. Justice Kennedy filed a concurring opinion. Id. (Kennedy, J., concurring). Justice Breyer’s dissenting opinion was joined by Justices Stevens, Souter, and Ginsburg. Id. (Breyer, J., dissenting).
4. Id. at 1150 (citing City of Los Angeles v. Lyons, 461 U.S. 95 (1983)).
5. Id.
7. Summers, 129 S. Ct. at 1150–53.
8. Id. at 1155–58 (Breyer, J., dissenting) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 106 n.7, 108 (1983) (emphasis added by Justice Breyer)).
of thousands of members of the plaintiff organizations would have his or her recreational experience diminished in the near future by the Forest Service’s frequent sales of fire-damaged timber in national forests.9 Accordingly, Justice Scalia’s majority opinion and Justice Breyer’s dissenting opinion in Summers reached quite different conclusions about how to apply Lyons’s realistic threat test to the quite different facts of an environmental standing case.10

One other major environmental standing case also involved a disagreement between the majority opinion and dissenting opinion about the application of Lyons’s realistic threat standing test. In Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,11 the Supreme Court applied Lyons’s realistic threat standing test to an environmental claim.12 Even though the plaintiffs could not prove that the defendant’s mercury discharges caused harm to the environment or human health, the Laidlaw Court concluded that the plaintiffs’ affidavits demonstrating that they had avoided recreational use of a river because of their “reasonable concerns” about the mercury’s impact on their health was sufficient for standing under Lyons.13 In his dissenting opinion in Laidlaw, however, Justice Scalia argued that the plaintiffs’ subjective concerns about the safety of recreating in a river subject to the defendant’s mercury releases failed to establish a realistic threat as defined in Lyons.14

Because the application of the Lyons standing test has become quite important in environmental cases, this Article re-examines Lyons’s framework and then applies it to the different factual circumstances in environmental cases. The Lyons Court rejected standing for injunctive relief where a plaintiff can allege only one prior violation of his rights by the government and cannot provide any credible evidence that he is likely to be subject to future violations.15 Subsequent cases have distinguished Lyons in cases in which there have been multiple past violations by the government and there is a more realistic threat of future violations.16 Additionally, the Lyons Court emphasized that its denial of standing was based in part on the fact that the Los Angeles Police Department had adopted a policy prohibiting police from using a chokehold against defendants like Lyons

9. Id. at 1156–58.
10. Id. at 1152–53 (majority opinion), 1156–58 (Breyer, J., dissenting).
12. Id. at 184–85; see infra Part IV.A.
13. See 528 U.S. at 183–85; see infra Part IV.A.
14. 528 U.S. at 198–200 (Scalia, J., dissenting); see infra Part IV.B.
15. See infra Parts II, VI.A.
16. See infra Parts II, VI.A.
unless there was adequate provocation. Subsequent cases have distinguished Lyons in holding that standing for injunctive relief is appropriate if the government has a policy that is likely to lead its agents to commit rights violations against the plaintiff.

Several Supreme Court and lower court decisions have distinguished Lyons in holding that a plaintiff had standing to seek prospective relief. For example, in Kolender v. Lawson, which was decided a few days after Lyons, the Supreme Court held that a vagrant who had been arrested or detained fifteen times by California police officers pursuant to a California statute had standing to seek prospective relief because he had demonstrated a "credible threat" that California would arrest him in the future in violation of his constitutional rights. In Honig v. Doe, the Supreme Court distinguished Lyons where the plaintiff demonstrated that government violations of his statutory rights were likely because his emotional disability led him to engage in behavior that was likely to provoke school officials to violate his statutory rights.

Furthermore, there are a number of lower court criminal, civil rights, and disability decisions which have either followed Kolender or Honig instead of Lyons, or found that standing was appropriate under the Lyons framework because the plaintiff had successfully demonstrated a likelihood of future government violations. These criminal, civil rights, and disability decisions are typically not cited in environmental cases, but can and should provide guidance in how Lyons's realistic threat test should be applied in environmental cases. Despite scholarly criticism, the Supreme Court has generally treated standing as an overarching trans-substantive jurisdiction question separate from substantive law, and, therefore, it is appropriate for courts to consider standing cases involving different substantive law.

17. See infra Parts II, VI.B.
18. See infra Parts II, VI.B.
20. 484 U.S. 305, 321–23 (1988); see infra Part III.B.
21. See infra Part III.C–G.
22. See infra Part III.
23. In Lujan v. Defenders of Wildlife, Justice Scalia concluded that it was irrelevant for Article III standing whether the underlying substantive issue was a constitutional or statutory question. 504 U.S. 555, 576 (1992). He stated: "But there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." Id. Scholars have unsuccessfully criticized the Court's view that Article III standing is trans-substantive. A number of scholars have persuasively argued that the Supreme Court's efforts to treat standing as a trans substantive jurisdictional issue are misguided. They explain that the question of standing is best treated as a question indistinguishable from whether the party has a right of action.
By re-examining Lyons, Kolender, Honig, and lower court decisions applying those decisions, it is possible to come to a better understanding of how the Supreme Court should have applied the Lyons realistic threat test in Summers. The likelihood that the members of the environmental organizations would be harmed by the Forest Service’s timber sales in Summers was far greater than the possibility that Los Angeles police officers would again subject Lyons to a chokehold, despite Justice Scalia’s unsupported assertion to the contrary. Justice Breyer’s dissenting opinion in Summers provided a more accurate application of Lyons’s realistic threat test than the majority opinion. His dissenting opinion would have been stronger, however, if he had also discussed Kolender, Honig, and several important lower court decisions. In light of Lyons and its progeny, the Court should have found standing in Summers.


I. STANDING DOCTRINE

A. Constitutional Standing

Although the Constitution does not explicitly require that a plaintiff have standing to file suit in federal courts, since 1944 the Supreme Court has inferred from the Constitution’s Article III limitation of judicial decisions to “cases” and “controversies” that federal courts must utilize standing requirements to guarantee that the plaintiff has a genuine interest and stake in a case. All litigants in federal Article III courts must meet certain

Phrased this way, the issue is one of substantive and remedial law, not one of Article III jurisdiction.


Despite his skepticism, Professor Hartnett acknowledges that the Supreme Court treats standing as a trans-substantive jurisdictional question. Id. at 2251–55.

24. See infra Part VI.
25. See infra Part VI.
26. See infra Part VI.
27. Part I’s discussion of standing builds upon my previous article on Summers. See Mank, Previous Article on Summers, supra note 4, at 7–13.
28. The Constitution provides:
standing requirements to bring a suit.29 The federal courts have jurisdiction over a case only if at least one plaintiff can prove that he or she has standing for each form of relief sought, such as damages or injunctive relief.30 As will be discussed in Part II, the Lyons decision treated standing for prospective relief as a separate issue from standing for damages.31 Standing doctrine resolves whether a party to a law suit is a proper party to sue and

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.


29. Mank, States Standing, supra note ‡, at 1709–10; Michael E. Solimine, Recalibrating Justiciability in Ohio Courts, 51 CLEV. ST. L. REV. 531, 533 (2004). States asserting sovereign or quasi-sovereign rights may be entitled to more lenient standing requirements in some cases, but generally must comply with the basic standing requirements discussed in Part I of this Article. See Massachusetts v. EPA, 549 U.S. 497, 518–20 (2007) (holding states asserting quasi-sovereign rights are entitled to more lenient standing test under the parens patriae standing doctrine); Mank, States Standing, supra note ‡, at 1727–34, 1746–56, 1775–80, 1785–87 (2008) (arguing Massachusetts liberalized standing requirements for states using parens patriae doctrine but did not eliminate all standing requirements for states).


31. See Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1040, 1041 & n.1 (9th Cir. 1999) (overruling Ninth Circuit decisions that had recognized standing for prospective relief if plaintiff had standing for damages as contrary to Lyons); Robinson v. City of Chicago, 868 F.2d 959, 966–67 (7th Cir. 1989) (holding Lyons requires separate standing analysis for damages and injunctive relief); Laura E. Little, It’s About Time: Unraveling Standing and Equitable Ripeness, 41 BUFF. L. REV. 933, 937, 941, 944 (1993) (agreeing with majority of lower courts that Lyons requires separate standing analysis for each type of remedy requested); infra Part II.
does not decide whether the asserted claim is appropriate. A federal court must dismiss a case without deciding the merits if the plaintiff fails to meet the constitutional standing test.

Standing requirements are related to broader constitutional principles. For example, standing doctrine prohibits federal courts from giving advisory opinions about proposed legislation and, as a result, prevents judicial entanglements with the political controversies of the legislative and executive branches. More broadly, standing requirements support separation of powers principles defining the division of powers between the judiciary and political branches of government so that the “Federal Judiciary respects ‘the proper—and properly limited—role of the courts in a democratic society.’”

Many cases have outlined standing criteria. Most notably, in Lujan v. Defenders of Wildlife, the Supreme Court required the plaintiff to show that: (1) she has “suffered an injury in fact,” which is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical”; (2) “there [is] a causal connection between the injury and the conduct complained of-the injury [is] fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court”; and (3) “it [is] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” A party must assert a personal injury and generally may not assert the rights of a third party unless the party is a legally appointed guardian for that third party. “A plaintiff has the burden of establishing all three prongs of the standing test.”

32. Mank, States Standing, supra note 3, at 1710.

33. See DaimlerChrysler, 547 U.S. at 339–43 (2006); Laidlaw, 528 U.S. at 180 (“[W]e have an obligation to assure ourselves that [petitioner] had Article III standing at the outset of the litigation.”); Mank, States Standing, supra note 3, at 1710.


37. Kowalski v. Tesmer, 543 U.S. 125, 129–34 (2004) (observing general rule that party does not have standing to represent the interests of third parties but recognizing narrow exception if party has “close” relationship with third party and “hindrance” prevents third party
In *Warth v. Seldin*, the Court first explicitly recognized that "an association may have standing solely as the representative of its members," despite "the absence of injury to itself." The Court warned, however, that "the possibility of such representational standing ... does not eliminate or attenuate the constitutional requirement of a case or controversy." The court stated that "the association must allege" that at least one of its members is "suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit."

**B. Imminent Injury**

The Court has suggested that a plaintiff may obtain standing for a threatened risk. Prior to its *Lujan* decision, in *Babbitt v. United Farm Workers National Union*, the Court stated, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." The *Lujan* court's recognition of standing for an "imminent" injury appears to be similar to *Babbitt’s* approach to "impending" injuries. The imminent injury test, however, does not clearly explain how probable a risk to a plaintiff must be or how

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39. Warth v. Seldin, 422 U.S. 490, 499 (1975) (holding party must assert personal interest for standing and usually cannot have standing on behalf of third parties).

38. *DaimlerChrysler*, 547 U.S. at 342 (stating that parties asserting federal jurisdiction must "carry the burden of establishing their standing under Article III"); *Lujan*, 504 U.S. at 561 (stating also that parties asserting federal jurisdiction must carry the burden of establishing standing under Article III); Mank, *Standing and Statistical Persons*, supra note 3, at 673.


42. Warth, 422 U.S. at 511; Mank, *Standing and Statistical Persons*, supra note 3, at 677–78; Roche, *supra* note 40, at 1493.


44. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Babbit, 442 U.S. at 298; see also Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1151 (9th Cir. 2000) (interpreting "imminent" standing test to include an increased risk of harm).
soon it must occur for the litigant to have standing. For example, the Ninth Circuit has interpreted the “imminent” standing test to include an increased risk of harm, but that approach is arguably contrary to Justice Scalia’s subsequent *Summers* decision.

II. *Lyons*

In *Summers*, Justice Scalia interpreted *Lyons* to hold that a plaintiff who has been injured by the government in the past does not have standing to obtain an injunction to prohibit future injury where there is only conjecture that the government might harm him in the future. While his interpretation is true in some circumstances, the *Lyons* decision also recognized that a plaintiff would have standing to obtain an injunction if there is a “realistic threat” that the government will harm him in the future. Furthermore, a plaintiff can establish such a realistic threat by showing, for example, that the government has a policy ordering government officials to act in a manner likely to harm individuals similar to him.

A. *Lyons’s Facts*

In 1976, a plaintiff, Adolph Lyons, filed a complaint in federal district court stating that City of Los Angeles (“City”) police officers had stopped him for the traffic violation of driving with a faulty taillight. Although he alleged that he had offered no resistance or provocation, the officers without justification “applied a ‘chokehold’—either the ‘bar arm control’ hold or the ‘carotid-artery control’ hold or both”—that rendered Lyons unconscious and seriously injured his larynx. Four months after the incident, Lyons filed suit in federal district court against the Los Angeles Police Department (“Department”) and four of its police officers for damages, declaratory

47. See infra Part V.A.
50. Id. at 106–07.
51. Id. at 97, 114.
52. Id. at 97–98.
53. Id. at 97 (explaining the police choked the plaintiff on October 6, 1976 and the plaintiff filed suit on February 7, 1977).
relief and an injunction to prohibit the Department from using chokeholds except where a suspect presented an immediate threat of deadly force to an officer.\textsuperscript{54} In support of the claim for injunctive relief, the complaint alleged that, pursuant to the city’s authorization, the City’s police officers “regularly and routinely” applied the chokeholds in “situations where they [were] not threatened by the use of any deadly force.”\textsuperscript{55} Furthermore, the complaint alleged that the plaintiff “and others similarly situated [were] threatened with irreparable injury in the form of bodily injury and loss of life,” and, therefore that the plaintiff reasonably feared that any contact with the City police might result in him being choked or strangled to death without cause.\textsuperscript{56} The district court granted a preliminary injunction against the Department’s use of the chokehold where no one is threatened with deadly force.\textsuperscript{57} The Court of Appeals for the Ninth Circuit affirmed the district court’s decision “in a brief \textit{per curiam} opinion stating that the District Court had not abused its discretion in entering a preliminary injunction.”\textsuperscript{58}

After the Supreme Court granted certiorari, “the Chief of Police in Los Angeles prohibited the use of the bar-arm chokehold in any circumstances,” and the Los Angeles “Board of Police Commissioners imposed a 6-month moratorium on the use of the carotid-artery chokehold except under circumstances where deadly force is authorized.”\textsuperscript{59} Because the moratorium raised questions about whether the case was moot, the City filed a memorandum suggesting a question of mootness, reciting the facts but arguing that the case was not moot.\textsuperscript{60} The plaintiff in response filed a motion arguing that the Court had improvidently granted certiorari; however, the Court denied that motion but reserved the question of mootness for later consideration.\textsuperscript{61} When it decided the case, the Court concluded that the case was not moot because the City’s moratorium was not permanent, but instead held that federal courts lacked jurisdiction to

\begin{itemize}
\item \textsuperscript{54} \textit{Id.} at 97–98.
\item \textsuperscript{55} \textit{Id.} at 98. “Originally, Lyons’ complaint alleged that at least two deaths had occurred as a result of the application of chokeholds by the police. His first amended complaint alleged that 10 chokehold-related deaths had occurred. By May, 1982, there had been five more such deaths.” \textit{Id.} at 100.
\item \textsuperscript{56} \textit{Id.} at 98. “Originally, Lyons’ complaint alleged that at least two deaths had occurred as a result of the application of chokeholds by the police. His first amended complaint alleged that 10 chokehold-related deaths had occurred. By May, 1982, there had been five more such deaths.” \textit{Id.} at 100.
\item \textsuperscript{57} \textit{Id.} at 99–100.
\item \textsuperscript{58} \textit{Id.} at 100.
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id.} at 101.
\item \textsuperscript{61} \textit{Id.} (citing County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)).
\end{itemize}
consider Lyons's claim for injunctive relief because he did not have standing.\footnote{62. \textit{Id.}}

\textbf{B. The Supreme Court's Decision}

The Supreme Court reversed the lower court decision granting a preliminary injunction because it concluded that Lyons could not establish that he was likely to be injured in the future and, thus, lacked standing to seek an injunction.\footnote{63. \textit{Id.}} The Court observed that its precedent had established that a plaintiff’s allegations that a defendant has engaged in illegal or harmful conduct in the past is insufficient to justify injunctive relief without a "real and immediate threat of repeated injury,"\footnote{64. \textit{Id.} at 102 (quoting O’Shea v. Littleton, 414 U.S. 488, 496 (1974)).} which might be satisfied by demonstrating that the defendant has a "deliberate policy" of engaging in wrongful conduct.\footnote{65. \textit{Id.} at 104 (discussing Rizzo v. Goode, 423 U.S. 362, 372 (1976)).} While the Court implied that Lyons's allegations of harm from the Los Angeles police officers were presumptively sufficient for standing to seek damages against the individual officers and perhaps the City, the Supreme Court in \textit{Lyons} concluded that the plaintiff’s allegations were insufficient for prospective injunctive relief because he could not prove that he was likely to suffer harm from the Los Angeles police in the future.\footnote{66. \textit{Id.} at 105; Little, supra note 31, at 941, 944 (explaining that \textit{Lyons} denied Lyons’s request for prospective injunctive relief, but suggested that he might recover damages).} Even if a court accepted as true Lyons’s additional allegation that the Los Angeles police routinely applied chokeholds in circumstances where the police were not “threatened by the use of deadly force,” the \textit{Lyons} Court reasoned that it was too speculative to assume that Lyons would, first, be stopped or arrested by the police and, second, that the arresting officers would apply a chokehold without provocation.\footnote{67. \textit{Lyons}, 461 U.S. at 105.} The Court determined that Lyons's allegations were insufficient to establish that the Los Angeles police would likely harm him now or in the future with an inappropriate chokehold.\footnote{68. \textit{Id.}} Furthermore, to the extent Lyons sought injunctive relief against the City and the Department to protect other citizens, the Court concluded that Lyons had the burden of showing either that all Los Angeles police officers consistently applied illegal chokeholds without provocation to all citizens they interact with, which is an impossible burden for a plaintiff like Lyons to meet, or that a City policy encouraged or required
police officers to use illegal chokeholds in situations where their use was not necessary. The Court stated:

In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the City ordered or authorized police officers to act in such manner.

Even if the Court accepted as true the allegations in his Complaint that Los Angeles police occasionally exceeded the scope of the City’s chokehold policy by using a chokehold without adequate provocation, Lyons’s allegations were insufficient to justify an injunction against the City and the Department.

Although Lyons’s complaint had alleged that the City authorized its police to use control chokeholds in circumstances where a citizen had not threatened deadly force against the officer, the Court concluded that Lyons had failed to demonstrate that he would “be realistically threatened by police officers who acted within the strictures of the City’s policy.” For example, if the City only authorized police to use chokeholds against suspects that resisted arrest or tried to escape, the Court reasoned that it was unlikely that the police would again use a chokehold against Lyons without provocation, and, therefore, no realistic threat existed that necessitated injunctive relief in his favor. Because Lyons failed to credibly allege that the police were likely to harm him and other citizens without provocation in the future, he lacked a personal injury sufficient to establish standing for an injunction barring the police from using chokeholds in the future.

In his dissenting opinion in Lyons, Justice Marshall criticized the majority for requiring separate standing for damages and for injunctive relief for a plaintiff who has suffered a personal injury that gives him or her a real stake in filing suit against the defendant. Furthermore, he argued:

The Court’s fragmentation of the standing inquiry is also inconsistent with the way the federal courts have treated remedial

69. Id. at 105–06.
70. Id.
71. Id.
72. Id. at 106 (emphasis added).
73. Id. at 106–10.
74. Id. at 106 n.7.
75. Id. at 113–14, 122–31 (Marshall, J., dissenting).
issues since the merger of law and equity. The federal practice has been to reserve consideration of the appropriate relief until after a determination of the merits, not to foreclose certain forms of relief by a ruling on the pleadings.\textsuperscript{76}

A number of commentators have criticized Lyons's separate standing analysis for damages and prospective injunctive relief because an action for the recovery of damages is often insufficient to prevent the government from committing civil rights abuses.\textsuperscript{77} While often criticized by academics for unduly restricting the availability of injunctive relief in civil rights cases, Lyons's requirement of separate standing for each form of relief remains the law.\textsuperscript{78}

It is important to distinguish the situation in Lyons from other possible factual scenarios a court might address in deciding whether a plaintiff has standing to seek injunctive relief. First, Lyons was the victim of one instance of a wrongful conduct.\textsuperscript{79} Lyons does not address a situation where a plaintiff has been repeatedly subjected to wrongful conduct by a defendant.\textsuperscript{80} As will be discussed in Part VI.A, in at least some cases where there has been repeated wrongful conduct by a defendant, it may be reasonable for a court to assume that the defendant is likely to repeat the conduct absent some change in circumstances affecting either the plaintiff or the defendant.\textsuperscript{81} Second, the Lyons Court acknowledged that the case would be different if the City, for example, had a policy of using the chokehold in every routine traffic stop, and subsequent cases have found a realistic threat of harm where a government agency has a policy of engaging in wrongful conduct.\textsuperscript{82} As will be discussed below in Part VI, in Summers there was far greater likelihood of future government violations than in Lyons because members of the plaintiff environmental groups in Summers frequently visited national forests, in contrast to Lyons's single encounter with the police.\textsuperscript{83} Furthermore, the government in Summers had a clear policy of conducting salvage sales of fire-damaged timber without the allegedly required public notice and comment.\textsuperscript{84} Accordingly, there was a

\textsuperscript{76} Id. at 130.
\textsuperscript{77} Erwin Chemerinsky, The Story of City of Los Angeles v. Lyons: Closing the Federal Courthouse Doors, in CIVIL RIGHTS STORIES 131, 131–32, 145 (Myriam E. Gilles & Risa L. Goluboff eds., 2008); Little, supra note 31 passim.
\textsuperscript{78} See, e.g., Chemerinsky, supra note 77, at 147–49; Little, supra note 31 passim.
\textsuperscript{79} See Lyons, 461 U.S. at 105, 111.
\textsuperscript{80} See infra Part VI.A.
\textsuperscript{81} See infra Part VI.A.
\textsuperscript{82} 461 U.S. at 105–06; see infra Part VI.B.
\textsuperscript{83} See infra Part VI.
\textsuperscript{84} See infra Part VI.
far greater likelihood of future government violations in *Summers* than in *Lyons*. 85

III. CASES FINDING INJUNCTIVE RELIEF IS APPROPRIATE TO ADDRESS REPEATED VIOLATIONS OR A POLICY CONDONING WRONGFUL CONDUCT

In several cases, the Supreme Court or lower courts have distinguished *Lyons* where a plaintiff provided credible allegations that a government defendant would likely harm him in the future. 86 First, some of these cases involved repeated past violations that seemed likely to recur in the future. 87 Second, some decisions have distinguished *Lyons* on the ground that the plaintiffs in their cases were involved in legally protected conduct that was more likely to be repeated in the future than the probability that Adolph Lyons would again commit an illegal motor vehicle violation that in turn would result in an unprovoked chokehold by the police. 88 Third, courts are especially likely to find a realistic threat of future harm if the government has adopted an official policy or practice that condoned or enhanced the likelihood of future violations. 89 Fourth, some courts found a credible or realistic threat of harm in part because the government targeted a minority or a disadvantaged group. 90 By contrast, the Supreme Court in *Lyons* did not find that the Los Angeles Police Department had targeted minorities despite evidence that African-American men were twenty times more likely to be

85. *See infra* Part VI.


87. *See infra* Parts III.H, VI.A; *see generally* Garrett, *supra* note 86, at 1820–26 & n.43 (quoting *Lyons*, 461 U.S. at 106 n.7) (arguing post-*Lyons* cases use a flexible, individualized fact-specific inquiry in determining whether there is a “credible threat of future harm,” including frequency of government misconduct).

88. *See* Rudovsky, *supra* note 86, at 1237 & n.234 (stating plaintiffs are more likely to demonstrate credible threat of future government harm if the plaintiff is engaging in “protected activity”); Garrett, *supra* note 86, at 1825–26 (arguing post-*Lyons* cases are more likely to find a credible threat of future harm if the plaintiff is engaging in law-abiding behavior than illegal behavior); *infra* Parts III.H, VI.A.

89. *See* Rudovsky, *supra* note 86, at 1237 & n.233 (stating plaintiff can demonstrate a credible or realistic threat of harm by demonstrating “that the harm was the product of a policy or practice of” government); Garrett, *supra* note 86, at 1821–25 (arguing post-*Lyons* cases are more likely to find a credible threat of future harm if there is an official policy condoning that misconduct); *infra* Parts III.H, VI.B.

90. *See* Garrett, *supra* note 86, at 1826–29; *infra* Parts III.H, VI.C.

Fifth, some courts have applied a more liberal approach to equitable remedies than Lyons in cases involving fundamental First Amendment speech rights.\footnote{See infra Parts II.H, VI.D.}

\textit{A. Kolender v. Lawson}

Just twelve days after Lyons,\footnote{Lyons was decided on April 20, 1983. 461 U.S. at 95. Kolender was decided on May 2, 1983. Kolender v. Lawson, 461 U.S. 352, 352 (1983).} the Supreme Court in \textit{Kolender v. Lawson} concluded that a plaintiff who had been arrested or detained fifteen times in the past had demonstrated a “credible threat” that California would arrest him in the future in alleged violation of his constitutional rights.\footnote{\textit{Kolender}, 461 U.S. at 355 n.3. “Lawson was prosecuted only twice, and was convicted once.” \textit{Id.} at 354.} The plaintiff, Edward Lawson, was either detained or arrested fifteen times for violating a California statute requiring “persons who loiter or wander [] the streets to provide a ‘credible and reliable’ identification and to identify themselves when stopped by a police officer.”\footnote{\textit{Id.} at 353–54 (discussing CAL. PENAL CODE § 647(e) (West 1970)).} He filed suit in a federal district court challenging the statute as unconstitutional, sought a mandatory injunction against enforcement of the statute, and also sought pecuniary and punitive damages from the detaining officers.\footnote{\textit{Id.} at 354.}

The district court found that the statute was overbroad and enjoined its enforcement.\footnote{\textit{Id.}} The Ninth Circuit affirmed the district court’s conclusion that the statute was unconstitutional for reasons articulated by the lower court.\footnote{\textit{Id.} at 355.} Additionally, the appellate court determined that the statute violated the Fourth Amendment’s prohibition “against unreasonable searches and seizures,” contained an impermissibly “vague enforcement standard,” and failed to provide “fair and adequate notice” of the proscribed conduct.\footnote{\textit{Id.} at 355.} Affirming the lower court decisions, the Supreme Court held that the statute was “unconstitutionally vague on its face” because it encouraged arbitrary enforcement by failing to clarify its “requirement that a suspect provide a ‘credible and reliable’ identification.”\footnote{\textit{Id.} at 352.}
Although observing that the defendant California officials did not challenge the declaratory and injunctive relief in the case nor Lawson’s standing, the Supreme Court in a footnote suggested that standing for declaratory and injunctive relief was appropriate in the *Kolender* case.\(^{101}\) Because Lawson had been stopped on “approximately 15 occasions pursuant to § 647(e) . . . in a period of less than two years,” the Court concluded there was a “‘credible threat’ that Lawson might be detained again under § 647(e).”\(^{102}\) While it did not cite or discuss *Lyons*, the *Kolender* Court found a realistic threat of future wrongful conduct by the government against Lawson that it was unwilling to find against Lyons twelve days earlier.\(^{103}\)

Common sense suggests that it is far more likely that a vagrant who has been detained or arrested fifteen times in less than two years will be detained in the future by police and asked for identification than a person driving a car who commits a minor code violation will be stopped by the police and then be harmed without provocation by the unnecessary use of a chokehold. California Penal Code section 647(e) required loiterers to carry identification and also declared that police officers had the right to ask for identification from loiterers.\(^{104}\) Assuming Lawson was a loiterer, it is not surprising that California police frequently followed statutory policy by detaining or arresting Lawson and demanding that he produce identification.\(^{105}\) By contrast, the police who applied a chokehold to Lyons without provocation clearly would have violated the Los Angeles Police Department’s policy on the use of the chokeholds adopted while Lyons’s case was pending before the Supreme Court.\(^{106}\) Accordingly, reading *Lyons* and *Kolender* together, the Court suggested that a plaintiff cannot rely on a single act of official misconduct in violation of policy to justify an injunctive relief against future harmful conduct. However, the plaintiff is entitled to relief if the government officials repeatedly harmed the defendant pursuant to a statute or policy requiring officials to engage in the alleged wrongful conduct.

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101. *Id.* at 355 n.3.
102. *Id.* (citing Ellis v. Dyson, 421 U.S. 426, 434 (1975)).
104. CAL. PENAL CODE § 647(e) (West 2004).
105. *Id.*
B. Honig v. Doe

In *Honig v. Doe*, the Supreme Court distinguished *Lyons* as inapplicable to a case in which a plaintiff had mental or physical conditions that made him likely to engage in conduct that would, in turn, result in wrongful government conduct.\textsuperscript{107} The *Honig* Court characterized *Lyons* as among a series of cases in which the Court was “unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury.”\textsuperscript{108} Thus, in *Lyons*, the Court was unwilling to assume that Lyons would be stopped again for a traffic violation or, if stopped, that he would engage in the type of conduct that would provoke the police to place him in a chokehold.\textsuperscript{109}

The central plaintiff in *Honig* was quite different from the plaintiff in *Lyons*. In *Honig*, plaintiff Jack Smith was an emotionally disabled or disturbed adolescent “unable to govern his aggressive, impulsive behavior.”\textsuperscript{110} Every state receiving federal funds must comply with the procedural safeguards of the Education of the Handicapped Act (“EHA”) which requires each state to ensure a “free appropriate public education” for all disabled children within the state’s jurisdiction.\textsuperscript{111} The statute accomplishes this goal by ensuring parental participation in educational decisions of their disabled children and allowing the parents to appeal contested school decisions.\textsuperscript{112} In particular, the EHA contains a “stay-put” provision, which mandates that a disabled child “shall remain in [his or her] then current educational placement” pending completion of any review proceedings, unless the parents and state or local educational agencies otherwise agree.”\textsuperscript{113} Despite the “stay put” provision in the EHA, officials in the San Francisco Unified School District (“SFUSD”) unilaterally and indefinitely suspended Smith, whom the school system had identified as an emotionally disturbed child within the protection of the EHA, from his classroom for misconduct without complying with the procedural requirements of the EHA.\textsuperscript{114}

After Smith and a similarly situated adolescent, John Doe, filed suit in federal district court, the district court entered summary judgment in favor of the two adolescent plaintiffs and issued injunctions against the SFUSD

\begin{itemize}
  \item \textsuperscript{107} 484 U.S. 305, 320–22 (1988).
  \item \textsuperscript{108} *Id.* at 320.
  \item \textsuperscript{109} *Id.*
  \item \textsuperscript{110} *Id.*
  \item \textsuperscript{111} 20 U.S.C. §§ 1400–01 (2006).
  \item \textsuperscript{112} *Honig*, 484 U.S. at 308–12 (discussing 20 U.S.C. § 1415).
  \item \textsuperscript{113} *Id.* at 308 (discussing 20 U.S.C. § 1415(e)(3)).
  \item \textsuperscript{114} *Id.* at 314–15.
\end{itemize}
and the State of California forbidding them from suspending any disabled child for more than five days, as long as the misconduct was related to the child’s disability.\textsuperscript{115} The Court of Appeals for the Ninth Circuit generally affirmed the district court’s orders with the modification that a suspension for up to thirty days was permissible.\textsuperscript{116} The Supreme Court concluded that John Doe’s case was moot because he was twenty-four and therefore outside the age limits of the EHA, which applies to disabled children between the ages of three and twenty-one, but that Smith’s case was not moot since he was twenty and had not completed high school.\textsuperscript{117} While Smith no longer resided within the SFUSD, he still resided in California and was eligible to attend California public schools within the scope of the challenged injunctions.\textsuperscript{118}

Based on his history of emotional problems and misconduct, the Supreme Court concluded that it was reasonable to assume that Smith would again engage in similar misconduct when he returned to the classroom because he was unable to control his behavior problems.\textsuperscript{119} Furthermore, the Court also found it “equally probable” that if Smith engaged in misconduct that school officials would once again seek to unilaterally remove him from the classroom without complying with the EHA.\textsuperscript{120} California’s Superintendent of Public Instruction acknowledged that local school districts would unilaterally remove students with conduct similar to Smith’s if the injunction was overturned by the Court.\textsuperscript{121} Unlike Lyons, the Honig Court concluded Smith could sue for injunctive relief to prevent future wrongful conduct because he “has demonstrated both ‘a sufficient likelihood that he will again be wronged in a similar way,’ and that any resulting claim he may have for relief will surely evade our review” unless the Court decided the case before he was harmed again by the defendant.\textsuperscript{122}

In \textit{Church v. City of Huntsville},\textsuperscript{123} the Eleventh Circuit argued that Honig was essentially a case that clarified and distinguished the scope of Lyons regarding when it is appropriate for a federal district court to issue an injunction against the government for civil rights violations:

\begin{itemize}
  \item \textsuperscript{115} Id. at 315–16.
  \item \textsuperscript{116} Id. at 316–17 (discussing Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986)).
  \item \textsuperscript{117} Id. at 318.
  \item \textsuperscript{118} Id. at 318–20.
  \item \textsuperscript{119} Id. at 320–21.
  \item \textsuperscript{120} Id. at 321.
  \item \textsuperscript{121} Id. at 321–22.
  \item \textsuperscript{122} Id. at 323 (internal citation omitted) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983)).
  \item \textsuperscript{123} 30 F.3d 1332 (11th Cir. 1994).
\end{itemize}
Jurisdictionally, *Honig* and *Lyons* are analogous. In each case, the plaintiff suffered a discrete injury in the past and sued to enjoin future recurrences of that wrong. The plaintiff’s ability to prosecute the action turned solely on the prospects that the defendant would wrong the plaintiff in a similar manner in the future. Thus, for present purposes, the relevant question is whether this case resembles *Honig*, where the Court found that a recurrence was sufficiently likely, or *Lyons*, where the Court held the risk of repeated injury to be too speculative.\(^{124}\)

The Eleventh Circuit acknowledged that the *Honig* decision might seem like it is procedurally different from *Lyons* because the *Honig* majority only mentioned the standing doctrine in passing and focused on whether the case was moot.\(^{125}\) Nevertheless, the *Church* court concluded that the two Supreme Court cases were procedurally similar enough to be compared to each other because the *Honig* Court implied that Smith had standing when it concluded that his case was not moot and when it determined that he was likely to be subject to harmful conduct in the future.\(^{126}\) The *Church* court persuasively argued that the *Honig* decision distinguished *Lyons* by demonstrating that prospective injunctive relief against the government is appropriate in some cases where: (1) a plaintiff has repeatedly engaged in certain conduct in the past, (2) the government has illegally punished the plaintiff for that conduct, (3) the plaintiff will likely engage in that conduct in the future, and (4) the government will likely punish him again for engaging in that conduct.\(^{127}\) Accordingly, a plaintiff can obtain injunctive relief against the government based on past injuries if he or she can make a persuasive case that the government is likely to cause him or her future injury as in *Honig*.

C. Church v. City of Huntsville

In *Church*, a group of homeless persons filed a class action suit in the federal district court, pursuant to § 1983,\(^ {128}\) against the city of Huntsville, Alabama alleging that it had a policy of arresting and harassing them, in violation of their constitutional rights, as a part of a strategy to drive them out of the city.\(^ {129}\) The plaintiffs sought declaratory and injunctive relief to

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124. *Id.* at 1337–38 n.2.
125. *Id.*
126. *Id.*
127. *Id.* at 1337–38; see also infra Part III.C.
129. 30 F.3d at 1335, 1339.
prohibit the allegedly unlawful arrests, "as well as compensatory damages for loss of property and emotional distress."\textsuperscript{130} The district court granted preliminary injunctive relief against Huntsville and its employees barring them from "implementing a policy of isolating and/or removing members of the defined class from the City of Huntsville simply because of their status as homeless persons."\textsuperscript{131} The district court also enjoined Huntsville officials from arresting or harassing homeless persons for using parks or other public places in the City.\textsuperscript{132} The Defendant then filed an interlocutory appeal\textsuperscript{133} "seeking vacation of the preliminary injunction."\textsuperscript{134}

The Eleventh Circuit concluded that the homeless plaintiffs had standing to seek injunctive relief against Huntsville's alleged policy of isolating or removing homeless persons from the city or its public places.\textsuperscript{135} Although the defendants did not raise an issue with the plaintiffs' standing in the district court, the Eleventh Circuit considered this issue \textit{sua sponte}.\textsuperscript{136} The court of appeals determined that the defendant's failure to challenge the plaintiffs' standing before the district court reduced the plaintiffs' evidentiary burden in establishing standing because the defendant did not put the plaintiffs on notice that they needed to address standing issues during its hearing for a preliminary injunction before the district court.\textsuperscript{137} In light of the defendant's failure to challenge standing during the compressed timeframe of a preliminary hearing, the Eleventh Circuit reasoned "that the plaintiffs' standing should be judged on the sufficiency of the allegations of the complaint, with any preliminary hearing evidence favorable to the plaintiffs on standing treated as additional allegations of the complaint."\textsuperscript{138}

The court of appeals rejected the defendant's argument that the case was analogous to \textit{Lyons} because any alleged wrongful conduct in the past by the City's employees was insufficient to prove a "real and immediate threat" that City employees were likely to harass or arrest them in the future.\textsuperscript{139} The Eleventh Circuit determined: "The situation in this case differs materially from that in \textit{Lyons}, because the plaintiffs here are far more likely to have future encounters with the police than was \textit{Lyons}.”\textsuperscript{140} Following the

\textsuperscript{130} Id. at 1335.  
\textsuperscript{131} Id.  
\textsuperscript{132} Id.  
\textsuperscript{134} \textit{Church}, 30 F.3d at 1335.  
\textsuperscript{135} Id. at 1335, 1337–39.  
\textsuperscript{136} Id. at 1336.  
\textsuperscript{137} Id.  
\textsuperscript{138} Id.  
\textsuperscript{139} Id. at 1337.  
\textsuperscript{140} Id.
rationale in *Honig*, the court of appeals reasoned that "the Supreme Court has held that such reluctance is not warranted when, for reasons beyond the plaintiff's control, he or she is unable to avoid repeating the conduct that led to the original injury at the hands of the defendant."\(^{141}\) Prior to the *Honig* decision, the Eleventh Circuit, in *Lynch v. Baxley*,\(^ {142}\) had distinguished *Lyons* by holding "that a mentally ill plaintiff had standing to seek an injunction against Alabama's practice of detaining individuals in county jails pending civil commitment hearings" because his mental condition would likely lead his family to petition for involuntary commitment in the future.\(^ {143}\) Following the reasoning in *Honig* and *Lynch* while distinguishing *Lyons*, the court of appeals in *Church* concluded that the homeless plaintiffs had standing to seek injunctive relief against Huntsville to prohibit harassment and arrests of homeless persons because as a result of the "allegedly involuntary nature of their condition, the plaintiffs [could not] avoid future 'exposure to the challenged course of conduct' in which the City allegedly engage[d]."\(^ {144}\)

Furthermore, the Eleventh Circuit determined that "[t]he likelihood that City officials will continue to respond to the plaintiffs' conduct in ways similar to those described in the plaintiffs' complaint is also greater here than in *Lyons*" because "[i]n this case, [unlike in *Lyons*], the plaintiffs allege that municipal policy authorizes the constitutional deprivations that they claim to have suffered at the hands of City officials."\(^ {145}\) The *Church* plaintiffs alleged that the City had a "custom, practice and policy of arresting, harassing and otherwise interfering with homeless people for engaging in the ordinary and essential activities of daily life in the public places where Plaintiffs are forced to live."\(^ {146}\) Thus, the Eleventh Circuit concluded that the *Church* allegations were distinguishable from those in *Lyons*, where the City of Los Angeles had not authorized police to use deadly chokeholds without provocation or in the absence of deadly force.\(^ {147}\) Accordingly, the court of appeals determined that the *Church* plaintiffs had

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141. Id. at 1338.
142. 744 F.2d 1452, 1456–57 & nn.6–7 (11th Cir. 1984).
143. *Church*, 30 F.3d at 1338 (discussing *Lynch v. Baxley*, 744 F.2d 1452, 1456–57 & nn.6–7 (11th Cir. 1984)).
144. Id. (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)).
145. Id. at 1338–39.
146. Id. at 1339 (internal quotations omitted).
147. See id. at 1337–39; supra Part II.A (discussing City of Los Angeles v. Lyons, 461 U.S. 95 (1983)).
standing to seek injunctive relief. In the subsequent decision *31 Foster Children v. Bush*, a case involving a class action on behalf of all of the “children in Florida’s foster care system against the Governor of Florida,” the Eleventh Circuit again distinguished the *Lyons* decision and followed *Church* because the plaintiffs were involuntarily in the custody of the defendants and could not avoid the defendants’ alleged wrongful conduct.

D. The Ninth Circuit Distinguishes Lyons in Two Decisions: LaDuke and Thomas

1. LaDuke

In two significant decisions, the Ninth Circuit distinguished the standing analysis in *Lyons*. First, in *LaDuke v. Nelson*, the Ninth Circuit concluded that the plaintiffs, who were residents in migrant farm dwellings in the greater Spokane “Sector,” had standing to seek permanent injunctive relief against the Immigration and Naturalization Service (“INS”) to enjoin the INS’s alleged practice of conducting warrantless searches of such dwellings without probable cause or articulable suspicion requirements of the Fourth Amendment. After the plaintiffs filed a class action and the district court certified them as a class, the district court found that the INS had engaged in a “standard pattern” of warrantless and involuntary searches of farm labor housing communities in the Sector. The district court issued an injunction forbidding the INS from engaging in similar unconstitutional searches of migrant farm housing.

On appeal, the INS challenged the plaintiffs’ standing to bring suit for injunctive relief under Article III of the Constitution because it maintained that they had not shown a credible threat of recurrent injury as required by *Lyons* and *Kolender*. The Ninth Circuit in *LaDuke* distinguished *Lyons* based on “the respective district court findings on the likelihood of recurrent injury. The district court in *Lyons* made no finding of likely recurrence

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148. See id. at 1337–39. On the merits, the Eleventh Circuit held that the plaintiffs were not entitled to an injunction because they failed to establish that they were likely to prove that the City had a policy or custom of arresting and harassing homeless persons. Id. at 1342–47.
149. 329 F.3d 1255 (11th Cir. 2003).
150. Id. at 1255, 1260–68.
151. 762 F.2d 1318 (9th Cir. 1985).
152. Id. at 1321, 1324–26.
153. Id. at 1321–22.
154. Id. at 1331–32.
155. Id. at 1322–24.
while the district court in this case made a specific finding of likely recurrence.”

Additionally, the LaDuke court observed that “the district court in this case explicitly found that the defendants engaged in a standard pattern of officially sanctioned officer behavior violative of the plaintiffs’ constitutional rights.” By contrast, the Ninth Circuit emphasized that “the Lyons opinion expressly noted the absence of any written or oral pronouncements by the Los Angeles Police Department sanctioning the unjustifiable application of the chokehold and pointed to the absence of ‘any [record] evidence showing a pattern of police behavior’ suggestive of an unconstitutional application of the chokehold.”

Because the Supreme Court had repeatedly upheld the appropriateness of injunctive relief by federal courts to address a “pattern” of illicit law enforcement wrongdoing, the LaDuke court concluded that it was appropriate for the district court in this case to award injunctive relief because the pattern of illegal enforcement distinguished the case from Lyons, where there was no proof in the record of a pattern of wrongdoing. The Ninth Circuit also distinguished Lyons on the grounds that the injunction in its case did not affect state or local law enforcement matters and, thus, did not implicate federalism concerns about the role of federal courts in local law enforcement issues. Furthermore, the court of appeals observed that its case involved a certified class action, unlike Lyons, which involved a single plaintiff. Accordingly, the Ninth Circuit concluded that injunctive relief was appropriate in the case.

2. Thomas

In Thomas v. County of Los Angeles, the Ninth Circuit distinguished Lyons, concluding that the plaintiffs had standing to obtain injunctive relief against county deputy sheriffs who allegedly mistreated minority residents in a small geographic area within the Lynwood station of the Los Angeles County Sheriff’s Department (“Sheriff’s Department”). The plaintiffs, who were predominately African-American and Hispanic residents of

156. Id. at 1324 (internal citation omitted) (citing City of Los Angeles v. Lyons, 461 U.S. 95, 110 n.9 (1983); LaDuke v. Nelson, 560 F. Supp. 158, 164 (E.D. Wash. 1982)).
157. Id. (internal citation omitted) (citing LaDuke, 560 F. Supp. at 160).
158. Id. (quoting Lyons, 461 U.S. at 110 n.9).
159. Id. at 1324, 1326.
160. Id. at 1324–25.
161. Id. at 1325.
162. Id. at 1324–26.
163. 978 F.2d 504 (9th Cir. 1992).
164. Id. at 507–08.
Lynwood, California, brought a § 1983 class action in federal district court alleging that the deputy sheriffs at the Sheriff's Department were abusing the minority citizens. The plaintiffs alleged that the defendant deputy sheriffs had engaged in “unlawful detentions and searches, beatings, shootings, terrorist activities” involving threats to execute detained suspects, “and destruction of property.” The district court granted a preliminary injunction ordering the entire Los Angeles County Sheriff’s Department to review its policies concerning the use of force and to submit to the court, in camera and under seal, copies of every report involving the Sheriff’s Department, although the plaintiffs had only sought injunctive relief addressing the Lynwood station. On appeal, the Ninth Circuit concluded that the district’s order affecting the entire Sheriff’s Department was overly broad in geographic and substantive scope and remanded the case to the district court for further proceedings.

On appeal to the Ninth Circuit, the Sheriff’s Department relied primarily upon Lyons to challenge the plaintiffs’ standing to seek injunctive relief. The Thomas court distinguished Lyons as a case involving “one citizen in a very large city, [who] could not credibly allege that he would again be detained by the police and again be the victim of a police chokehold.” By contrast, the Ninth Circuit observed that Thomas was factually distinguishable from Lyons because the allegations involved far more violations in a narrow six-by-seven block area and that some of the minority residents alleged that they had been mistreated more than once by sheriff deputies in the Department, unlike Lyons who was the alleged victim of only one incident. Furthermore, the Thomas plaintiffs “alleged that the misconduct is purposefully aimed at minorities and that such misconduct was condoned and tacitly authorized by department policy makers.” On the other hand, the Lyons Court found that the Los Angeles Police Department did not condone the use of deadly chokeholds by officers, unless they were the subject of a deadly force. Thus, the Ninth Circuit in Thomas distinguished Lyons on the basis of the greater number of alleged acts of wrongdoing, the narrow geographic area in which the violations

166. Thomas, 978 F.2d at 505–06.
167. Id.
168. Id. at 506–07.
169. Id. at 506, 509–10.
170. Id. at 507.
171. Id. at 507–08.
172. Id.
173. Id. at 508.
174. See supra Part II.A.
occurred, and the allegation that some residents were victims of multiple cases of abuse. Furthermore, the Ninth Circuit distinguished Lyons because the Thomas plaintiffs alleged that the Sheriff’s Department had a policy encouraging abuse. As a result, the Thomas court concluded that the plaintiffs had standing to seek injunctive relief.

E. The Fifth Circuit Distinguishes Lyons in the first Hill decision and in Hernandez

1. Hill v. City of Houston

a. Background

In Hill v. City of Houston, a Fifth Circuit panel distinguished Lyons, holding that a plaintiff who had been arrested four times for violating a challenged ordinance faced a “credible threat” of future prosecutions that gave him standing to challenge the constitutionality of the ordinance. Subsequently, the Fifth Circuit, sitting en banc, and the Supreme Court agreed that the plaintiff had standing, but neither decision addressed Lyons. On four different occasions between 1975 and 1982, Houston police officers arrested Raymond Hill for violating a city ordinance that prohibited citizens from interfering with police officers in the execution of their duties. Hill was never convicted, however, because the court either found him not guilty or dismissed the case. Hill did not raise a direct constitutional challenge in the state court to his prosecution under the ordinance for his arrest in February 1982. Instead, he filed a separate action in federal district court alleging the unconstitutionality of the ordinance under the free speech provisions of the First Amendment of the

175. Thomas, 978 F.2d at 507–08.
176. Id.
177. Id.
178. 764 F.2d 1156 (5th Cir. 1985), reh’g granted, 789 F.2d 1103 (5th Cir. 1986) (en banc), aff’d, 482 U.S. 451 (1987).
179. Id. at 1161.
181. Hill, 764 F.2d at 1158–59, 1169. Section 34-11(a) of the Code of Ordinances of the City of Houston, Texas, provides: “It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest.” HOUSTON, TEX., MUN. CODE § 34-11(a) (1984).
183. Id. at 1160.
U.S. Constitution and seeking declaratory and injunctive relief. The district court held that Hill lacked standing to challenge the constitutionality of the ordinance. Furthermore, the district court also concluded that, even if Hill met the standing requirement, it would deny his claim for relief because the ordinance was "neither overly broad, void for vagueness, nor applied in an unconstitutional manner as to Hill’s arrest in February 1982."

b. Panel Decision

On appeal, a three-judge panel of the Fifth Circuit reversed the district court in concluding that Hill had standing and that the ordinance violated the First Amendment because its language was substantially overbroad, although one judge filed a dissenting opinion. The majority, in an opinion written by Judge Rubin, distinguished Lyons as factually different and concluded "that Hill has the requisites to standing defined in Lyons.' Judge Rubin reasoned that the plaintiff had standing because Hill had already been arrested four times, far more than Lyons’s single arrest, and Hill “steadfastly asserted that he intends to continue to act in a manner that will subject him to further arrests under the ordinance.” Thus, the court concluded, citing Lyons and Kolender:

Hill has shown, therefore, that he faces more than a “subjective apprehension” of repeated injury; he faces a “credible threat” of future criminal prosecutions under the ordinance that is more than a mere speculative and remote possibility. Hill, therefore, clearly has standing to challenge the constitutionality of the ordinance on First Amendment grounds.

In his dissenting opinion, Judge Higginbotham “agree[d] with the majority that Hill has standing to raise an overbreadth challenge, because his challenge rests on the ordinance’s application to hypothetical persons in hypothetical cases.” He was “troubl[ed], however, [by] the majority’s suggestion that Hill has standing to challenge the ordinance on vagueness grounds as well” because Hill “was intimately familiar with the ordinance

184. Id.
185. Id. at 1159.
186. Id.
187. Id. at 1161–65. But see id. at 1165–73 (Higginbotham, J., dissenting).
188. Id. at 1161 (majority opinion).
189. Id.
190. Id. (citing City of Los Angeles v. Lyons, 461 U.S. 95, 107 n.8 (1983); Kolender v. Lawson, 461 U.S. 352, 355 n.3 (1983)).
191. Id. at 1172 (Higginbotham, J., dissenting) (citation omitted).
REVISITING THE LYONS DEN

and how it was applied by the Houston police prior to his 1982 arrest. Judge Higginbotham’s standing discussion focused on the special standing issues involved in First Amendment speech challenges and did not address the more general standing issues related to the Lyons decision.

c. Rehearing En Banc

A majority of the Fifth Circuit voted to rehear the Hill case en banc. On rehearing en banc, the Fifth Circuit in an opinion by Judge Rubin held that the plaintiff had standing to challenge the constitutionality of the ordinance and that the ordinance in its present form was facially and substantially overbroad and, therefore, unconstitutional under the First Amendment. In his dissenting opinion, Judge Higginbotham argued that the Fifth Circuit should have affirmed the district court’s opinion because “the Houston ordinance was constitutionally applied to Raymond Hill for his conduct on the Montrose streetcorner [sic],” and “his challenge to the facial validity of the provision, which is based on the claim that the ordinance threatens the constitutional rights of others, cannot be sustained” because Texas courts could provide a limiting construction of the ordinance’s language that would meet First Amendment requirements.

Judge Rubin adopted a different standing analysis than he had used in his panel opinion. He emphasized that liberal standing rules apply in First Amendment challenges instead of the normal standing rule that a plaintiff must demonstrate he is personally harmed. Because of the danger that people who are harmed by the unconstitutional restrictions on free speech will be afraid to challenge the government, a plaintiff may seek declaratory or injunctive relief against an allegedly overbroad or vague law on behalf of other persons whose speech is allegedly chilled by the law, without meeting the usual injury requirement for standing. Judge Rubin concluded: “Hill clearly had sufficient standing to question the facial validity of the ordinance. Hill’s record of arrests under the ordinance and his adopted role as citizen provocateur made his Article III standing to seek injunctive and declaratory relief certain.” In his dissenting opinion, Judge Higginbotham essentially reiterated his argument in his panel dissenting opinion that Hill

192. Id. at 1172 n.4.
193. Id. at 1172 & n.4.
194. Id. at 1173.
196. Id. at 1114–28 (Higginbotham, J., dissenting).
197. Id. at 1106–07 (majority opinion).
198. Id. (citing Sec’y of State v. Joseph H. Munson Co., 467 U.S. 947 (1984)).
199. Id. at 1107.
had Article III standing to raise an overbreadth challenge on behalf of other persons but that he did not have standing to raise a vagueness claim because of his experience with the challenged ordinance.200

d. Supreme Court Affirms En Banc Decision in City of Houston v. Hill

In City of Houston v. Hill, the Supreme Court affirmed the en banc decision that the Houston ordinance was an unconstitutionally overbroad infringement on First Amendment rights of free speech.201 While it did not cite Lyons, the Court in a footnote concluded that Hill had standing because he “has shown ‘a genuine threat of enforcement’ of the ordinance against his future activities.”202 In determining that Hill had standing to sue, Justice Brennan relied on the same factors as those articulated in the panel decision in reasoning that Hill was likely to be arrested in the future.203 First, the majority opinion observed that the likeliness of Hill being arrested in the future was supported by “testimony of Hill’s willingness to interrupt officers in the future.”204 Second, Justice Brennan found that it was likely that the Houston police would arrest Hill in the future in light of the “[d]istrict [c]ourt[’s] finding that Hill [was] a gay rights activist who claim[ed] that the Houston police ha[d] systematically harassed him as the direct result of his sexual preferences.”205 Third, the majority noted “the fact that Hill has already been arrested four times under the ordinance lends compelling support to the threat of future enforcement.”206 The Court concluded: “We therefore agree with the Court of Appeals that ‘Hill’s record of arrests under the ordinance and his adopted role as citizen provocateur’ give Hill standing to challenge the facial validity of the ordinance.”207 Although it did not discuss Lyons, the Court’s application of the three factors to determine that Hill faced a credible prospect of future arrest could easily have been used to distinguish Lyons, as the panel decision had concluded.208

200. Id. at 1121–28 (Higginbotham, J., dissenting).
202. Id. at 459 n.7 (quoting Steffel v. Thompson, 415 U.S. 452, 475 (1974)).
203. Id. at 459–63; see supra Part III.E.1.b.
204. Hill, 482 U.S. at 459 n.7; see supra Part III.E.1.b.
205. Hill, 482 U.S. at 459 n.7 (internal quotation marks omitted); see supra Part III.E.1.b.
206. Hill, 482 U.S. at 459 n.7; see supra Part III.E.1.b.
207. Hill, 482 U.S. at 459 n.7 (quoting Hill v. City of Houston, 789 F.2d 1103, 1107 (5th Cir. 1986) (en banc)).
208. See supra Part III.E.1.b.
2. The Fifth Circuit Distinguishes Lyons in Hernandez v. Cremer

In Hernandez v. Cremer, the Fifth Circuit distinguished Lyons in affirming injunctive relief against the INS on behalf of a border entry applicant who was denied entry to the United States despite presenting documentary evidence of United States citizenship. Judge Higginbotham, however, dissented on the ground that the plaintiff was not entitled to injunctive relief in light of Lyons because it was too speculative whether INS agents would deny the plaintiff entry to the United States in the future. Plaintiff "Carmelo Hernandez, a United States citizen born in Puerto Rico . . . sought entry from Mexico into the United States at the International Bridge at Del Rio, Texas." Hernandez "presented a Puerto Rican birth certificate and a union card with his social security number to support his claim that he was a United States citizen," but the INS immigration inspector, James Blake, was not satisfied that the documents were valid and "processed Hernandez for an exclusion hearing before an immigration judge." Blake "did not schedule a hearing at the time Hernandez was processed" and failed to annotate that he had provided Hernandez with a list of legal aid organizations as required by the I-122 INS form given to applicants at the time of entry. After Hernandez spent forty-six days in Mexico repeatedly trying to reenter the United States, another INS inspector was satisfied with his documentation and allowed him to enter the United States without a formal hearing.

Hernandez then sued in federal district court, seeking tort damages and injunctive relief against Lee Cremer, "individually and as the INS officer in charge of the Del Rio port of entry"; Blake, "individually and as an officer of the INS"; the INS; and the United States. The district court "dismissed all claims against Cremer and Blake as well as the tort actions against the INS and the United States." The district court, however, issued an injunction against the San Antonio District of the INS, "requiring that the INS follow certain minimal procedures when an applicant for entry into the United States presents documentary evidence which, if accepted as authentic, would conclusively establish the applicant's United States

209. 913 F.2d 230, 235–36 (5th Cir. 1990).
210. Id. at 241 (Higginbotham, J., dissenting).
211. Id. at 232 (majority opinion).
212. Id.
213. Id.
214. Id. at 232–33.
215. Id. at 232–33.
216. Id.
The INS appealed to the Fifth Circuit arguing that voluntary oral procedures it had adopted made the injunctive relief unnecessary. The court of appeals remanded the case back to the district court to reconsider "the injunction in light of the new procedures." After a hearing, "the district court [entered] a final decision, ordering that the injunction initially entered remain in effect but authorizing the application of the new INS procedures in lieu of the injunction." The INS then appealed to the Fifth Circuit.

On appeal, the INS argued that Lyons barred injunctive relief because Hernandez could not show that the INS agents would likely deny him future entry in the United States. The Fifth Circuit distinguished Lyons because Hernandez, unlike Lyons, had exercised a constitutional right and was likely to exercise that right in the future. The court of appeals stated:

We find a critical factual distinction between Lyons and the instant case which dictate a different result. Hernandez (unlike Lyons) was engaged in an activity protected by the Constitution. Although at present Hernandez is safely inside the United States, he is a United States citizen and is entitled to travel to and from Mexico without deprivation of his Fifth Amendment due process rights. We think there is at the very least a reasonable expectation that Hernandez will exercise his right to travel.

The Fifth Circuit observed that the Supreme Court's Honig decision had stated that courts were reluctant to assume that a plaintiff injured during an arrest would repeat that "misconduct." The Hernandez decision concluded that "[n]o such reluctance, however, is warranted here" regarding Hernandez's exercise of his right to travel. The court of appeals explained: "The injury alleged to have been inflicted did not result from an individual's disobedience of official instructions and Hernandez was not engaged in any form of misconduct; on the contrary, he was exercising a fundamental Constitutional right." Accordingly, the Fifth Circuit

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217. Id.
218. Id.
219. Id.
220. Id.
221. Id.
222. Id. at 234.
223. Id.
224. Id. (citations omitted).
225. Id. (quoting Honig v. Doe, 484 U.S. 305, 320 (1988)) (emphasis added by Fifth Circuit).
226. Id.
227. Id. at 234–35 (footnote omitted).
determined that the plaintiff had standing because "there is a reasonable expectation that Hernandez will be subject to the alleged deprivation of his Fifth Amendment due process rights in the future." An interesting question addressed in Part VI is whether a plaintiff who has a statutory right to visit a national park is entitled to the same relaxation of the Lyons test as a plaintiff exercising a constitutional right like Hernandez. Like Hernandez and unlike Adolph Lyons, the plaintiffs in Summers were not engaging in misconduct but were exercising a lawful right.

In his dissenting opinion, Judge Higginbotham argued that the plaintiff was not entitled to injunctive relief in light of Lyons because it was too speculative whether INS agents would again deny the plaintiff entry to the United States and that Hernandez's exercise of his constitutional right to travel did not distinguish the case from Lyons. Judge Higginbotham asserted:

> With deference, I cannot agree that Lyons is distinguishable because Hernandez was engaged in constitutionally protected conduct. Lyons also enjoyed a constitutional right not to be subjected to the excessive force of the choke-hold. The decision in Lyons does not rest on the legality or constitutional protection of the plaintiff's conduct. Lyons instead mandates an inquiry into the likelihood that the single plaintiff will incur the difficulty again. Such an inquiry is compelled by basic notions of Article III standing as well as by fundamental equitable principles controlling the issuing of injunctions.

Judge Higginbotham contended that Hernandez did not bring a class action because "the record is bereft of any suggestion that Hernandez's experience was shared by others." He concluded that the majority should have "reversed the district court's grant of an injunction."

F. The Second Circuit Distinguishes Lyons in Deshawn

In Deshawn E. ex rel. Charlotte E. v. Safir, the Second Circuit distinguished Lyons and concluded that the plaintiffs had standing because "the challenged interrogation methods in this case [were] officially

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228. Id. at 235.
229. See infra Part VI.D.
230. See infra Part VI.A.
231. Hernandez, 913 F.2d at 241 (Higginbotham, J., dissenting).
232. Id.
233. Id.
234. Id.
The parents of juveniles claimed that the New York Police Department had illegally used coercive interrogation techniques when questioning their children. The federal district court "denied [the] plaintiffs’ motion for a preliminary injunction and granted [the] defendants’ motion for summary judgment on the ground that ‘plaintiffs have not established a federal cause of action.’" On appeal, the Second Circuit distinguished Lyons in "find[ing] that the plaintiffs have standing to seek equitable relief." First, the court of appeals determined that the case was different from Lyons because "the plaintiffs in this case allege that they, as a certified class, are likely to suffer future interrogations by the Squad." Second, the Deshawn decision reasoned that, "unlike Lyons, the plaintiffs in this case allegedly continue to suffer harm from the challenged conduct because the information secured by the Squad is used to enhance their cases and to obtain plea bargains." Finally, the Second Circuit concluded that "this case is distinguishable from Lyons because, in Lyons, there was no proof of a pattern of illegality as the police had discretion to decide if they were going to apply a choke hold and there was no formal policy which sanctioned the application of the choke hold." By contrast, the court of appeals in Deshawn determined that the New York City Police Department ("Department") had an official policy of using coercive interrogations against juveniles, that there was a likelihood of recurring injury, and that the Department was planning to expand this policy. Because the Department had an official policy sanctioning the allegedly illegal interrogation practices, the Second Circuit distinguished Lyons and concluded that the plaintiffs had standing.

235. 156 F.3d 340, 344–45 (2d Cir. 1998).
236. Id. at 343–44.
237. Id. at 344 (quoting Deshawn E. v. Safir, No. 96 Civ. 5296 JSM, 1997 WL 107544, at *1 (S.D.N.Y. March 10, 1997), aff’d, 156 F.3d 340 (1998)).
238. Id.
239. Id.
240. Id.
241. Id. at 344–45.
242. Id. at 345.

In contrast, the challenged interrogation methods in this case are officially endorsed policies; there is a likelihood of recurring injury because the Squad’s activities are authorized by a written memorandum of understanding between the Corporation Counsel and the Police Commissioner. In addition, plaintiffs’ complaint alleges that the New York Police Department “has plans to and is in the process of instituting Detective Squads in the Family Court buildings in the Bronx, Brooklyn, and Queens.”

Id. (quoting Complaint, Deshawn E. v. Safir, No. 96 Civ. 5296 JSM, 1997 WL 107544 (S.D.N.Y. March 10, 1997), aff’d, 156 F.3d 340 (1998)).

243. Id. at 344–45.
merits, however, the Deshawn court held that the plaintiffs failed to establish a violation of their Fifth Amendment or Fourteenth Amendment rights because the Department’s interrogation techniques were not so uniformly coercive to establish a per se, facial violation of those rights for the entire class.\textsuperscript{244} The Court observed that individual plaintiffs could still bring challenges on a case-by-case basis if coerced statements were used against them in court, in violation of their constitutional rights.\textsuperscript{245}

G. \textit{The Tenth Circuit Recognizes Standing to Enforce Statutory Rights in Tandy}

In \textit{Tandy v. City of Wichita}, the Tenth Circuit held that the disabled bus passengers had standing to seek prospective relief because there was a “realistic threat” of future discrimination by Wichita’s transit system against disabled people in violation of their statutory rights.\textsuperscript{246} The \textit{Tandy} plaintiffs sued the City of Wichita, which operates the Wichita Metropolitan Transit Authority (“Wichita Transit”), in federal district court for allegedly violating the Rehabilitation Act\textsuperscript{247} and Title II of the Americans with Disabilities Act (“ADA”).\textsuperscript{248} They “alleged that Wichita Transit’s fixed-route bus system was intentionally inaccessible to and unusable by people with disabilities.”\textsuperscript{249} “Each [plaintiff] sought injunctive relief, declaratory relief, compensatory damages, punitive damages, costs, and attorneys’ fees.”\textsuperscript{250} Several of the plaintiffs “were testing Wichita Transit’s compliance” with the two statutes and “did not reside in the Wichita area.”\textsuperscript{251}

The district court concluded that three plaintiffs, the “cross-appellees” before the Tenth Circuit, had standing because they resided in the Wichita area and regularly used the transit system.\textsuperscript{252} Conversely, seven other

\begin{itemize}
  \item \textsuperscript{244} \textit{Id.} at 345–49.
  \item \textsuperscript{245} \textit{Id.} at 346–47.
  \item \textsuperscript{246} 380 F.3d 1277, 1284–85, 1287–89 (10th Cir. 2004).
  \item \textsuperscript{247} 29 U.S.C. § 794 (2002).
  \item \textsuperscript{248} 380 F.3d at 1280–90 (discussing Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131–12165 (2000)). All of the plaintiffs met the statutory definition of “‘qualified individuals with a disability’ within the meaning of the ADA and the Rehabilitation Act.” \textit{Id.} at 1280 n.2 (quoting 29 U.S.C. § 794; 42 U.S.C. § 12132).
  \item \textsuperscript{249} \textit{Id.} at 1280.
  \item \textsuperscript{250} \textit{Id.}
  \item \textsuperscript{251} \textit{Id.}
  \item \textsuperscript{252} \textit{Id.}; \textit{Tandy v. City of Wichita}, 208 F. Supp. 2d 1214, 1219–20 (D. Kan. 2002) (explaining rationale for recognizing standing for Wichita residents who regularly use the transit system, but denying standing to testers or infrequent users), \textit{aff’d in part, rev’d in part, dismissed in part}, 380 F.3d 1277 (10th Cir. 2004).
\end{itemize}
plaintiffs, the “cross-appellants” before the Tenth Circuit, did not have standing because they were either “testers” who did not reside in the greater Wichita area or resided in Wichita, but rarely used the transit system. The district court “issued an injunction against Wichita Transit’s continued use of its policy of giving drivers the discretion to deny wheelchair-bound passengers access to an accessible bus on an inaccessible route, reasoning that this policy violates the ADA.”

On appeal before the Tenth Circuit, the “cross-appellants” challenged the district court’s denial of their standing. The City of Wichita cross-appealed the district court’s issuance of the injunction, contending that “the injunction was unnecessary and [was] now moot because Wichita Transit’s fixed-routes . . . [had] . . . become fully accessible to wheelchair users as of April 2002”; however, Wichita did not appeal the district court’s determination “that its driver-discretion policy violated the ADA.” The Tenth Circuit denied Wichita’s appeal because it concluded that a losing party’s voluntary compliance with a district court’s injunctive relief does not require a court of appeals to vacate the injunction, unless the losing party provides equitable considerations justifying vacatur, which Wichita failed to offer.

The Tenth Circuit reversed the district court’s denial of standing to four of the “cross-appellants” because it concluded that some of the non-resident “testers” and occasional but regular residential users faced a sufficiently “realistic threat” of discrimination by the transit system. For example, the court of appeals concluded that Betty Allen, who uses a power chair as a mobility aid, had standing to seek prospective relief because she was “under a realistic threat of experiencing a lift malfunction during at least twenty percent of her several yearly attempts to use Wichita Transit’s buses.” Similarly, the court of appeals determined that Wichita Transit’s past failure to provide Carolyn Jefferies, a deaf person, with workable Telecommunications Device for the Deaf (“TDD”) service to communicate by phone established that she was “under a real and immediate threat of repeated injury” in light of her avowed intention to use the TDD service

253. *Tandy*, 380 F.3d at 1280; *Tandy*, 208 F. Supp. 2d at 1219–20 (explaining rationale for recognizing standing for Wichita residents who regularly use the transit system, but denying standing to testers or infrequent users).
254. *Tandy*, 380 F.3d at 1280.
255. *Id.*
256. *Id.* at 1280–81.
257. *Id.* at 1291–92.
258. *Id.* at 1283–89.
259. *Id.* at 1281, 1284–85 (footnote omitted).
once a month in the future.\textsuperscript{260} Citing Lyons, the Tenth Circuit reasoned: “Past exposure to wrongful conduct bears on whether there is a real and immediate threat of repeated injury.”\textsuperscript{261} By referring to “repeated injury,” the Tenth Circuit implicitly distinguished Lyons, which involved only one injury.\textsuperscript{262}

Additionally, the Tandy court held that the testers can establish standing to seek prospective relief.\textsuperscript{263} The court observed that “[t]he question whether testers have standing to sue under the Rehabilitation Act and under Title II of the ADA is an issue of first impression.”\textsuperscript{264} The Tenth Circuit relied heavily on Havens Realty Corp. v. Coleman,\textsuperscript{265} a case in which “the Supreme Court held that an African-American tester who was given misinformation about the availability of a rental property had alleged sufficient injury in fact to support standing to sue under the” Fair Housing Act (“FHA”).\textsuperscript{266} The Tandy court explained that the Supreme Court in Havens Realty had interpreted Congress’s extension of the reach of the FHA to “any person” denied a dwelling “to confer standing ‘to the full limits of Article III,’ which includes tester standing.”\textsuperscript{267} The Tenth Circuit observed that several courts of appeals decisions “have followed the Supreme Court’s reasoning in Havens Realty to hold that tester standing exists under other anti-discrimination statutory provisions.”\textsuperscript{268}

Because both Title II of the ADA and the Rehabilitation Act broadly prohibit discrimination against any “qualified individual” with a qualifying disability, the Tandy court concluded that the reasoning in Havens Realty that Congress intended the FHA to reach the full limits of Article III standing, including tester standing, applied to those two statutes as well.\textsuperscript{269} The Tenth Circuit held that all of the testers in its case who planned to test the system in the future had standing since they were all “qualified individuals with a disability’ within the meaning of the ADA and the Rehabilitation Act.”\textsuperscript{270} For example, the Tandy court cited Lyons in holding...

\textsuperscript{260} Id. at 1282, 1288–89.
\textsuperscript{261} Id. at 1289 (citing City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)).
\textsuperscript{262} See infra Part VI.A.
\textsuperscript{263} 380 F.3d at 1285–88.
\textsuperscript{264} Id. at 1285.
\textsuperscript{265} 455 U.S. 363, 374–75 (1982).
\textsuperscript{266} Tandy, 380 F.3d at 1285–86 (discussing Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–75 (1982)).
\textsuperscript{267} Id. at 1286 (quoting Havens Realty, 455 U.S. at 372–74).
\textsuperscript{268} Id. (citing Smith v. Pac. Props. & Dev. Corp., 358 F.3d 1097, 1103–04 (9th Cir. 2004); Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289, 298 (7th Cir. 2000); Watts v. Boyd Props., Inc., 758 F.2d 1482, 1485 (11th Cir. 1985)).
\textsuperscript{269} Id. at 1286–87.
\textsuperscript{270} Id. at 1287.
that Mike Goupil had "established the requisite injury in fact because he is under a real and immediate threat of experiencing a lift malfunction" in light of his plan to test the system several times per year and the evidence that lift malfunctions occurred "twenty to thirty percent of the time." 271

The Tenth Circuit followed Lyons in holding that Ann Donnell did not have standing to seek "prospective relief against the driver's failure to call out stops and failure to offer her a designated seat" because Wichita Transit had a policy requiring drivers to call out stops. 272 Although there was evidence that Wichita Transit's drivers "often" failed to call out stops and a driver in the past had failed to call out stops for Donnell, the court of appeals concluded that her claim must fail in light of Lyons because she could not demonstrate that drivers would refuse to follow the official policy requiring them to call out stops "or that all drivers always fail to offer disabled passengers designated seats." 273 Accordingly, the Tenth Circuit held that "Donnell has no standing to seek prospective relief requiring drivers to call out stops or to offer designated seats." 274 The Tenth Circuit appeared to presume that past mechanical failures such as lift malfunctions or TDD failures would recur in the future but followed Lyons's reasoning that past misconduct by government officials does not necessarily predict their future behavior if the government subsequently adopts an official policy prohibiting such misconduct in the future. 275

H. Brief Summary of Lyons's Progeny

As will be discussed more fully in Part VI, Lyons has been distinguished on several grounds by subsequent cases. First, the courts in the Kolender, Thomas, and Hill decisions found a realistic or credible threat of future harm when the plaintiffs alleged multiple past government violations of their rights and distinguished Lyons by observing that it had only involved one incident of harm. 276 Second, the Honig and Hernandez decisions differed from Lyons on the ground that the plaintiffs in those cases were involved in legal conduct that was more likely to be repeated in the future, whereas Adolph Lyons had engaged in illegal behavior that was less likely

271. Id. at 1287-88 (citing City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)).
272. Id. at 1288.
273. Id.
274. Id.
275. See id. at 1284-89.
276. See supra Parts III.A, III.D.2, III.E.1; infra Part VI.A; see generally Garrett, supra note 86, at 1820-26 & n.43 (arguing post-Lyons cases use a flexible, individualized, factspecific inquiry in determining whether there is a credible threat of future harm, including frequency of government misconduct).
to be repeated. Third, the courts, in the Kolender, Honig, Church, LaDuke, and Deshawn decisions, found a realistic or credible threat of future harm when the plaintiffs alleged that the government had an official policy or practice of condoning misconduct against them and, therefore, distinguished Lyons, where the City had adopted a policy forbidding the use of the challenged chokehold, except in justified situations.

Fourth, the courts, in the Kolender, Honig, Church, LaDuke, Deshawn, and Tandy decisions, found a credible or realistic threat of harm in part because the government targeted a minority or disadvantaged group. On the other hand, in Lyons, the Supreme Court did not find that the Los Angeles Police Department had targeted minorities, even though African-American males accounted for 75% of the chokehold deaths since 1975 despite constituting only 9% of the Los Angeles population.

Fifth, the courts, in all three Hill decisions, appropriately adopted a more liberal approach to equitable remedies than Lyons because Hill alleged that the Houston police had violated his and others’ fundamental First Amendment rights, to which courts give greater protection than other constitutional or statutory rights.

Part VI will examine whether any of these five ways of distinguishing Lyons can be applied to the facts in Summers.

IV. **Laidlaw Distinguishes Lyons**

A. **Majority Decision**

The Supreme Court distinguished Lyons in Laidlaw, a case involving illegal mercury discharges that violated the defendant’s permit but where

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277. See supra Parts III.B, III.E.2; infra Part VI.A; see generally Rudovsky, supra note 86, at 1237 n.234 (stating plaintiff is more likely to demonstrate credible threat of future government harm if the plaintiff is engaging in “protected activity”); Garrett, supra note 86, at 1825–26 (arguing post-Lyons cases are more likely to find a credible threat of future harm if the plaintiff is engaging in law-abiding behavior as opposed to illegal behavior).

278. See Rudovsky, supra note 86, at 1237 n.233 (stating plaintiff can demonstrate a credible or realistic threat of harm by demonstrating that the harm was the product of a policy or practice of government); Garrett, supra note 86, at 1821–25 (arguing post-Lyons cases are more likely to find a credible threat of future harm if there is an official policy condoning that misconduct); infra Part VI.B.

279. See Garrett, supra note 86, at 1826–29; infra Part VI.C.


281. See supra Part III.E.1; infra Part VI.D.

282. Part IV’s examination of Laidlaw builds upon my previous article on Summers, but focuses more on the Laidlaw decision’s discussion of Lyons. See generally Mank, Previous Article on Summers, supra note ‡.
there was no actual proof of harm to the plaintiffs or evidence that they would be harmed in the future by the pollution. The plaintiffs argued that they had standing to sue the defendant that discharged mercury into a river because they avoided swimming or fishing in a river due to the fear of possible harm from the mercury. The Supreme Court held that the plaintiffs had standing even though they could not prove that the concentrations of mercury were likely to harm them or the environment. The Supreme Court concluded that the plaintiffs had suffered a sufficient injury for Article III standing because their "reasonable concerns" about the harmfulness of the mercury caused them to discontinue recreational use of the river. The Court explained that the plaintiffs did not have to demonstrate an actual injury to the environment from the pollution because "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." 

The Laidlaw Court distinguished Lyons. Justice Ginsburg, writing for the majority, observed: "In Lyons, we held that a plaintiff lacked standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a realistic threat from the policy." In response to Justice Scalia's dissenting opinion, she acknowledged that Lyons had required that standing for prospective relief be based on the probability of future harm rather than a plaintiff's subjective fear of that harm. The Court observed: "In the footnote from Lyons cited by the dissent, we noted that '[t]he reasonableness of Lyons' fear is dependent upon the likelihood of a recurrence of the allegedly

285. Laidlaw, 528 U.S. at 181–83; Craig, supra note 284, at 181; Mank, Future Generations, supra note 3, at 40–41; Mank, Standing and Statistical Persons, supra note 4, at 685–86.
286. Laidlaw, 528 U.S. at 181; Mank, Future Generations, supra note 3, at 40–41; Mank, Standing and Statistical Persons, supra note 4, at 686.
287. Laidlaw, 528 U.S. at 181; Craig, supra note 284, at 181; Mank, Standing and Statistical Persons, supra note 4, at 685.
288. Laidlaw, 528 U.S. at 184–85 (discussing City of Los Angeles v. Lyons, 461 U.S. 95, 106–08 (1983)).
289. Laidlaw, 528 U.S. at 184 (citing Lyons, 461 U.S. at 106–07 n.7) (emphasis added).
290. Id.
unlawful conduct,' and his ‘subjective apprehensions’ that such a recurrence would even take place were not enough to support standing.”

The *Laidlaw* Court concluded that the plaintiffs in its case faced a more realistic threat of future harm than the plaintiff in *Lyons*.292 Contrasting Adolph Lyons’s mere subjective concern that he might be subject to a police chokehold in the future with the acknowledged evidence of permit violations in *Laidlaw*, Justice Ginsburg distinguished the facts in *Lyons* by focusing on the “undisputed” evidence “that Laidlaw’s unlawful conduct—discharging pollutants in excess of permit limits—was occurring at the time the complaint was filed.”293 She conceded that there was a subjective issue in *Laidlaw* about whether the plaintiffs’ avoidance of the river was reasonable, but she concluded that their concerns were clearly reasonable, or in other words, that they met the *Lyons*’s realistic threat test.294 She reasoned:

Unlike the dissent . . . we see nothing “improbable” about the proposition that a company’s continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely reasonable, the District Court found it was true in this case, and that is enough for injury in fact.295

The *Laidlaw* majority determined that the plaintiffs, in effect, faced a “realistic threat” of harm under *Lyons* even though the *Laidlaw* majority ultimately used a different “reasonable concerns” test.296 The *Laidlaw* Court observed that mercury is “an extremely toxic pollutant” and “that repeatedly, Laidlaw’s discharges exceeded the limits set by the permit” in determining that the plaintiffs’ avoidance of recreational activities was based on “reasonable concerns” about potentially harmful pollution.297 Such evidence arguably might meet *Lyons*’s realistic threat test. Justice Scalia argued, in his dissenting opinion, however, that the plaintiffs’ evidence and the *Laidlaw* majority’s “reasonable concerns” test were both inconsistent with the *Lyons*’s realistic threat test.298

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291. *Id.* (quoting *Lyons*, 461 U.S. at 108 n.8).
293. *Id.* at 184.
294. *Id.* at 184–85.
295. *Id.*
296. *Id.* at 181–85.
298. *Id.* at 199–201 (Scalia, J., dissenting); *see also* Karl S. Coplan, *Ideological Plaintiffs, Administrative Lawmaking, Standing, and the Petition Clause*, 61 ME. L. REV. 377, 436 (2009) (implying *Laidlaw*s broad standing approach is inconsistent with *Lyons*’s narrow approach to
B. Justice Scalia’s Dissenting Opinion

Justice Scalia, in his dissenting opinion, which was joined by Justice Thomas, criticized the majority’s conclusion that injury to a plaintiff without injury to the environment was sufficient for standing. He argued that “[i]n the normal course” plaintiffs must demonstrate injury both to the environment and themselves to have standing. He rejected the majority’s subjective “reasonable concerns” test as inconsistent with Lyons’s “realistic threat” test. Quoting Lyons, Justice Scalia contended: “Ongoing ‘concerns’ about the environment are not enough, for ‘[i]t is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff’s subjective apprehensions.’” He asserted that the plaintiffs had failed to present any realistic evidence that they were actually harmed by Laidlaw’s mercury discharges, stating:

At the very least, in the present case, one would expect to see evidence supporting the affidavits’ bald assertions regarding decreasing recreational usage and declining home values, as well as evidence for the improbable proposition that Laidlaw’s violations, even though harmless to the environment, are somehow responsible for these effects. Plaintiffs here have made no attempt at such a showing, but rely entirely upon unsupported and unexplained affidavit allegations of “concern.”

In his dissenting opinion in Laidlaw, Justice Scalia made a stronger argument than he would in his subsequent Summers majority decision that the Laidlaw plaintiffs had failed to demonstrate any realistic threat of present or future harm and that their fears of possible harm were closer to Adolph Lyons’s subjective apprehension that the Los Angeles Police Department might harm him someday. Additionally, Justice Scalia argued that a plaintiff did not have standing to seek penalties from the defendant payable to the United States Treasury based on the mere possibility that

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standing); Mank, Previous Article on Summers, supra note †, at Part VI (criticizing subjectivity of Laidlaw’s “reasonable concerns” standing test).

299. Laidlaw, 528 U.S. at 198 (Scalia, J. dissenting).
300. Id. at 199–200 (Justice Scalia conceded that it was “perhaps possible” for a plaintiff to be injured even if the environment was not by, for instance, a loss of property value, as the Laidlaw plaintiffs had too vaguely alleged, but “such a plaintiff would have the burden of articulating and demonstrating the nature of that injury,” a burden which he contended the plaintiffs had failed to meet.).
301. Id.
302. Id. (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 107 n.8 (1983)).
303. Id. (citation omitted).
304. Id. at 199–201.
those penalties might deter future wrongful conduct by the defendant. He contended that a member of the general public who has not been harmed by a defendant lacks sufficient personal injury to seek public penalties even though he may indirectly benefit from a deterrent effect, along with other members of the general public. Citing Lyons, Justice Scalia observed that the “relief against prospective harm is traditionally afforded by way of an injunction, the scope of which is limited by the scope of the threatened injury.” In other words, a private plaintiff only has standing to seek prospective relief in the form of an injunction to the extent to which he is personally likely to suffer harm in the future and not to the potential harm to the general public. Justice Scalia criticized the majority for giving a private plaintiff standing to seek a public remedy for general harm that did not specifically injure him. In the absence of any specific private injury to one of the plaintiffs or a realistic threat of any future injury to them, Justice Scalia argued that only the government could sue the defendant for penalties related to the permit violations. He made a good argument that the plaintiffs in Laidlaw did not face a “realistic threat” of future harm, and thus, that the majority should have held that the plaintiffs did not have standing to seek prospective relief in Lyons. As will be discussed in Part V, his interpretation and application of Lyons in Summers was less convincing than his use of Lyons in his Laidlaw dissenting opinion.

V. Summers

In Summers, several environmental organizations, collectively referred to as “Earth Island,” filed suit in federal district court seeking to enjoin the Forest Service (“Service”) from applying regulations exempting salvage-timber sales of less than 250 acres from the notice, comment, and appeal process that Congress had required the Service to apply for “more significant land management decisions.” In 1992, Congress enacted the Forest Service Decisionmaking and Appeals Reform Act (the “Appeals

305. Id. at 202–09.
306. Id.
307. Id. at 204 (citing Lyons, 461 U.S. at 105–07 & n.7).
308. Id. at 204–05.
309. Id. at 202–09.
310. See id. at 202–14 (arguing that private parties cannot sue as private attorneys general to collect penalties for the public treasury in the absence of any injury, and thus implicitly, only the government can bring such a suit).
311. Part IV’s examination of Summers builds upon my previous article on Summers, see supra note ‡, but focuses more on the Summers decision’s discussion of Lyons.
Reform Act” or the “Act”). The Act required the “Service to establish a notice, comment, and appeal process for ‘proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974.” The “Service’s regulations implementing the Act [initially] provided that certain of its procedures would not be applied to projects that the Service considered categorically excluded from the requirement to file an environmental impact statement (EIS) or an environmental assessment (EA).” Subsequently, the Service adopted a rule, after notice and comment, categorically exempting “fire-rehabilitation activities on areas of less than 4,200 acres, and salvage-timber sales of 250 acres or less” from the notice, comment, and appeal process.

In 2002, a “fire burned a significant area of the Sequoia National Forest.” In 2003, the Service approved the Burnt Ridge Project (“Project”), “a salvage sale of timber on 238 acres damaged by that fire.” In accordance with its rule applying a “categorical exclusion of salvage sales of less than 250 acres, the Forest Service did not provide notice in a form consistent with the Appeals Reform Act, did not provide a period of public comment, and did not make an appeal process available” for the Project.

Earth Island and several other environmental groups filed suit to enjoin the Service from selling timber from the Project without the notice, comment, and appeal process specified in the Appeals Reform Act. “The [district] court granted a preliminary injunction against the Burnt Ridge salvage-timber sale,” and “the parties settled their dispute over the Project.” Despite the government’s argument that the plaintiffs lacked standing as soon as they settled the Burnt Ridge Project dispute, the district court “adjudicate[d] the merits of [the plaintiffs’] challenges” by

317. Id.
318. Id.
319. Id. at 1147–48.
320. Id. at 1148.
321. Id.
invalidating five of the Service’s regulations and entering “a nationwide injunction against their application.”322 “The Ninth Circuit held that [the plaintiffs’] challenges to regulations not at issue in the . . . Project were not ripe for adjudication.”323 The Ninth Circuit, however, affirmed the district court’s conclusion that two regulations that “were applicable to the” Project “were contrary to law” and, therefore, “upheld the nationwide injunction against their application.”324

A. Justice Scalia’s Majority Opinion

In Summers, Justice Scalia, in his majority opinion, concluded that the plaintiffs no longer satisfied the injury prong of the standing test once they settled the Burnt Ridge Project dispute.325 The plaintiffs had initially satisfied the injury requirement when they submitted an affidavit alleging that the “organization member, Ara Marderosian, had repeatedly visited the Burnt Ridge site, that he had imminent plans to” visit the site again, and that the government’s actions would harm his aesthetic “interests in viewing the flora and fauna” at the site.326 The settlement, however, had remedied Marderosian’s injury, and no other affidavit submitted by the plaintiffs alleged that the Service’s application of the challenged regulations was causing a particular organization’s member an imminent injury at a specific site.327

In its Summers decision, the Supreme Court, for the first time, specifically addressed the question of probabilistic standing based on potential future injuries to some of an organization’s members rather than actual or imminent injuries to particular members of an organization.328 Several environmental organizations challenged the government’s sales as harming their members.329 The largest membership organization among the plaintiffs, the Sierra Club, asserted in its Complaint that it had “more than 700,000 members nationwide, including thousands of members in California” who [recreated in the] Sequoia National Forest,” and, therefore, argued that it is likely that the Service’s future application of its challenged

322. Id.
323. Id.
324. Id.
325. Id. at 1149–50.
326. Id. at 1149.
327. Id. at 1149–51.
328. For a detailed discussion of statistical standing, see Mank, Standing and Statistical Persons, supra note ‡, at 748–52.
329. Summers, 129 S. Ct. at 1147, 1151; accord id. at 1154 (Breyer, J., dissenting) (listing the membership size of the various plaintiff organizations).
regulations would harm at least one of its members.\textsuperscript{330} Justice Scalia rejected the plaintiffs' probabilistic standing argument because "[t]his novel approach to the law of organizational standing would make a mockery of our prior cases, which have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm."\textsuperscript{331} He maintained that a court cannot rely on an organization's general assertions about its members' activities and that the Court's precedent required an organizational member to file an individual affidavit confirming that he or she uses a specific site that the government is affecting and that his or her recreational interests will be harmed by the government's alleged failure to comply with legal requirements.\textsuperscript{332} The Court observed that its precedent required individual members of an organization to file affidavits affirming how each one is harmed or will be imminently harmed by a challenged activity, unless all members of an organization are harmed by an activity and that exception was clearly inapplicable.\textsuperscript{333}

Because federal courts have an independent duty to assess whether standing exists even if no party challenges standing, the Court reasoned that a federal court must verify that standing exists by examining affidavits from individual members to determine if he or she has suffered an actual injury caused by the challenged activity.\textsuperscript{334} Justice Scalia argued: "While it is certainly possible—perhaps even likely—that one individual will meet all of these [standing] criteria, that speculation does not suffice."\textsuperscript{335} The Court concluded that none of the timely filed affidavits "establish[ed] that the affiants' members will ever visit one of the small parcels at issue."\textsuperscript{336}

Justice Scalia concluded that none of the plaintiffs presented any credible evidence that there was a "realistic threat" that they would be injured in the future.\textsuperscript{337} Besides Marderosian's affidavit, the only affidavit presented by the plaintiffs was that of Jim Bensman.\textsuperscript{338} Bensman "assert[ed] that he has visited many" national parks, "had suffered injury in the past from

\textsuperscript{330} \textit{Id.} at 1151 (quoting \textit{id.} at 1154 (Breyer, J., dissenting) (quoting Complaint at 34 ¶ 12, \textit{Summers} 129 S. Ct. 1142 (No. 07-46300)) (listing the membership size of the various plaintiff organizations).

\textsuperscript{331} \textit{Id.}

\textsuperscript{332} \textit{Id.} at 1151–52.

\textsuperscript{333} \textit{Id.} at 1152 (citing \textit{NAACP v. Alabama ex rel. Patterson}, 357 U.S. 449, 459 (1958)) ("all organization members affected by release of membership lists").

\textsuperscript{334} \textit{Id.}

\textsuperscript{335} \textit{Id.} at 1152 (emphasis added).

\textsuperscript{336} \textit{Id.} at 1153.

\textsuperscript{337} \textit{Id.} at 1150–53.

\textsuperscript{338} \textit{Id.} at 1150.
development on Forest Service land," and "plann[ed] to visit several unnamed National Forests in the future." The Court rejected his affidavit as insufficient in part because he could not identify any particular site where he was likely to be harmed by timber sales or other actions authorized by the challenged regulations. The Court stated:

It is a failure to allege that any particular timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan of Bensman's to enjoy the National Forests. The National Forests occupy more than 190 million acres, an area larger than Texas. There may be a chance, but is hardly a likelihood, that Bensman's wanderings will bring him to a parcel about to be affected by a project unlawfully subject to! the regulations. Indeed, without further specification it is impossible to tell which projects are (in respondents' view) unlawfully subject to the regulations.

Justice Scalia determined that Bensman's allegations of possible future harm were weaker than Adolph Lyons's. The Court stated:

The allegations here present a weaker likelihood of concrete harm than that which we found insufficient in Lyons, where . . . [w]e said it was "no more than conjecture" that Lyons would be subjected to that chokehold upon a later encounter. Here we are asked to assume not only that Bensman will stumble across a project tract unlawfully subject to the regulations, but also that the tract is about to be developed by the Forest Service in a way that harms his recreational interests, and that he would have commented on the project but for the regulation. Accepting an intention to visit the National Forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact.

Furthermore, the Court concluded that Bensman's assertion that he might visit a forest where the Forest Service was allegedly conducting illegal timber sales was insufficient. Justice Scalia stated:

The Bensman affidavit does refer specifically to a series of projects in the Allegheny National Forest that are subject to the

339. Id.
340. Id. ("There may be a chance, but is hardly a likelihood, that Bensman's wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations.").
341. Id. (citation omitted).
342. Id. (citations omitted).
challenged regulations. It does not assert, however, any firm intention to visit their locations, saying only that Bensman "want[s] to" go there. This vague desire to return is insufficient to satisfy the requirement of imminent injury: "Such 'some day' intentions—without any description of concrete plans, or indeed any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."

Thus, the Court concluded that none of the plaintiffs presented credible evidence that they faced a realistic threat of future harm. The plaintiffs had sought to introduce additional affidavits, but the majority rejected all late-filed affidavits introduced by the plaintiffs after the district court entered its judgment and after the plaintiffs had filed a notice of appeal. The Court concluded that such late supplementation of the record was inappropriate under the Federal Rules of Civil Procedure despite the dissenting opinion's contrary view. Because it held that the plaintiffs failed to demonstrate standing, the Court did not address the Government's contention that the case was not "ripe for review" or whether a "nationwide injunction would [have] be[en] appropriate" if the plaintiffs had prevailed.

B. Justice Kennedy's Concurring Opinion

In a brief concurring opinion, Justice Kennedy explained that he joined in full the opinion of the Court because a plaintiff can challenge the alleged violation of a procedural right only if he can demonstrate a separate concrete injury arising from that violation and that the plaintiffs had failed to prove such a concrete injury. He observed that "[t]his case would present different considerations if Congress had sought to provide redress for a concrete injury 'giv[ing] rise to a case or controversy where none existed before.'" Similarly, in his concurring opinion in *Lujan*, Justice Kennedy had argued that Congress had the authority to confer citizen

344. *Id.* at 1151–53.
345. *Id.* at 1153.
346. *Id.*
347. *Id.*
348. *Id.* (Kennedy, J., concurring).
standing in at least some situations to address new types of injury, not recognized by the common law, to meet Article III standing requirement, so long as Congress carefully defined the type of injury it sought to remedy. He concluded, however, that the statute at issue in the Summers case did not include an express citizen suit provision “indicat[ing] [that] Congress intended to identify or confer some interest separate and apart from a procedural right.”

In Havens Realty, the Supreme Court interpreted the Fair Housing Act to reach the outer limits of Article III standing because Congress intended that statute to extend to those limits to protect minorities from housing discrimination. In particular, the Court allowed tester standing. In light of Havens Realty, Justice Kennedy’s view that congressional intent is a factor in whether a statute reaches the outer limits of Article III standing is reasonable. More controversially, Justice Kennedy suggested in both his Summers and Lujan concurrences that Congress has some constitutional role in defining the murky boundaries of Article III standing so long as the national legislature clearly defines the class of injury it seeks to rectify. In Massachusetts v. EPA, the Court stated that it agreed with his general view that Congress has some authority to define what constitutes an Article III injury.

350. Kennedy argued in Lujan: Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.

Lujan, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment) (citation omitted).

351. Summers, 129 S. Ct. at 1153 (Kennedy, J., concurring).

352. See supra Part III.G.

353. See supra Part III.G.

354. See Summers, 129 S. Ct. at 1153 (Kennedy, J., concurring); Lujan, 504 U.S. at 580–81 (Kennedy, J., concurring in part and concurring in judgment); supra notes 350, 352 and accompanying text.

355. The Court stated: Congress has moreover authorized this type of challenge to EPA action. That authorization is of critical importance to the standing inquiry: “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. . . . In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.” We will not, therefore, “entertain citizen suits to vindicate the public’s nonconcrete interest in the proper administration of the laws.”

Justice Breyer, in his dissenting opinion, read Justice Kennedy’s concurring opinion as implying that Congress has the authority to allow probabilistic organizational standing if a statute, especially one containing a citizen suit provision, carefully specifies when such an organization may sue. Justice Breyer observed that if Congress had expressly enacted a statute allowing standing for parties injured by salvage sales in the past to have standing if they are likely to use salvage parcels in the future “[t]he majority cannot, and does not, claim that such a statute would be unconstitutional.” It is possible that public interest organizations will lobby Congress to amend statutes to give them standing in similar cases in the future to test Justice Breyer’s interpretation of Justice Kennedy’s concurring opinion.

C. Justice Breyer’s Dissenting Opinion

In his dissenting opinion, Justice Breyer relied on Lyons in proposing a “realistic threat” test for assessing when an injury is sufficient for standing. He argued that the plaintiffs, who collectively have more than 700,000 members in the United States, had standing to sue because their members were likely to be affected by the government’s allegedly illegal salvage timber sales in the future. Because members of the organizations had been harmed in the past by timber sales which took place without legally required notice and comment, and the Service planned thousands of


357. Summers, 129 S. Ct. at 1154–55 (Breyer, J., dissenting) (“To understand the constitutional issue that the majority decides, it may prove helpful to imagine that Congress enacted a statutory provision that expressly permitted environmental groups like the respondents here to bring cases just like the present one.”); Mank, Standing and Statistical Persons, supra note 1, at 750–51.

358. Summers, 129 S. Ct. at 1155 (Breyer, J., dissenting); Mank, Standing and Statistical Persons, supra note 1, at 751.

359. Mank, Standing and Statistical Persons, supra note 1, at 751.


361. Id. at 1153–55. The plaintiff Sierra Club has more than 700,000 members, Earth Island Institute has over 15,000 members, and the Center for Biological Diversity has over 5,000 members in the United States. Id. at 1154.
sales in the future, Justice Breyer concluded that the plaintiffs had demonstrated a realistic threat that they would be harmed in the future.\textsuperscript{362}

Justice Breyer argued that the Court should adopt Lyons's realistic threat test in deciding when a plaintiff who has been injured in the past has standing for a future injury.\textsuperscript{363} He argued that the majority had too narrowly construed the term "imminent" to reject standing even though previous decisions had used that term to deny standing only in situations where the alleged harm "was merely 'conjectural' or 'hypothetical' or otherwise speculative."\textsuperscript{364} Justice Breyer contended that the majority's use of the "imminent" test was inappropriate where "a plaintiff has already been subject to the injury it wishes to challenge," as the plaintiffs had in the case at issue, and "there is a realistic likelihood that the challenged future conduct will, in fact, recur and harm the plaintiff."\textsuperscript{365} He relied on Lyons, where the Court stated that the plaintiff, Adolph Lyons, "would have had standing had he shown 'a realistic threat' that reoccurrence of the challenged activity would cause him harm 'in the reasonably near future.'"\textsuperscript{366} Justice Breyer maintained that the Court's standing precedent required only a "realistic threat" for standing based upon a future threat of injury and did not require a plaintiff to meet "identification requirements more stringent than the word 'realistic' implies."\textsuperscript{367} Thus, while he conceded that plaintiffs could not predict which specific tracts of fire-damaged land the Service would sell as salvage timber, he reasoned that there was a "realistic threat" that a member of the plaintiff organizations would be harmed by a Forest Service sale, and, accordingly, that the plaintiffs were entitled to standing under the Court's precedent.\textsuperscript{368}

Justice Breyer maintained that the Court had implicitly used a realistic threat test for standing in several other areas of law. He asked:

Would courts deny standing to a holder of a future interest in property who complains that a life tenant's waste of the land will almost inevitably hurt the value of his interest—though he will have no personal interest for several years into the future? Would

\begin{itemize}
  \item \textsuperscript{362} Id. at 1155–58.
  \item \textsuperscript{363} Id. at 1155–56.
  \item \textsuperscript{364} Summers, 129 S. Ct. at 1155 (Breyer, J., dissenting); Mank, \textit{Standing and Statistical Persons}, \textit{supra} note \textdagger, at 750.
  \item \textsuperscript{365} Summers, 129 S. Ct. at 1155–56 (Breyer, J., dissenting); Mank, \textit{Standing and Statistical Persons}, \textit{supra} note \textdagger, at 750.
  \item \textsuperscript{366} Summers, 129 S. Ct. at 1156 (Breyer, J., dissenting) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 107 n.7, 108 (1983) (emphasis added by Justice Breyer)).
  \item \textsuperscript{367} Id. (citing Blum v. Yaretsky, 457 U.S. 991, 1000 (1982)).
  \item \textsuperscript{368} See id. at 1156–58; see also, Mank, \textit{Standing and Statistical Persons}, \textit{supra} note \textdagger, at 751.
\end{itemize}
courts deny standing to a landowner who complains that a neighbor's upstream dam constitutes a nuisance—even if the harm to his downstream property (while bound to occur) will not occur for several years? Would courts deny standing to an injured person seeking a protection order from future realistic (but nongeographically specific) threats of further attacks?369

Justice Breyer argued that "a threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates."370 Relying on the Massachusetts decision, he reasoned that "we recently held that Massachusetts has standing to complain of a procedural failing, namely, EPA's failure properly to determine whether to restrict carbon dioxide emissions, even though that failing would create Massachusetts-based harm which (though likely to occur) might not occur for several decades."371

Justice Breyer argued that there was a realistic threat that the plaintiffs would be injured in the future because the government conceded that the Service would "conduct thousands of further salvage-timber sales."372 It was likely that these sales would harm some members of the plaintiff organizations.373 For instance, Bensman stated in an affidavit that he had visited seventy national forests and had "visited some of those forests 'hundreds of times.'"374 Although his affidavit did not state "which particular sites will be affected by future [] Service projects," Justice Breyer concluded that there was a realistic threat that Bensman would be affected by one of the thousands of future Service timber sales that do not follow mandatory procedural rules.375 Justice Breyer offered a persuasive analogy, stating: "To know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where

369. Summers, 129 S. Ct. at 1156 (Breyer, J., dissenting).
370. Id.
371. Id. at 1156 (citing Massachusetts v. EPA, 549 U.S. 497, 522–23 (2007)). There has been uncertainty, however, about whether Massachusetts's liberal approach to standing for future injuries applies only to state plaintiffs or all plaintiffs. See Mank, States Standing, supra note ¶, at 1746–47, 1786 (discussing uncertainties about whether standing analysis in Massachusetts applies only to states or to all plaintiffs). Some portion of the Massachusetts decision appears to apply to all procedural plaintiffs, but the definition and scope of what are procedural rights is uncertain. See Massachusetts, 549 U.S. at 517–18; Mank, States Standing, supra note ¶, at 1727 (arguing "some possibility" standard in Massachusetts applies to all procedural plaintiffs); Mank, States Standing, supra note ¶, at 1747–52 (arguing definition and scope of procedural rights exception is uncertain).
373. Id.
374. Id. at 1157.
375. Id. at 1156–57.
it is bound to arrive. The law of standing does not require the latter kind of specificity."376

Furthermore, Justice Breyer argued that the majority had wrongly excluded the affidavits filed by the plaintiffs after they settled the Burnt Ridge dispute.377 He explained that the plaintiffs had not originally filed more affidavits because the need for additional affidavits only became apparent when they settled the original Burnt Ridge dispute.378 He contended that no law prohibited the filing of additional affidavits.379 Additionally, Federal Rules of Civil Procedure 15(d) empowers a district court judge with liberal discretion to amend a complaint and, hence, allow additional affidavits "even after one dispute . . . is settled."380 Because the affidavits identified a number of pending salvage timber sales in areas that the affiants frequently visited and planned to visit again in the near future,381 Justice Breyer contended that these affidavits clearly demonstrated a "'realistic threat' of injury to plaintiffs brought about by reoccurrence of the challenged conduct—conduct that the Forest Service thinks lawful and admits will reoccur.”382

D. Analysis

Justice Scalia and Justice Breyer disagreed whether to establish an injury in fact, a plaintiff must demonstrate, as Justice Scalia argued for the majority, exactly when and how he will be injured by the government’s allegedly illegal actions, or, as Justice Breyer argued, that it is enough for a plaintiff to allege sufficient facts that he will probably be injured by the government actions. The difference in their approaches is evident in the divergent ways they interpreted and applied Lyons to the facts in Summers. According to Justice Scalia, the facts alleged by the plaintiffs in Summers were weaker than those in Lyons because it was mere speculation that “Bensman will stumble across a project tract unlawfully subject to the regulations, but also that the tract is about to be developed by the Forest Service in a way that harms his recreational interests, and that he would have commented on the project but for the regulation.”383 Based upon his

376. Id. at 1157.
377. Id. at 1157-58.
378. Id.
379. Id. at 1158.
380. Id.
381. Id.
382. Id.
383. Id. at 1150 (majority opinion).
interpretation that Lyons requires a plaintiff to establish with certainty that he would be subject to a future harm, Justice Scalia reasoned that the Summers plaintiffs failed to demonstrate an injury because they could not prove when a member of their organization would be harmed at a specific site by the government’s failure to follow notice and comment procedures with a particular fire salvage sale.

By contrast, Justice Breyer argued that Lyons only required a plaintiff to demonstrate a “realistic threat” of future injury. According to Justice Breyer, the Summers plaintiffs met the “realistic threat” test because the facts alleged by the plaintiffs demonstrated that one of their thousands of members who regularly used federal forest lands would be harmed in the reasonably near future by one of the thousands of fire salvage sales conducted by the Service. In particular, it seemed likely that Bensman would be harmed because he regularly traveled to numerous Service forest properties.

VI. APPLYING LYONS, KOLENDER, HONIG, AND RELATED LOWER COURT DECISIONS TO SUMMERS

The debate between Justice Scalia and Justice Breyer in Summers about the meaning of Lyons’s realistic threat test would have been better informed if they had discussed Kolender, Honig, and the lower court decisions discussed in Part III of this Article that either directly, implicitly or indirectly distinguished Lyons. Justice Breyer provided more examples than Justice Scalia of what might constitute a “realistic threat” in other areas of the law and related those examples back to the facts in Summers. Even Justice Breyer did not grapple, however, with the progeny of Lyons. Likewise, the Laidlaw majority and Justice Scalia in that case simply discussed the “realistic threat” test in Lyons in isolation, without addressing how the Court or lower courts had applied that test over the years.

One plausible reason that the Summers and Laidlaw majority and dissenting opinions did not examine Lyons’s progeny is that those cases involved statutory environmental issues and the latter cases involved constitutional, criminal justice, or disability rights that might appear to be

384. Id. at 1156 (Breyer, J., dissenting) (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 107 n.7 (1983) (emphasis added by Justice Breyer)).
385. Id. at 1156–58.
386. Id. at 1157.
387. See supra Parts V.A, V.C.
388. See supra Part IV.A–B.
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quite different from environmental issues. Nevertheless, both the Summers and Laidlaw decisions were willing to use Lyons's realistic threat test for prospective standing and at least to some extent compare Lyons's facts to their quite different environmental situations. Accordingly, if the Court in Summers and Laidlaw was willing to use Lyons's realistic threat test for prospective standing then they should also have been willing to explore how that test had been used in subsequent cases, even if none of those cases involved environmental statutes. The Supreme Court has generally treated standing as an overarching, trans-substantive jurisdiction question separate from substantive law, and, therefore, it is appropriate for courts to apply the same standing considerations to cases involving different substantive law.

Part VI will consider how the facts in Summers compare with those in Lyons and with the cases discussed in Part III. First, Mr. Bensman, the affiant in Summers, was more likely than the plaintiffs in Lyons and many, but not all, of the plaintiffs discussed in Part III to suffer future injury. Unlike Lyons who had suffered one wrongful act in the past and was unlikely to suffer a similar wrong in the future, Bensman could demonstrate that he had made numerous visits to many different national parks and forests. Accordingly, Bensman was likely in the future to visit one of the many forests where the Service was selling timber without adhering to the allegedly required procedural safeguards. Second, unlike Adolph Lyons who violated the law in operating a motor vehicle without a taillight and who might not repeat that illegal conduct in the future, Bensman was engaging in legal conduct when he visited national forests. Third, unlike Lyons, where the Los Angeles Police Department during the pendency of Adolph Lyons's lawsuit had adopted an official policy prohibiting the use of a chokehold without provocation, the Service had not adopted any policy prohibiting the sale of fire-damaged timber in lots less than 250 acres without following arguably required procedural safeguards.

389. See supra Parts II, IV, V.
390. See supra Parts II, IV, V.
391. See supra note 23 and accompanying text; Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992) (concluding it is irrelevant for Article III standing whether the underlying substantive issue was a constitutional or statutory matter); Hartnett, supra note 23, at 2251–52 (acknowledging that the Supreme Court treats standing as a trans-substantive jurisdictional question, but criticizing that approach).
392. See supra Part III.H; infra Part VI.A.
393. See supra Part III.H; infra Part VI.A.
394. See supra Part III.H; infra Part VI.A.
395. See supra Part III.H; infra Part VI.A.
396. See supra Part III.H; infra Part VI.B.
Some of the cases in Part III are more compelling than *Summers* because the plaintiffs were disabled persons or persecuted minorities who could not avoid harmful government behavior.\(^{397}\) Although some plaintiffs might have more compelling cases than Bensman, there is no reason to deny him prospective relief because he voluntarily exercised his statutory right to visit the national parks and forests.\(^{398}\) Another issue is whether plaintiffs, like those in *Summers*, who seek to enforce statutory rights have a lesser right to standing than plaintiffs seeking to enforce constitutional rights. In *Lujan v. Defenders of Wildlife*, Justice Scalia concluded it is irrelevant for Article III standing whether the underlying substantive issue was a constitutional or statutory matter despite the objections of some commentators who have criticized his trans-substantive approach to standing.\(^{399}\) Only in First Amendment speech cases are plaintiffs entitled to significantly relaxed standing requirements.\(^{400}\) In all other constitutional and statutory challenges, plaintiffs must meet *Lujan*’s standing test of demonstrating a personal, concrete injury in fact rather than a violation of the Constitution or statute that harms the public at large.\(^{401}\) While they were not entitled to the special standing rights in First Amendment speech cases, the plaintiffs in *Summers*, nevertheless, demonstrated a sufficient likelihood of injury to meet *Lyons*’s realistic threat standing test.\(^{402}\)

### A. Courts Usually Are More Willing to Grant Prospective Injunctive Relief to Plaintiffs who Have Suffered Repeated Injuries in the Past and Engaged in Legal Conduct

The Court in *Lyons* emphasized that Adolph Lyons was the victim of only one incident of alleged police misconduct, although his injuries were quite severe.\(^{403}\) By contrast, a few days later, the Supreme Court, in *Kolender*, concluded that a plaintiff who had been arrested or detained fifteen times faced a credible threat of future arrests and, therefore, upheld

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397. See infra Part VI.C.
398. See infra Part VI.C.
399. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (concluding it is irrelevant for Article III standing whether the underlying substantive issue was a constitutional or statutory matter); Hartnett, *supra* note 23, at 2251–52 (acknowledging that the Supreme Court treats standing as a trans-substantive jurisdictional question, but criticizing that approach); *supra* note 23 and accompanying text.
400. See Hartnett, *supra* note 23, at 2240–41; *infra* Part VI.D.
401. See *Lujan*, 504 U.S. at 560–61, 573–74, 576 (1992); id. at 580–81 (Kennedy, J., concurring); Hartnett, *supra* note 23, at 2240–41; *supra* Part I; *infra* Part VI.D.
402. See *supra* Part I; *infra* Part VI.D.
403. See *supra* Part II.
the lower court’s prospective injunctive relief. Clearly, the Court in *Lyons* and in *Kolender* thought that the harm was more likely to recur in the future to someone who had been harmed fifteen times in the past than to someone who had been harmed only once, assuming there was not a significant change in the circumstances since the harm took place.

Lower court decisions have also focused in part on the number of prior wrongful incidents. In *Hill*, both the lower courts and the Supreme Court took note of the fact that Hill had been arrested four times in determining that he had standing to seek prospective relief. Similarly, in *Thomas*, the Ninth Circuit concluded that plaintiffs who had been repeatedly arrested in a small geographic area had standing to seek injunctive relief because the likelihood of recurring injury to them was stronger than in *Lyons* where Adolph Lyons argued that he and a few other people had been victims of illegal police chokeholds over a much larger geographic area and population base.

In *Summers*, Bensman stated in his affidavit that he had visited seventy national forests, some of them hundreds of times. It is true that Bensman could not identify which of the forests that he would visit in the future would be subject to illegal Service timber sales. Nevertheless, in light of the sheer number of times that Bensman visited national forests, it seemed far more likely that Bensman would in the future visit a forest where procedurally questionable timber sales were proceeding than that Lyons would commit an illegal act that in turn would result in him being the victim of an unprovoked chokehold in the future.

Another difference between *Lyons* and *Summers* supports prospective relief in the latter case. Courts are much more likely to grant equitable relief if a plaintiff is engaging in legal, protected activity than in illegal activity

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404. See supra Part III.A.
405. See supra Part III.A.
406. See supra Parts III.D.2, III.E.1, V.C; see generally Garrett, supra note 86, at 1820–26 & n.43 (arguing post-*Lyons* cases use a flexible, individualized, fact-specific inquiry in determining whether there is a credible threat of future harm, including frequency of government misconduct).
407. See supra Part III.E.1.
408. See supra Part III.D.2.
409. See supra Part V.C.
410. See supra Parts V.A, V.C.
411. Compare supra Part V.C (discussing Justice Breyer’s argument that Bensman’s numerous visits to national parks and forests established a “realistic threat” of future harm), *and* supra Part III.E.1 (discussing lower court’s and Supreme Court’s conclusion that Hill’s four past arrests demonstrated credible threat of future harm), *with* supra Part II (discussing Supreme Court’s conclusion in *Lyons* that one prior incident of government misconduct was insufficient to predict future government misconduct).
because judges are more likely to assume that a plaintiff will engage in lawful activity in the future than unlawful activity, unless there is a persistent pattern of arrests as in Kolender. Thus, courts are more likely to accept that a future harm may recur in cases where the plaintiff is engaging in legal conduct. According to the Supreme Court’s Honig decision and the Fifth Circuit’s decision in Hernandez, the Lyons decision was reluctant to assume that Lyons would again engage in illegal conduct that would result in an arrest that in turn might expose him to the risk of a police chokehold. By contrast, Bensman was and would be engaging in legal conduct when visiting national forests. Presumptively, because it is more likely that most people will engage in legal conduct than in illegal conduct, it is reasonable to presume that Bensman is more likely to visit a national park than that Lyons would be arrested, let alone be subject to chokehold without provocation on his part. Courts have been willing to assume that a plaintiff will engage in illegal conduct in the future only if the plaintiff is among a class of people likely to be arrested, such as the vagrant plaintiff in Kolender and the immigrant plaintiffs in Hernandez, or where the plaintiff had sincerely declared that he intends to violate a law with which he disagrees, as in Hill.

Because Bensman had repeatedly engaged in the legal behavior of visiting national forests and parks in the past, it was reasonable to expect he would do so in the future. Since the Forest Service planned so many arguably illegal timber sales in the future, Justice Breyer was right to argue that Bensman faced a realistic threat of future harm. Justice Scalia was wrong when he argued that Bensman’s allegations presented a weaker case

412. See Rudovsky, supra note 86, at 1237 & n.234 (stating plaintiff is more likely to demonstrate credible threat of future government harm if the plaintiff is engaging in “protected activity”); Garrett, supra note 86, at 1825–26 (arguing post-Lyons cases are more likely to find a credible threat of future harm if the plaintiff is engaging in law-abiding behavior than illegal behavior).

413. See Rudovsky, supra note 86, at 1237 & n.234 (stating plaintiff is more likely to demonstrate credible threat of future government harm if the plaintiff is engaging in “protected activity”); Garrett, supra note 86, at 1825–26 (arguing post-Lyons cases are more likely to find a credible threat of future harm if the plaintiff is engaging in law-abiding behavior than illegal behavior).


415. See infra Part VI.D.

416. See Hernandez, 913 F.2d at 234–35 (reasoning that plaintiff Carmelo Hernandez was more likely in the future to engage in legal right to travel than Adolph Lyons was to engage in illegal conduct in the future); supra Part III.E.2.


418. See supra Part V.C.

419. See supra Part V.C.
for prospective relief than Lyons, who had only been harmed once in the past for illegal conduct that might not recur in the future.\textsuperscript{420}

B. Official Policy of Wrongdoing

In Lyons, the Court emphasized that the Los Angeles Police Department’s official policy restricting the use of chokeholds made it unlikely that its officers would again subject Adolph Lyons to a chokehold without provocation.\textsuperscript{421} The Court assumed that most officers would follow the official policy in conducting their duties.\textsuperscript{422} Thus, whether the government’s allegedly wrongful actions are in contradiction or in accord with official policy is a crucial factor in determining whether a violation is likely to recur in the future and hence, whether a court should issue prospective injunctive relief.

Courts are much more likely to approve prospective injunctive relief if there is an official policy, regulation, or law supporting the challenged conduct.\textsuperscript{423} In Kolender, a California statute required loiterers or vagabonds to present “credible and reliable” identification when stopped by a police officer.\textsuperscript{424} In light of this statute, the Kolender Court concluded that it was likely that a loiterer, such as Kolender, would be stopped and asked for identification in the future, and thus, that the lower courts were justified in issuing injunctive relief to prevent violations of his Fourth Amendment rights.\textsuperscript{425} Similarly, in LaDuke, the Ninth Circuit approved prospective relief to protect immigrants from an INS policy authorizing unconstitutional searches of immigrant dwellings.\textsuperscript{426} Likewise, in Church, the Eleventh Circuit concluded that the plaintiffs had standing to seek prospective relief because they alleged that the City of Huntsville had a policy of harassing and arresting homeless persons.\textsuperscript{427}

In Summers, the Forestry Service had a policy of selling fire-damaged timber lots less than 250 acres without arguably-required procedural

\textsuperscript{420} See supra Parts V.A, V.C.
\textsuperscript{421} See supra Part II.
\textsuperscript{422} See supra Part II.
\textsuperscript{423} See Rudovsky, supra note 86, at 1237 n.233 (stating plaintiff can demonstrate a credible or realistic threat of harm by demonstrating that the harm was the product of a policy or practice of government); Garrett, supra note 86, at 1821–25 (arguing post-Lyons cases are more likely to find a credible threat of future harm if there is an official policy condoning that misconduct); supra Part III.
\textsuperscript{424} See supra Part III.A.
\textsuperscript{425} See supra Part III.A.
\textsuperscript{426} See supra Part III.D.1.
\textsuperscript{427} See supra Part III.C.
safeguards. In comparing the facts in *Summers* with those in *Lyons*, Justice Scalia failed to recognize the importance of the official policy at issue in *Summers*, making it more likely that the Service would violate the rights of Bensman and other members of the plaintiff organizations compared to Lyons, where official policy prohibited the conduct that *Lyons* sought to enjoin.

C. **Targeting Minorities or Particular Groups**

Government misconduct is arguably more reprehensible when it targets a group because of their racial, disability, economic, or immigrant status, although the *Lyons* majority ignored the fact that Adolph Lyons was African-American and that he alleged that racial minorities were more likely to be killed by the chokehold. *Honig*, and some of the lower cases in Part III including *Thomas*, *LaDuke*, *Church*, and *Tandy*, appeared to consider whether the government was targeting a racial minority or a disadvantaged group in determining the appropriateness of equitable relief. For example, in *Honig*, the Court was concerned that the school disciplinary policies inevitably targeted emotionally disturbed students like Jack Smith, who could not avoid acting out in class. In *Thomas*, the police allegedly targeted the plaintiffs because of their minority status. Similarly, the disabled plaintiffs in *Tandy* alleged that the government either targeted them or ignored their statutory rights because of their disability status. The homeless plaintiffs in *Church* also alleged that the city targeted them as a group because of their distressed economic condition. By contrast, in *Summers*, the government was not targeting individuals based on immutable characteristics. Bensman voluntarily visited the national forests and could stop doing so without physical harm and was not as deserving of sympathy as some of the plaintiffs in Part III.

While courts should consider whether a government policy is targeting a group based on immutable characteristics in deciding whether to grant

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428. See supra Part V.
429. See supra Parts V.A, V.D.
431. Id. at 1827–28; see supra Parts III.B–D, III.G.
433. See supra Part III.D.2; Garrett, supra note 86, at 1827–28 n.56.
434. See supra Part III.G.
435. See supra Part III.C.
436. See supra Part V.
equitable relief, there are certainly cases where equitable relief is justified even in the absence of targeting. Although some plaintiffs, who are members of targeted groups, might have more compelling cases than Bensman, there is no reason to deny him prospective relief for exercising his statutory right to visit the national parks and forests.437 Additionally, if the likelihood of future harm is the only criterion for whether a plaintiff has standing to seek prospective relief and relief does not depend on whether the plaintiff is entitled to compassion because he is targeted based on an immutable characteristic, it seems as likely that Bensman will visit a national forest as that Smith will be disruptive in class, that the homeless will be arrested in Church, or that the disabled in Tandy will be unable to use a Wichita Transit Bus because of a lift malfunction.438 Furthermore, there is an equitable argument that Bensman and the plaintiff organizations in Summers should be able to represent the right of future generations to enjoy visiting the national forests, which is an idea that some foreign courts have accepted, but the U.S. Supreme Court appears to recognize only when states bring parens patriae suits on behalf of future generations.439 Thus, the Summers Court should have recognized that Bensman was entitled to prospective relief because it was likely that he would be harmed in the future by the Service’s procedurally flawed timber sales.

D. Constitutional versus Statutory Rights

An interesting question is whether a plaintiff, who has a statutory right to visit a national park, is entitled to the same relaxation of the Lyons test as a plaintiff exercising a constitutional right like Hill, who asserted First Amendment rights, or Kolender, who asserted Fourth Amendment rights.440 Bensman and the plaintiff organizations in Summers were seeking to

437. See supra Part V.
438. See supra Parts III.B–C, III.G, V.
439. See Minors Oposa v. Sec’y of the Dep’t of Env’t and Natural Res., 33 I.L.M. 173, 185 (S.C. 1994) (holding that a group of schoolchildren had standing to challenge the timber leasing of old growth forests “for themselves, for others of their generation and for the succeeding generations”); Mank, Future Generations, supra note 4; at 8 (arguing that American private plaintiffs should have standing in federal courts to represent future generations but acknowledging U.S. Supreme Court only recognizes standing when states bring parens patriae suits on behalf of future generations).
enforce statutory rights.441 By partial contrast, most, but not all, of the plaintiffs in Part III were seeking to enforce constitutional rights.442

In Lujan, Justice Scalia concluded it is irrelevant for Article III standing whether the underlying substantive issue was a constitutional or statutory matter, although some commentators have criticized his trans-substantive approach to standing.443 Only in First Amendment speech cases are plaintiffs entitled to significantly relaxed standing requirements.444 In First Amendment cases involving government censorship of speech, the Hill courts stated that the Supreme Court applies a relaxed standing test and allows a person to sue on behalf of another person because of the likelihood that some affected individuals may not file suit for fear of retaliation if they challenge government limitations on speech.445 By contrast, the Court rejected Adolph Lyons's prospective standing claim despite his past constitutional injuries and his assertion that many others had suffered similar injuries at the hands of Los Angeles police officers because he could not prove that the police would injure his person in the future.446 The Lyons Court did not allow Lyons to sue on behalf of other victims of the chokehold.447 If Los Angeles had censored speech, however, then Lyons could have sued on behalf of others according to Hill.448

There is no reason to deny standing in Summers simply because it is not a constitutional case. There is even an argument that courts should apply a

441. See supra Part III.
442. Most of the cases in Part III involved constitutional violations in part. See supra Part III.A, III.C, III.D.1–2, III.E.1–2, III.F. The Honig and Tandy cases involved statutory issues. See supra Parts III.B, III.G.
443. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992) (concluding it is irrelevant for Article III standing whether the underlying substantive issue was constitutional or statutory); Hartnett, supra note 23, at 2251–52 (acknowledging that the Supreme Court treats standing as a trans-substantive jurisdictional question, but criticizing that approach); supra note 23 and accompanying text.
444. See Lujan, 504 U.S. at 560–61, 573–74, 576; id. at 580–81 (Kennedy, J., concurring); Hartnett, supra note 23, at 2240–41; supra Part I and infra Part VI.D. In addition to the special standing rules for First Amendment litigants, the Court has allowed standing for qui tam relators even though the relators have suffered no harm to themselves but simply receive a reward or bounty for suing on behalf of the United States to recover for fraud against the government because the common law traditionally provided that litigants had the authority to assign a cause of action to another; but this is a narrow historical exception to normal standing doctrine’s personal injury requirement. See Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 774 (2000); Heather Elliott, The Functions of Standing, 61 STAN. L. REV. 459, 495–96 (2008) (discussing Vermont Agency); Mank, Global Warming, supra note 36, at 34 (discussing qui tam actions).
446. See supra Part II.B.
447. See supra Part II.B.
448. See supra Part III.E.1.
more lenient standing test in cases where Congress gives statutory plaintiffs an explicit right to sue the executive branch than in purely constitutional cases where there is no explicit right to sue.449 Bensman and the other plaintiffs in *Summers* have a statutory right to enjoy the national forests and parks.450 They are not entitled to the lenient standing test applied to First Amendment litigants in *Hill*,451 but they enjoy the same rights as most other litigants seeking Article III standing.452 The plaintiffs in *Summers* demonstrated a sufficient likelihood of future injury as required by *Lyons, Kolender, Honig*, or their progeny.

Congress, in the Appeals Reform Act, provided the public with notice, comment, and appeals rights.453 As Justice Kennedy suggested in his concurring opinion in *Summers*, Congress did not include an explicit citizen suit provision in the Act addressing plaintiffs like Bensman.454 Nevertheless, the Court in *Summers* did not question congressional intent to allow the public to sue the Service pursuant to the Act and acknowledged that Marderosian had standing before he settled the Burnt Ridge case.455 If it had applied a reasonable interpretation of *Lyons*’s realistic threat test, the *Summers* Court should have found that Bensman had standing, as Justice Breyer argued in his dissenting opinion.456

**CONCLUSION**

This Article faults both Justice Scalia’s majority and Justice Breyer’s dissenting opinions in *Summers* for failing to discuss how subsequent decisions applied or distinguished *Lyons*’s realistic threat test.457 Likewise, neither the *Laidlaw* majority nor dissent looked at *Lyons*’s progeny.458 By

450. See supra Part V.
452. See supra *Lujan* v. Defenders of Wildlife, 504 U.S. at 576 (concluding it is irrelevant for Article III standing whether the underlying substantive issue was constitutional or statutory); Hartnett, supra note 23, at 2251–52 (acknowledging that the Supreme Court treats standing as a trans-substantive jurisdictional question but criticizing that approach); note 23 and accompanying text.
454. See supra Part V.B.
456. See supra Part V.C.
457. See supra Part VI.
458. See supra Part IV.
failing to look at a broader range of cases applying and distinguishing Lyons, the Court in both Summers and Laidlaw missed an opportunity to give context to the realistic threat test.459

Justice Scalia’s majority opinion in Summers seriously misapplied the realistic threat test in Lyons to the facts of Summers.460 Adolph Lyons was the one time victim of abuse, and the Los Angeles Police Department, subsequently during the litigation, adopted an official policy prohibiting the police from using a chokehold without provocation.461 By contrast, Bensman had visited numerous national parks and forests in the past, and there is every reason to believe that he will do so in the future.462 The Service has a clear policy of selling fire-damaged-timber in lots of less than 250 acres without procedural safeguards.463 It is true, as Justice Scalia argued, that it is uncertain whether Bensman’s travels will take him to a forest where the Service is selling timber without the procedural safeguards that the plaintiffs contend are required by statute or regulation.464 But the proper way to assess the probability he will do so is to ask in how many forests are such sales taking place, as Justice Breyer suggested in his Summers dissent.465 Even Justice Scalia conceded it was “likely” that a member of the plaintiff organizations would hike in an affected forest.466 As Justice Breyer argued in dissent, Justice Scalia’s opinion demanded more certainty than is required by the term "realistic threat."467

Justice Breyer’s dissenting opinion in Summers was more persuasive than the majority opinion because he discussed the probability that Bensman would hike in an affected forest, thereby applying Lyons’s realistic threat test to the facts of Summers.468 Additionally, he provided some examples from other areas of the law to illustrate what is a realistic threat of future harm.469 Nevertheless, his opinion would have been stronger if he had discussed at least some of the cases examined in Part III. Perhaps he shied away from these cases because they involved constitutional claims or disability statutes, but these cases provide necessary context to understanding Lyons’s realistic threat test.

459. See supra Part VI.
460. See supra Part VI.
461. See supra Part II.
462. See supra Parts V.C, VI.B.
463. See supra Parts V.C, VI.B.
464. See supra Part V.A.
465. See supra Part V.C.
467. See supra Part V.C.
468. See supra Part V.C.
469. See supra Part V.C.
REVISITING THE LYONS DEN

The cases in Part III are diverse. But they suggest that courts are willing to distinguish Lyons and grant injunctive relief against the government in factual circumstances different from Lyons. For example, courts are more likely to distinguish Lyons, which involved a single incident of government misconduct, and recognize standing for prospective relief if a plaintiff has been harmed by the government on multiple occasions in the past because courts assume that government officials who have repeatedly violated the law in the past are more likely to repeat that misconduct in the future, unless there has been a change in policy suggesting a change in behavior. Additionally, courts are more willing to assume that plaintiffs who engage in legally protected conduct will continue to engage in that conduct in the future, despite misconduct by the government, and less likely to assume that a plaintiff such as Adolph Lyons, who engages in illegal conduct, will repeat that conduct in the future.

In comparing Summers to the cases in Part III, it is important to observe that the Service was expected to engage in many procedurally questionable salvage sales in the future according to Justice Breyer’s dissenting opinion in Summers, and therefore, the probability of future harm by the government in Summers was more like Kolender or Honig, cases where the Supreme Court approved injunctive relief against the government, than Lyons, where the Court rejected injunctive relief. Also, because Bensman and the other members of the plaintiff organizations were engaged in legally-protected conduct in visiting our national parks, they were, therefore, much more likely to engage in that legal conduct in the future than Adolph Lyons was to engage in future illegal conduct. Furthermore, courts are much more willing to recognize standing for prospective relief if a plaintiff can show that the government has an official policy of committing the alleged wrongful behavior, unlike Lyons where the officers’ conduct would have violated Department policy if they repeated that conduct in the future. Based on Bensman’s multiple visits to national parks and forests and the Service’s policy of conducting timber sales without required procedures on sales involving less than 250 acres, the Summers Court should have held that Bensman faced a realistic threat of future harm, and thus, had standing to seek prospective relief.

470. See supra Part VI.A.
471. See supra Part VI.A.
472. See supra Part V.C.
473. See supra Part VI.A.
474. See supra Part VI.A.
475. See supra Part VI.B.
476. See supra Parts VI.A–B.