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By Patrick J. Smith

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In a prior report, Smith argued that after the Supreme Court's recent decision in *Direct Marketing*, taxpayers will likely be able to bring direct challenges to the validity of tax regulations in district court without being barred by the Anti-Injunction Act, meaning that they will not have to first engage in a transaction to which the regulations are applied and thereby incur a tax liability based on the application of the regulations to that transaction.

In this report, Smith argues that taxpayers that have refrained from engaging in specific transactions to avoid the tax consequences of Treasury regulations should be able to overcome the government's likely argument that they have not suffered an injury in fact and therefore lack standing to challenge those regulations under the direct review provisions of the Administrative Procedure Act.

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I. Introduction

In an earlier report,[1] I discussed the Anti-Injunction Act (AIA)[2] implications of the Supreme Court's recent decision in *Direct Marketing Association v. Brohl*.[3] The AIA limits the types of lawsuits involving federal taxes that may be brought in U.S. district courts. It provides that with some specified exceptions, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." In two cases decided in 1974 — *Bob Jones University v. Simon*[4] and *Alexander v. "Americans United" Inc.*[5] — the Supreme Court interpreted that provision in a way that seemed to broadly apply the limitation.

Direct Marketing dealt not with the AIA but with the Tax Injunction Act (TIA),[6] which limits the types of lawsuits a district court may hear concerning state taxes. It provides that "the district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." The Supreme Court in *Direct Marketing* interpreted that provision in a way that narrows the circumstances in which the limitation applies.

I previously argued that based on the Court's analysis in *Direct Marketing*, which focused on the similarity and close relationship of the TIA and the AIA, the AIA will now be given a similarly narrow interpretation — contrary to *Bob Jones University* and *Americans United*.[7]

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[1]Patrick J. Smith, "Challenges to Tax Regulations: The APA and the Anti-Injunction Act," *Tax Notes*, May 25, 2015, p. 915.
[2]Section 7421(a).
[3]135 S. Ct. 1124 (2015).
[4]416 U.S. 725 (1974).
[5]416 U.S. 752 (1974).
[6]28 U.S.C. section 1341.
[7]I have also argued that the same conclusion may hold true for the tax exception to the Federal Tort Claims Act. *See* Smith, "The Implications of the Supreme Court's *Direct Marketing*

(Footnote continued on next page.)

A panel of the D.C. Circuit recently rejected that view on *Direct Marketing*'s significance for the AIA. As discussed below, I believe the panel's judgment is incorrect and will eventually be overturned.

I have also argued that in light of the *Direct Marketing* decision, the AIA will likely pose much less of an obstacle to future challenges to tax regulations in district court under the direct review provisions of the Administrative Procedure Act (APA).[8] Direct challenges allow taxpayers to avoid the cumbersome traditional route, which imposes the prerequisite that the regulations have been applied to the taxpayer for a particular transaction (or group of transactions) for a particular tax year. That application is reflected in a notice of deficiency issued to the taxpayer by the IRS. The taxpayer can either (1) challenge the notice and the validity of the regulation in a Tax Court deficiency redetermination action; or (2) pay the additional tax reflected in the deficiency notice and sue for a refund based on a challenge to the validity of the regulation in district court or the Court of Federal Claims.

The traditional route has at least two major disadvantages compared with direct APA challenges, available for regulations issued by agencies other than the IRS and Treasury. First, judicial resolution of the regulations' validity comes much later than in a direct challenge. Second, a taxpayer wishing to challenge tax regulations through the traditional route must engage in at least one transaction to which they would apply. If the challenge fails, the taxpayer is burdened with the adverse tax consequences of engaging in that transaction. A direct APA challenge would not pose that risk, since the taxpayer would not be required to first engage in a transaction to which the regulations applied.

Thus, if I am correct that the Supreme Court's *Direct Marketing* decision will result in the narrowest application of the AIA since at least 1974, there will be a significant increase in the number of litigated challenges to tax regulations. And the government will likely respond to those direct challenges by arguing that the taxpayer lacks standing to bring the suit because it hasn't engaged in a transaction to which the regulations would apply if valid.

This report explains why taxpayers in those circumstances should still satisfy the standing requirements based on relevant Supreme Court decisions — that is, cases dealing with standing issues in similar contexts.[9]

II. Recent D.C. Circuit Decisions

Before turning to the standing issues, it is necessary to discuss two decisions that have been issued by the D.C. Circuit since my previous report. Both cases involve significant AIA issues.

A. *Z Street*

The first of these cases, *Z Street v. Koskinen*,[10] was brought in district court by an organization that had applied for tax-exempt status. The organization's purpose is to educate the public about the Middle East and Israel in particular. The suit alleges that the IRS has an ''Israel special policy'' under which exempt status applications submitted by organizations that espouse political views on Israel inconsistent with those of the Obama administration receive increased scrutiny. As a result, according to the complaint, the exemption applications of these organizations are processed more slowly than those of other types of organizations.

The government moved to dismiss the suit, arguing that it was barred by the AIA. The district court denied the motion on grounds that the suit did not seek to restrain the assessment or collection of any tax but to prevent the IRS from delaying the processing of the organization's application on a basis that violated the First Amendment. The D.C. Circuit agreed with the district court.

At the oral argument before the D.C. Circuit, the three-judge panel displayed considerable skepticism toward the government's position that the AIA barred the suit. The panel focused on the relevance of the *Direct Marketing* decision to resolution of the AIA issue and criticized the government for referring to that case only in a footnote. Based on the oral

Decision for the Interpretation of the Tax Exception in the Federal Tort Claims Act,'' Procedurally Taxing blog (June 8, 2015).

[8]5 U.S.C. sections 701 through 706.

[9]I do not discuss *American Institute of Certified Public Accountants v. IRS*, No. 14-5309 (D.D.C. 2014) because the standing issues in that case are far afield from those that would be presented in a direct APA challenge to tax regulations. That case challenges the IRS's voluntary program for regulating tax return preparers, which it adopted after its mandatory program was invalidated in *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014). The American Institute of Certified Public Accountants' strongest argument for why the injury-in-fact requirement is satisfied is that the program gives return preparers who are not CPAs a competitive advantage over AICPA members. After this report was completed, the D.C. Circuit issued its decision in the case, holding that the AICPA does in fact have standing based on the competitor standing doctrine.

[10]791 F.3d 24 (D.C. Cir. 2015). *See* Smith, ''D.C. Circuit Opinion in *Z Street v. Koskinen* Denies Application of Anti-Injunction Act in Suit Over Delay in Processing Application for Tax Exemption,'' TaxProf Blog op-ed (June 20, 2015).

argument, it seemed clear the panel would hold that the AIA did not apply to bar the organization's suit.

That is in fact the conclusion the panel reached, but two aspects of its decision are somewhat surprising. First, the tone of the opinion is much milder than what might have been expected based on the tone of the judges' questions at the oral argument. Second, the opinion did not rely on the *Direct Marketing* decision as the basis for its holding.

The *Z Street* opinion instead relied on the principle articulated by the Supreme Court in 1984 in *South Carolina v. Regan*,[11] a case involving South Carolina's challenge to a new IRC provision that eliminated the tax exemption for interest on state bearer bonds. The Supreme Court held that the AIA did not bar the suit — even though the provision affected the tax liability of bondholders — because the state would otherwise have no way to challenge the provision in court.

The D.C. Circuit in *Z Street* held that the principle articulated in *Regan* applied because the plaintiff organization had no other judicial avenue to raise a challenge based on improper delays in processing an application for tax-exempt status. Although the D.C. Circuit did not rely on *Direct Marketing* as the basis for its holding, the opinion discussed the relevance of that decision for interpretation of the AIA:

> Our rejection of the Commissioner's broad reading of the Act finds support in the Supreme Court's recent decision in *Direct Marketing Association v. Brohl*. There, interpreting the Anti-Injunction Act's cousin, the Tax Injunction Act, which serves a similar function for federal court challenges to state taxes, the Court read "restrain" in that statute as having a "narrow meaning . . . captur[ing] only those orders that stop . . . assessment, levy and collection" rather than "merely inhibit" those activities. True, the two statutes differ: the Tax Injunction Act pairs "restrain" with "'enjoin' and 'suspend'" suggesting that the word is used "in its narrow sense," while the word "restraining" stands alone in the Anti-Injunction Act. Yet *Brohl*'s holding is significant here because the Court "assume[s] that words used in both Acts are generally used in the same way."[12]

Thus, while the court in *Z Street* did not rely on *Direct Marketing*, the foregoing dictum does generally support the conclusion that the analysis in *Direct Marketing* is relevant in interpreting the AIA.

B. *Florida Bankers*

In *Florida Bankers Association v. Department of the Treasury*,[13] two bankers associations are challenging the validity of Treasury regulations requiring U.S. banks to report interest earned on accounts held by nonresident aliens. Although the interest is not subject to U.S. taxation, the IRS and Treasury contend that the reporting requirement is critical to the United States' compliance with information exchange agreements with countries that provide information on offshore bank accounts held by U.S. citizens.

The associations argue that in issuing the regulations, the IRS and Treasury violated the APA's arbitrary and capricious standard[14] by failing to give sufficient weight to the likelihood that the reporting requirement would lead some NRAs to withdraw their funds from U.S. banks — not because they want to avoid home country tax on the interest but because they fear misuse of the information by their home country government or others.

The U.S. government maintains that the AIA bars the suit, even though the reporting requirement does not concern any income tax owed to the United States. It argues that the penalty to which the banks would be subject for violating the reporting requirement is treated as a tax for AIA purposes under section 6671(a) and the Supreme Court's decision in *National Federation of Independent Business v. Sebelius* (*NFIB*).[15]

The district court, in an opinion issued before the Supreme Court decided *Direct Marketing*, held that the AIA did not apply for several reasons. First, the penalty would be imposed only if one of the association members failed to comply with the reporting requirement, but none of those banks has violated the requirement or threatened to do so. The challenge is not to the penalty but rather to the reporting requirement itself. Second, the D.C. Circuit, in a 1987 decision,[16] held that the AIA did not bar a challenge to the validity of another information reporting requirement that did not relate directly to the assessment or collection of taxes but was subject to the same penalty applicable in *Florida Bankers*. Finally, in *Seven-Sky v. Holder*[17] (the D.C.

[11]465 U.S. 367 (1984).
[12]*Z Street*, 791 F.3d at 30-31 (citations omitted).

[13]799 F.3d 1065 (D.C. Cir. 2015), *vacating* 19 F. Supp.3d 111 (D.D.C. 2014).
[14]5 U.S.C. section 706(2)(A).
[15]132 S. Ct. 2566, 2583 (2012).
[16]*Foodservice and Lodging Institute Inc. v. Regan*, 809 F.2d 842 (D.C. Cir. 1987).
[17]661 F.3d 1 (D.C. Cir. 2011).

Circuit decision that addressed the same issue decided by the Supreme Court in *NFIB*), the D.C. Circuit noted that the AIA ''has never been applied to bar suits brought to enjoin regulatory requirements that bear no relation to tax revenues or enforcement.''[18]

Although the district court in *Florida Bankers* disagreed with the government's argument that the AIA barred the suit, it rejected the challenge on the merits. (I have elsewhere explained why that merits decision was incorrect.[19]) On appeal, the D.C. Circuit, in a split decision, did not reach the merits.

The majority, in an opinion by Judge Brett Kavanaugh, held that the suit was barred by the AIA. Kavanaugh accepted the government's conclusion that the penalty at issue is treated as a tax for purposes of the AIA. He also applied the broad view of the AIA based on *Bob Jones University*, under which the act bars any suit that might hurt the collection of tax revenue. The majority distinguished *Direct Marketing* on the grounds that it involved no argument that the relevant penalty should be considered a tax for purposes of the TIA.

The majority opinion is wrong and clearly at odds with the Supreme Court's decision in *Direct Marketing*. Kavanaugh correctly noted that the issue in *Direct Marketing* was the effect of notice and reporting obligations imposed on out-of-state retailers that sold goods to Colorado consumers but did not collect the state's sales and use tax — the case did not concern the effect of the penalty faced by retailers that violated those requirements. However, the majority in *Florida Bankers* failed to address the reasoning in *Direct Marketing*, which relied on a narrow, technical reading of the terms ''assessment,'' ''collection,'' and ''restrain.'' That reading would clearly lead to the conclusion that the AIA does not apply when the only tax that could bring it into play would be imposed on conduct that the parties bringing the suit have not engaged in — namely, a violation of the reporting requirement. In other words, a suit could not possibly restrain the assessment or collection of a penalty under the reasoning in *Direct Marketing* if the conduct that would trigger it has not taken place.[20]

As Judge Karen LeCraft Henderson argued in her dissenting opinion, because section 7203 makes willful violation of the reporting requirement in *Florida Bankers* a misdemeanor, it was particularly inappropriate for the majority opinion to hold that the only way to challenge the reporting requirement is for a bank to violate it, pay the resulting penalty, and sue for a refund of the penalty. The plaintiffs in *Florida Bankers* filed a petition for rehearing *en banc*, but in a very surprising development, the D.C. Circuit denied the petition earlier this month. It is very likely the plaintiffs in the case will file a petition for certiorari with the Supreme Court.

III. General Background on Standing Issues

The legal framework for determining whether a plaintiff has standing to bring a suit was established by the Supreme Court in 1992 in *Lujan v. Defenders of Wildlife*,[21] although that opinion largely restated principles that had been established in earlier cases. The *Lujan* Court, in an opinion by Justice Antonin Scalia, noted at the outset that the standing requirement is part of the constitutional principle of separation of powers between the legislative, executive, and judicial branches of the federal government. The standing requirement is an aspect of the statement in Article III, section 2, that the judicial power of the federal government extends to specific cases and controversies.[22] The Court in *Lujan* identified the standing requirement as one of the landmarks that define the extent of the judicial power:

> One of those landmarks, setting apart the ''Cases'' and ''Controversies'' that are of the justiciable sort referred to in Article III — ''serv[ing] to identify those disputes which are appropriately resolved through the judicial process,'' — is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of

[18] *Id.* at 9.

[19] *See* Smith, ''District Court Misapplies APA in *Florida Bankers Association*,'' *Tax Notes*, Feb. 17, 2014, p. 745; and Smith, ''More Ways *Florida Bankers* Misapplied the APA,'' *Tax Notes*, Apr. 21, 2014, p. 361.

[20] *See* Smith, ''D.C. Circuit Majority Opinion in *Florida Bankers* Not Consistent With Supreme Court's *Direct Marketing* Decision (Part 1),'' Procedurally Taxing blog (Aug. 17, 2015); and Smith, ''D.C. Circuit Majority Opinion in *Florida Bankers* Not Consistent With Supreme Court's *Direct Marketing* Decision (Part 2),'' Procedurally Taxing blog (Aug. 18, 2015).

[21] 504 U.S. 555 (1992).

[22] ''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.''

standing is an essential and unchanging part of the case-or-controversy requirement of Article III.[23]

The Court then noted that three basic requirements must be satisfied for a plaintiff to have standing:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "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." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[24]

The government will most likely rely on the injury-in-fact requirement in arguing that taxpayers bringing direct APA challenges to tax regulations in district court lack standing if they have not engaged in at least one transaction to which the challenged regulation would apply. The reasoning would be that the challenger has not suffered an injury in fact as a result of the issuance of the regulations.

According to the Court, an injury must be actual or imminent — not conjectural or hypothetical — to satisfy the injury-in-fact requirement for standing. The government will likely argue that any injury suffered by a taxpayer that has not engaged in a transaction to which the regulations would apply is only conjectural or hypothetical.

The government is much less likely to rely on the second and third requirements for standing — that there be a causal connection between the injury and the challenged conduct and that it be likely the injury will be redressed by a favorable decision. If a taxpayer in a direct challenge to tax regulations can satisfy the injury-in-fact requirement, it can almost certainly satisfy the causation and "redressability" requirements.

After setting forth the three basic requirements for standing, the Court in *Lujan* distinguished cases in which the plaintiff is among the objects of the challenged government action from those in which the government action has only an indirect effect on the plaintiff. The latter category refers to cases in which the effect is on parties that are not themselves challenging the government action but whose conduct in response to it may harm the plaintiff:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction — and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish.[25]

That discussion in *Lujan* should be the starting point for a taxpayer's response to the government's likely argument that it must have engaged in a transaction to which the challenged regulations would apply in order to satisfy the injury-in-fact requirement. The taxpayer's counterargument would be that a party can be an object of regulations without having actually engaged in a transaction to which they would apply.

The reasoning would be that the regulations have harmed the taxpayer by making it less desirable and less advantageous to engage in the type of transaction to which the regulations would apply and that, in the absence of the adverse tax consequences, the taxpayer clearly would have engaged

[23]504 U.S. at 560 (citations omitted).
[24]*Id.* at 560-561 (citations omitted).
[25]*Id.* at 561-562 (citations omitted).

in it. In other words, the taxpayer is harmed by the challenged regulations because it is refraining from that transaction. This line of reasoning is the focus of the discussion of the relevant Supreme Court decisions below.

As noted earlier, *Lujan* drew a distinction between challengers that are the direct objects of the government action and challengers that claim to be harmed by the actions of parties that are the direct objects of the government action. It is clear that taxpayers in non-transaction challenges to the validity of tax regulations are not in the latter category. Thus, they are necessarily in the category of challengers directly affected by the regulations.

Because those taxpayers are objects of the challenged government action, there is usually little question that the action has caused them injury, according to *Lujan*. That conclusion is supported by the Supreme Court decisions discussed below.

IV. Actual or Imminent Injury

The government is likely to argue that any injury a taxpayer may have suffered from the issuance of the regulations is conjectural or hypothetical rather than actual or imminent and therefore fails to satisfy the injury-in-fact requirement for standing.

The "actual or imminent" requirement is based on a distinction between present injuries and potential future injuries. A present injury is actual and thus necessarily satisfies the injury-in-fact requirement, while a potential future injury may or may not be imminent and thus may or may not satisfy that requirement. The distinction between present injuries and potential future injuries is therefore critically important. However, neither the case law nor the commentary on the injury-in-fact requirement provides any clear analysis of the inquiry that should be conducted to determine whether an alleged harm is a present injury.

When a taxpayer has refrained from engaging in the type of transaction to which the challenged regulations would apply in order to avoid their adverse tax consequences, the situation can be viewed as involving either a present injury or a potential future injury. The present injury is the taxpayer's conduct in refraining from a transaction in which it otherwise would have engaged. The adverse tax consequences from application of the challenged regulations constitute the potential future injury.

If the harm in this situation is viewed as a present injury, it seems certain that the injury-in-fact requirement would be satisfied. If the harm is instead considered only a potential future injury, it might be viewed as merely conjectural or hypothetical and, thus, not as satisfying the injury-in-fact requirement. Based on the case law discussed below, I believe it is much more accurate to view the harm in this situation as a present injury.

Recent commentary discussing Supreme Court case law in this area uses the term "fear-based standing" to describe the unifying concept of those decisions.[26] Although that commentary is extremely valuable in gathering the relevant Supreme Court decisions and classifying them, fear-based standing is an inaccurate description of the principles at work in those cases.

I believe a more accurate way to describe these cases — at least those in which the injury-in-fact requirement was held to be satisfied — is as involving situations in which a party claims that in order to avoid the adverse consequences of the challenged government action, it refrained from specific conduct in which it otherwise would have engaged. The injury suffered by the challenging party in this situation is not a fear of the adverse consequences resulting from engaging in the specific conduct, nor is it a potential future injury consisting of the adverse tax consequences themselves. Instead, it is a present injury — the party's refraining from specific conduct.

The Supreme Court decisions discussed below support the conclusion that the plaintiff in this situation meets the injury-in-fact requirement for standing. By contrast, when plaintiffs have not identified specific conduct from which they are refraining because of the challenged government action and instead have identified only a generalized and nonspecific apprehension about potential future adverse consequences to them, the Court has held that the injury-in-fact requirement is not satisfied.

When the Supreme Court cases are conceptualized in this way, it is obvious that they are relevant in evaluating the likely government contention that a taxpayer lacks standing to challenge the validity of tax regulations if it has not engaged in a transaction to which the regulations would apply. That taxpayer would ordinarily be able to assert that but for the existence of the regulations, it would certainly have engaged in that type of transaction.

A significant obstacle to analysis and predictability in this area is that relevant authorities on standing (Supreme Court decisions, lower court decisions, and commentary) use extremely vague,

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[26]*See* Brian Calabrese, "Fear-Based Standing: Cognizing an Injury-in-Fact," 68 *Wash. & Lee L. Rev.* 1445 (2011). *See also* Andrew C. Sand, "Standing Uncertainty: An Expected-Value Standard for Fear-Based Injury in *Clapper v. Amnesty International USA*," 113 *Mich. L. Rev.* 711 (2015); and Amanda Mariam McDowell, "The Impact of *Clapper v. Amnesty International USA* on the Doctrine of Fear-Based Standing," 49 *Ga. L. Rev.* 247 (2014).

general, and abstract tests and terminology to describe when an injury in fact will and will not be found. Nevertheless, as noted earlier, the commentary discussing fear-based standing is valuable in gathering and classifying the relevant Supreme Court decisions. I borrow from that classification system, which divides the cases into three groups: (1) those involving chilling effect injury; (2) those involving fear of the enforcement of a statute or regulation before it is actually enforced; and (3) those involving fear of anticipated future harm.[27]

V. Chilling Effect

The first group of Supreme Court decisions concerns situations in which plaintiffs have alleged that the challenged government action has a chilling effect on the exercise of their First Amendment rights.

A. *Laird v. Tatum*

One of the early prominent Supreme Court decisions in this area is *Laird v. Tatum*[28] from 1972. In this case, the Court held that the injury-in-fact requirement was not satisfied by the plaintiffs' allegation of a "subjective chill." The government would likely rely on this case in deflecting a direct APA challenge to tax regulations. However, as discussed below, *Laird* is distinguishable because the plaintiffs in that case failed to identify any specific conduct from which they were refraining as a result of the challenged government program.

They argued that a domestic information gathering program designed to detect potential public disorders in which the Army might be called on to assist local authorities infringed on their First Amendment rights. They asserted that they had suffered the requisite injury in fact for standing because the existence of the program had a chilling effect on the exercise of their First Amendment rights.

This chilling effect might be viewed as generically similar to the alleged injury in fact relied on by a taxpayer as providing standing to challenge tax regulations without having engaged in a transaction to which they would apply — namely, the adverse tax consequences caused the taxpayer to refrain from engaging in the transaction.

However, *Laird* is clearly distinguishable because the plaintiffs failed to identify any specific conduct they had refrained from engaging in because of the program or any specific adverse consequences the program might have caused them. The Supreme Court quoted the following passage from the D.C. Circuit's opinion regarding the sorts of injuries the plaintiffs did not allege:

> Appellants freely admit that they complain of no specific action of the Army against them. . . . There is no evidence of illegal or unlawful surveillance activities. We are not cited to any clandestine intrusion by a military agent.[29]

The Supreme Court noted that the issue for decision was correctly identified by the D.C. Circuit:

> The Court of Appeals properly identified the issue presented, namely, whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose.[30]

The Court held that in the circumstances of this case, any subjective chilling effect the plaintiffs might have experienced as a result of the program was insufficient to satisfy the injury-in-fact requirement for standing. The Court contrasted the case with prior decisions in which it had held that a chilling effect on the exercise of First Amendment rights could constitute an injury in fact:

> In recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or "chilling," effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. In none of these cases, however, did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual. Rather, in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging.[31]

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[27]Calabrese, *supra* note 26, at 1447.
[28]408 U.S. 1 (1972), *rev'g* 444 F.2d 947 (D.C. Cir. 1971).
[29]444 F.2d at 953 (quoted in 408 U.S. at 9).
[30]408 U.S. at 10.
[31]*Id.* at 11 (citations omitted).

None of those prior cases involved standing issues. However, the substantive harm that gave rise to the alleged First Amendment violations was that the challenged government action inhibited the plaintiffs from engaging in conduct in which they otherwise clearly would have engaged. Thus, the harm in those prior cases parallels the harm suffered by the plaintiff-taxpayers in direct APA challenges to tax regulations.

After briefly discussing each of those prior cases, the Court explained why the plaintiffs in *Laird* had failed to show that they had sustained, or were immediately in danger of sustaining, a direct injury as the result of the challenged government action[32]:

> The respondents do not meet this test; their claim, simply stated, is that they disagree with the judgments made by the Executive Branch with respect to the type and amount of information the Army needs and that the very existence of the Army's data-gathering system produces a constitutionally impermissible chilling effect upon the exercise of their First Amendment rights. That alleged chilling effect may perhaps be seen as arising from respondents' very perception of the system as inappropriate to the Army's role under our form of government, or as arising from respondents' beliefs that it is inherently dangerous for the military to be concerned with activities in the civilian sector, or as arising from respondents' less generalized yet speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to respondents. *Allegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm*; "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions."[33]

The *Laird* opinion is frequently cited for the proposition that a subjective chill is insufficient to satisfy the injury-in-fact requirement for standing. However, that is a much broader reading than the decision actually suggests or supports, because the case involved no allegations of specific conduct from which the plaintiffs had refrained or of any other specific harms the plaintiffs had suffered as a result of the program. Nowhere does the opinion suggest that the plaintiffs identified any specific activity from which they had refrained as a result of their knowledge of the existence of the information gathering program, such as attending particular meetings or participating in particular organizations.

In light of this weakness in the allegations in *Laird*, it would be inappropriate to rely on that decision for the proposition that a chilling effect cannot constitute an injury in fact sufficient to provide standing when a plaintiff can allege having refrained from specific activities because they would trigger adverse consequences as a result of the challenged government action.

Moreover, the Court, in a footnote, questioned whether there was a genuine subjective chilling effect of any sort in this case:

> Not only have respondents left somewhat unclear the precise connection between the mere existence of the challenged system and their own alleged chill, but they have also cast considerable doubt on whether they themselves are in fact suffering from any such chill. Judge MacKinnon took cogent note of this difficulty in dissenting from the Court of Appeals' judgment. . . . At the oral argument before the District Court, counsel for respondents admitted that his clients were "not people, obviously, who are cowed and chilled"; indeed, they were quite willing "to open themselves up to public investigation and public scrutiny." . . . It was Judge MacKinnon's view that this concession "constitutes a basic denial of practically their whole case."[34]

This footnote suggesting that the plaintiffs most likely had not in fact been subject to any sort of chilling effect further undermines the decision's application when a better case can be made that the plaintiff refrained from engaging in specific actions that would produce particular adverse consequences because of the challenged government action.

Courts often cite the following portion of the *Laird* opinion, which summarizes the relevant characteristics of government actions found by the Supreme Court in earlier cases to have a chilling effect sufficient to satisfy the injury-in-fact requirement for standing:

> In each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging.[35]

[32]*Id.* at 13.

[33]*Id.* at 13-14 (emphasis added; citations and footnotes omitted).

[34]*Id.* at 13 n.7 (citations omitted).

[35]*Id.* at 11.

In a direct APA challenge to tax regulations, the taxpayer would be challenging an exercise of governmental power that was regulatory in nature, and it would be either currently or prospectively subject to the regulations.

The government may attempt to distinguish the earlier chilling effect cases on the basis that they all involve First Amendment challenges to government action. As discussed below, the Supreme Court has found the injury-in-fact requirement satisfied in cases not involving First Amendment challenges when the plaintiffs alleged that they refrained from conduct they would otherwise have engaged in because the conduct would have triggered adverse consequences as a result of the challenged action.

B. *Meese v. Keene*

Another significant Supreme Court decision in the chilling effect category is *Meese v. Keene*.[36] In that case, in contrast to *Laird*, the Court held that the injury-in-fact requirement for standing was satisfied. *Keene* involved a federal statute that used the term "political propaganda" to refer to expressive materials for which it imposed specific registration, filing, and disclosure requirements. The plaintiff was an attorney and member of the California State Legislature who wished to exhibit three Canadian motion picture films that the Justice Department had identified as being subject to these statutory requirements.

The Court held that the plaintiff had standing to bring the suit. It concluded that the injury-in-fact requirement was satisfied by the plaintiff's allegation "that he wished to exhibit the three films, but was deterred from exhibiting the films by a statutory characterization of the films as 'political propaganda.'"[37] The Court distinguished this situation from the one in *Laird*: "If Keene had merely alleged that the appellation deterred him by exercising a chilling effect on the exercise of his First Amendment rights, he would not have standing to seek its invalidation."[38] The Court offered the following analysis in support of its conclusion:

> We find . . . that appellee has alleged and demonstrated more than a "subjective chill"; he establishes that the term "political propaganda" threatens to cause him cognizable injury. He stated that "if he were to exhibit the films while they bore such characterization, his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired." In support of this claim, appellee submitted detailed affidavits, including one describing the results of an opinion poll and another containing the views of an experienced political analyst, supporting the conclusion that his exhibition of films that have been classified as "political propaganda" by the Department of Justice would substantially harm his chances for reelection and would adversely affect his reputation in the community. The affidavits were uncontradicted.
>
> In ruling on the motion for summary judgment, the District Court correctly determined that the affidavits supported the conclusion that appellee could not exhibit the films without incurring a risk of injury to his reputation and of an impairment of his political career. The court found that the act "puts the plaintiff to the Hobson's choice of foregoing the use of the three Canadian films for the exposition of his own views or suffering an injury to his reputation."[39]

Thus, in contrast to the plaintiffs in *Laird*, the plaintiff in *Keene* identified specific conduct that he was refraining from engaging in because of the challenged government action and also specific adverse consequences that would result from the action if he were to engage in that conduct. In both respects, a direct APA challenge to tax regulations is much closer to the situation in *Keene* than that in *Laird*.

For that type of challenge, the taxpayer could identify specific types of transactions in which it would have engaged if not for the adverse tax consequences that would be produced under the challenged regulations, and it would indicate those adverse consequences. *Keene* illustrates that the injury-in-fact requirement should be satisfied when a plaintiff is able to make specific allegations of this type, while *Laird* illustrates that when a plaintiff fails to make them, the injury-in-fact requirement will not be satisfied.

VI. Pre-Enforcement Challenges

The next category of Supreme Court decisions identified by the commentary on fear-based standing involves pre-enforcement fear that a statute or regulation may be enforced against the plaintiff in the future.

[36]481 U.S. 465 (1987).
[37]*Id.* at 473 (internal quotation marks omitted).
[38]*Id.*
[39]*Id.* at 473-475 (footnotes omitted).

A. *Virginia v. American Booksellers Association*

A significant decision in this category is *Virginia v. American Booksellers Association*.[40] The case involved a First Amendment challenge to a state criminal statute that prohibited the commercial display of any sexually explicit visual or written material that could be examined or perused by juveniles.

The plaintiffs — booksellers organizations and two specific Virginia booksellers — alleged that to comply with the statute, booksellers would be required to undertake the following alternative measures:

> (1) create an ''adults only'' section of the store; (2) place the covered works behind the counter (which would require a bookbuyer to request specially a work); (3) decline to carry the materials in question; or (4) bar juveniles from the store.[41]

The plaintiffs asserted that realistically, booksellers would choose the alternative of simply not offering for sale material that could be subject to the statutory restrictions:

> Plaintiffs maintained that because bookbuyers generally make their selections by browsing through displayed books, and because adults would be reluctant to enter an ''adults only'' store or section of a store, the statute effectively restricts the entire population's access to books that fall within its purview. In effect, argued plaintiffs, the law reduces the adult population to reading and viewing only works suitable for children, something this Court has repeatedly held is prohibited by the First Amendment.[42]

The Court held that the plaintiffs satisfied the injury-in-fact requirement for standing:

> That requirement is met here, as the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution.[43]

The Court also addressed the pre-enforcement aspect of the litigation:

> We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them. *Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution*.[44]

As the last sentence in that passage makes clear, *American Booksellers* also involves a situation in which a plaintiff alleges that as a result of the challenged government action, it is refraining from engaging in conduct in which it would otherwise engage — in this case, offering for sale materials that could be subject to the statute. This parallels a direct APA challenge to tax regulations. As in *Keene*, and in contrast to *Laird*, the plaintiffs made very specific allegations regarding the conduct they would be required to refrain from and the adverse consequences that would result if they either refrained or did not refrain, and because of those allegations, the injury-in-fact requirement was satisfied.

B. *Babbitt v. United Farm Workers*

Another important Supreme Court decision in the pre-enforcement fear category is *Babbitt v. United Farm Workers National Union*,[45] in which individual farmworkers and a union challenged the constitutionality of various provisions of Arizona's farm labor statute. The statute contained both civil and criminal enforcement mechanisms.

The Court held that the plaintiffs satisfied the requirements for standing for three of the provisions being challenged. The Court began its discussion of the standing requirements as follows:

> A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. But ''[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.''
>
> When contesting the constitutionality of a criminal statute, ''it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.'' When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he ''should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'' But ''persons

[40]484 U.S. 383 (1988).
[41]*Id.* at 389.
[42]*Id.*
[43]*Id.* at 392.
[44]*Id.* at 393 (emphasis added).
[45]442 U.S. 289 (1979).

having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs.'' When plaintiffs ''do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,'' they do not allege a dispute susceptible to resolution by a federal court.[46]

The Court then addressed the specific challenges that it believed satisfied the standing requirements:

> Examining the claims adjudicated by the three-judge court against the foregoing principles, it is our view that the challenges to the provisions regulating election procedures, consumer publicity, and criminal sanctions — but only those challenges — present a case or controversy. As already noted, appellees' principal complaint about the statutory election procedures is that they entail inescapable delays and so preclude conducting an election promptly enough to permit participation by many farmworkers engaged in the production of crops having short seasons. Appellees also assail the assertedly austere limitations on who is eligible to participate in elections under the Act. Appellees admittedly have not invoked the Act's election procedures in the past nor have they expressed any intention of doing so in the future. But, as we see it, appellees' reluctance in this respect does not defeat the justiciability of their challenge in view of the nature of their claim.
>
> Appellees insist that agricultural workers are constitutionally entitled to select representatives to bargain with their employers over employment conditions. As appellees read the statute, only representatives duly elected under its provisions may compel an employer to bargain with them. But appellees maintain, and have adduced evidence tending to prove, that the statutory election procedures frustrate rather than facilitate democratic selection of bargaining representatives. And the [union] has declined to pursue those procedures, not for lack of interest in representing Arizona farmworkers in negotiations with employers, but due to the procedures' asserted futility. . . .
>
> Even though a challenged statute is sure to work the injury alleged, however, adjudication might be postponed until ''a better factual record might be available.'' Thus, appellants urge that we should decline to entertain appellees' challenge until they undertake to invoke the Act's election procedures. In that way, the Court might acquire information regarding how the challenged procedures actually operate, in lieu of the predictive evidence that appellees introduced at trial. We are persuaded, however, that awaiting appellees' participation in an election would not assist our resolution of the threshold question whether the election procedures are subject to scrutiny under the First Amendment at all. As we regard that question dispositive to appellees' challenge — as elaborated below — we think there is no warrant for postponing adjudication of the election claim.[47]

Although much of the general introductory language quoted earlier concerning the injury-in-fact requirement focused on challenges to criminal statutes, the Court's discussion of the requirement in the context of the statute's election procedures does not suggest that there was any criminal aspect to them. The Court held that the plaintiffs had satisfied the injury-in-fact requirement for challenging those provisions without having subjected themselves to the operation of them because the challenged provisions were ''sure to work the injury alleged.''

Once again, there is a clear parallel to a direct APA challenge to tax regulations. The plaintiffs in *American Farm Workers* had refrained from engaging in the election procedures to which the statute applied, just as a taxpayer would have done regarding a transaction to which challenged regulations would apply. Moreover, as with the challenge to the election procedures, if the taxpayer were to engage in a transaction to which the challenged regulations applied, he would be ''sure to work the injury alleged'' in the form of specific adverse tax consequences.

The Court next explained why it believed the plaintiffs had standing to challenge the consumer publicity provisions:

> Appellees' twofold attack on the Act's limitation on consumer publicity is also justiciable now. [The statute] makes it an unfair labor practice ''[t]o induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity.'' And violations of that section may be criminally punishable. Appellees maintain that the consumer publicity provision unconstitutionally

[46] *Id.* at 298-299 (citations omitted).

[47] *Id.* at 299-300 (footnotes and citations omitted).

> penalizes inaccuracies inadvertently uttered in the course of consumer appeals.
>
> The record shows that the [union] has actively engaged in consumer publicity campaigns in the past in Arizona, and appellees have alleged in their complaint an intention to continue to engage in boycott activities in that State. Although appellees do not plan to propagate untruths, they contend — as we have observed — that ''erroneous statement is inevitable in free debate.'' They submit that to avoid criminal prosecution they must curtail their consumer appeals, and thus forgo full exercise of what they insist are their First Amendment rights. It is urged, accordingly, that their challenge to the limitation on consumer publicity plainly poses an actual case or controversy.
>
> Appellants maintain that the criminal penalty provision has not yet been applied and may never be applied to commissions of unfair labor practices, including forbidden consumer publicity. But, as we have noted, when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not ''first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.'' The consumer publicity provision on its face proscribes dishonest, untruthful, and deceptive publicity, and the criminal penalty provision applies in terms to ''[a]ny person . . . who violates any provision'' of the Act. Moreover, the State has not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices. Appellees are thus not without some reason in fearing prosecution for violation of the ban on specified forms of consumer publicity. In our view, the positions of the parties are sufficiently adverse with respect to the consumer publicity provision proscribing misrepresentations to present a case or controversy within the jurisdiction of the District Court.[48]

Thus, the plaintiffs had refrained from engaging in any conduct to which the challenged consumer publicity provisions could apply because of the adverse consequences that could result under the challenged statute. The parallel to a direct APA challenge to tax regulations is obvious.

A plaintiff's refraining from conduct because of potential criminal prosecution that could result from the challenged government action is obviously a more serious consequence than being subject to adverse tax consequences. However, prosecutorial discretion and other factors make the likelihood of criminal prosecution uncertain. Still, as the quotations above make clear, when the potential adverse consequences are criminal prosecution, the injury-in-fact requirement is satisfied if the possibility of prosecution ''is not imaginary or wholly speculative.''

In contrast, there is no uncertainty that adverse tax consequences will result if a taxpayer engages in a specific transaction targeted by the challenged regulations because of the obligation on taxpayers to calculate and report their taxable income correctly. If the taxpayer were to engage in the transaction and the regulations were determined to be valid, the adverse tax consequences would be certain. Thus, the fact that the adverse consequences are certain to occur in the tax case, in contrast to the more relaxed standard in a challenge to a criminal statute, surely counterbalances the difference in severity of the adverse consequences in the two contexts.

VII. Anticipated Future Harm

The third category of Supreme Court cases identified in the fear-based standing commentary consists of cases involving a fear of anticipated future harm.

A. *Los Angeles v. Lyons*

An important decision in this category is *Los Angeles v. Lyons*,[49] from 1983. The plaintiff alleged that without provocation or justification, Los Angeles police officers who had stopped him for a traffic violation applied a chokehold that damaged his larynx and caused him to lose consciousness.

The plaintiff sought preliminary and permanent injunctions against the city based on the contention that the Los Angeles police had a policy of regularly and routinely applying chokeholds without justification. He claimed he feared that any future encounter with the police might result in their using a chokehold that could injure or kill him. The plaintiff claimed that the alleged policy violated various provisions of the Constitution. The district court and Ninth Circuit agreed with the plaintiff's contentions and granted the relief he sought.

The Supreme Court reversed, holding that the plaintiff did not have standing:

> Lyons' standing to seek the injunction requested depended on whether he was likely to

[48] *Id.* at 301-302 (footnotes and citations omitted).

[49] 461 U.S. 95 (1983).

suffer future injury from the use of the chokeholds by police officers. Count V of the complaint alleged the traffic stop and choking incident five months before. That Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part. . . .

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. Although Count V alleged that the City authorized the use of the control holds in situations where deadly force was not threatened, it did not indicate why Lyons might be realistically threatened by police officers who acted within the strictures of the City's policy. If, for example, chokeholds were authorized to be used only to counter resistance to an arrest by a suspect, or to thwart an effort to escape, any future threat to Lyons from the City's policy or from the conduct of police officers would be no more real than the possibility that he would again have an encounter with the police and that either he would illegally resist arrest or detention or the officers would disobey their instructions and again render him unconscious without any provocation. . . .

There was no finding that Lyons faced a real and immediate threat of again being illegally choked. The City's policy was described as authorizing the use of the strangleholds "under circumstances where no one is threatened with death or grievous bodily harm." That policy was not further described, but the record before the court contained the department's existing policy with respect to the employment of chokeholds. Nothing in that policy, contained in a Police Department manual, suggests that the chokeholds, or other kinds of force for that matter, are authorized absent some resistance or other provocation by the arrestee or other suspect. On the contrary, police officers were instructed to use chokeholds only when lesser degrees of force do not suffice and then only "to gain control of a suspect who is violently resisting the officer or trying to escape."[50]

This is really the first of the Supreme Court decisions discussed by the fear-based standing commentary that could be viewed as involving a claim of fear-based standing, as opposed to a claim of standing based on an asserted injury in fact consisting of refraining from engaging in particular conduct. There is no suggestion in the opinion that the plaintiff had identified any particular conduct he was refraining from engaging in because of his belief in the existence of the alleged police policy he was challenging. The absence of such an allegation is surely part of the reason why the Court found that the injury-in-fact requirement was not satisfied in this case. It meant that there was no possibility the claimed harm could be present harm; instead, there was only the possibility of future harm. As discussed earlier, the injury-in-fact requirement is satisfied more readily if the claimed harm is a present harm rather than the possibility of future harm.

Moreover, the only harm referred to by the Court was not the harm consisting of fear but rather the potential harm from possible application of a chokehold by the police. The Court found that the possibility of this future harm actually occurring was simply too speculative to support a conclusion that the injury-in-fact requirement was satisfied. Obviously, the facts in this case are readily distinguishable from those in a direct APA challenge to tax regulations.

B. *Friends of the Earth v. Laidlaw*

The other significant Supreme Court decision that the fear-based standing commentary places in the category of fear of anticipated future harm is *Friends of the Earth Inc. v. Laidlaw Environmental Services (TOC) Inc*.[51] The Court held that the injury-in-fact requirement was satisfied in this case. In contrast to *Lyons*, *Laidlaw* clearly involved claims of refraining from specific conduct because of the adverse consequences it might trigger under the challenged action.

This case involved the Clean Water Act (CWA), which authorizes suits in district court by private parties whose interests may be affected by violations of the CWA. Several environmental organizations sued the defendant, a wastewater treatment

[50]*Id.* at 105-110 (citations and footnotes omitted).
[51]528 U.S. 167 (2000).

plant owner, for repeatedly exceeding the pollution discharge limits imposed by a state-issued permit.

The Court held that the injury-in-fact requirement was satisfied by the affidavits and depositions of various members of the organizations. For example, one member said "that he would like to fish, camp, swim, and picnic in and near the river between three and 15 miles downstream from the facility, as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by [the defendant's] discharges."[52]

This harm clearly consists of the person's refraining from conduct that he would have engaged in but for the potential adverse consequences caused by the challenged action. Other members testified to the same. For example, one said that before the defendant operated the facility, "she picnicked, walked, birdwatched, and waded in and along the North Tyger River because of the natural beauty of the area; that she no longer engaged in these activities in or near the river because she was concerned about harmful effects from discharged pollutants."[53]

Another member said "that she lived one-quarter mile from [the defendant's] facility and would like to fish, hike, and picnic along the North Tyger River, but has refrained from those activities because of the discharges."[54] Another member "testified at length that she would hike, picnic, camp, swim, boat, and drive near or in the river were it not for her concerns about illegal discharges."[55] And another member testified "that he had canoed approximately 40 miles downstream of the [defendant's] facility and would like to canoe in the North Tyger River closer to [the defendant's] discharge point, but did not do so because he was concerned that the water contained harmful pollutants."[56]

These allegations of refraining from specific conduct that the plaintiffs feared would trigger adverse consequences because of the challenged action clearly parallel the allegations a taxpayer would make in a direct APA challenge to tax regulations. The act of refraining did not raise First Amendment issues, and the adverse consequences the refraining parties wanted to avoid were not the possibility of criminal prosecution. Thus, *Laidlaw* provides strong support for the conclusion that the injury-in-fact requirement would be satisfied in a direct APA challenge to tax regulations.

The *Laidlaw* Court factually distinguished *Lyons*:

> 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 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 unlawful conduct," and that his "subjective apprehensions" that such a recurrence would even take place were not enough to support standing. Here, in contrast, it is undisputed that Laidlaw's unlawful conduct — discharging pollutants in excess of permit limits — was occurring at the time the complaint was filed. Under *Lyons*, then, the only "subjective" issue here is "[t]he reasonableness of [the] fear" that led the affiants to respond to that concededly ongoing conduct by refraining from use of the North Tyger River and surrounding areas. 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.[57]

The weakest aspect of the injuries in fact that the Court found sufficient in *Laidlaw* — namely, the uncertainty that members of the plaintiff organizations would have suffered real harm if they had not refrained from the conduct described in their testimony — is clearly distinguishable from the situation in which a taxpayer refrains from a targeted transaction. In that type of challenge, there is no doubt that the taxpayer would suffer adverse tax consequences if it engaged in a transaction to which the challenged regulations would apply, which is why it is refraining from that conduct and raising the challenge.

Thus, if there can be an injury in fact sufficient to satisfy the requirements for standing when the conduct the plaintiff refrains from engaging in is far from certain to produce actual adverse consequences, as the Court held in *Laidlaw*, surely there is one when a taxpayer refrains from engaging in a

[52]*Id.* at 181-182.
[53]*Id.* at 182.
[54]*Id.*
[55]*Id.*
[56]*Id.* at 183.

[57]*Id.* at 184-185 (citations omitted).

targeted transaction that would unquestionably produce the adverse tax consequences it wishes to avoid if the regulations were allowed to withstand challenge. Clearly, *Laidlaw* is the Supreme Court decision that provides the strongest and most direct support for the conclusion that the injury-in-fact requirement would be satisfied in a direct APA challenge to tax regulations.

VIII. Other Cases

There are a few other Supreme Court decisions relevant to the standing issue in a direct APA challenge to tax regulations.

A. *Summers v. Earth Island Institute*

The government might cite *Summers v. Earth Island Institute*[58] in support of its likely position that a taxpayer challenging tax regulations without having engaged in a transaction to which the regulations would apply does not satisfy the injury-in-fact requirement. The plaintiffs, a group of environmental organizations, sought to enjoin the U.S. Forest Service from enforcing regulations that exempted small projects from the notice, comment, and appeal process used for more significant land management decisions. The organizations had initially sued concerning the regulations that applied to a specific timber-salvage project, but while the case was pending, the parties reached a settlement on that aspect of the case.

The Supreme Court stated the issue as whether the plaintiffs had standing to challenge the regulations "in the absence of a live dispute over a concrete application of those regulations."[59] It held that they lacked standing. The government might argue that this holding supports the conclusion that standing to challenge tax regulations does not exist unless they have been applied to the taxpayer bringing the challenge. That argument would clearly represent a distortion of the case.

The Court, in an opinion by Scalia, began its analysis as follows:

> The regulations under challenge here neither require nor forbid any action on the part of [the plaintiffs]. The standards and procedures that they prescribe for Forest Service appeals govern only the conduct of Forest Service officials engaged in project planning. "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." Here, [the plaintiffs] can demonstrate standing only if application of the regulations by the Government will affect them in the manner described above.[60]

Thus, unlike a direct APA challenge to tax regulations, this case was a challenge by plaintiffs who were not among the objects of the challenged regulations. This case brought into play the principle established in *Lujan* — that for those plaintiffs, standing is substantially more difficult to establish.

The plaintiffs had submitted affidavits stating that a member of one of the organizations had visited the site of the specific lumber-salvage project, "that he had imminent plans to do so again, and that his interests in viewing the flora and fauna of the area would be harmed if the [project] went forward without incorporation of the ideas he would have suggested if the Forest Service had provided him an opportunity to comment."[61] While this was sufficient to establish standing regarding the application of the challenged regulations to that specific project, according to the Court, it was insufficient to preserve standing after that portion of the challenge had been settled:

> We know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests. Such a holding would fly in the face of Article III's injury-in-fact requirement.[62]

The Court held that the only other affidavit submitted was likewise insufficient to satisfy the injury-in-fact requirement for standing:

> Respondents have identified no other application of the invalidated regulations that threatens imminent and concrete harm to the interests of their members. The only other affidavit relied on was that of Jim Bensman. He asserted, first, that he had suffered injury in the past from development on Forest Service land. That does not suffice for several reasons: because it was not tied to application of the challenged regulations, because it does not identify any particular site, and because it relates to past injury rather than imminent future injury that is sought to be enjoined.

[58]555 U.S. 488 (2009).
[59]*Id.*
[60]*Id.* at 493-494 (citations omitted; emphasis in original; alterations added).
[61]*Id.* at 494.
[62]*Id.*

> Bensman's affidavit further asserts that he has visited many National Forests and plans to visit several unnamed National Forests in the future. Respondents describe this as a mere failure to "provide the name of each timber sale that affected [Bensman's] interests." It is much more (or much less) than that. 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.[63]

This does not, as the government may contend, support the proposition that a challenge to the validity of regulations must be based on an actual application of the regulations to a specific factual situation. At the outset of its analysis, the Court's opinion makes clear that as in *Lujan*, the plaintiffs were subject to the more demanding injury-in-fact standards that apply to plaintiffs who are not the objects of the challenged government action.

Moreover, this was not the typical case brought by environmental organizations, in which the challenge is to government action that permits private parties to engage in conduct that the organizations claim will cause environmental harm. Instead, the regulations being challenged governed only the actions of the agency itself. This combination of circumstances explains why the Court held that the injury-in-fact requirement was not satisfied in this case. It found that in light of the unusual nature of the challenged regulations, the injury-in-fact requirement could be satisfied only when they were applied to a particular project.

This case does not support the more general principle that a regulation can be challenged only after it has been applied to the plaintiff bringing the challenge. That was made clear by the seminal Supreme Court decision in *Abbott Laboratories v. Gardner*,[64] which established that the APA's judicial review provisions permit pre-enforcement challenges to regulations.

B. *Susan B. Anthony List v. Driehaus*

A relatively recent Supreme Court decision in the category of pre-enforcement fear of future enforcement is *Susan B. Anthony List v. Driehaus*.[65] This case involved an Ohio statute that prohibited specified false statements during the course of a political campaign. The issue was whether the plaintiffs — the Susan B. Anthony List (SBA) and the Coalition Opposed to Additional Spending and Taxes (COAST) — satisfied the injury-in-fact requirement for standing to bring a pre-enforcement challenge to the statute, "and in particular, whether they . . . alleged a sufficiently imminent injury for the purposes of Article III."[66] The Court held that they had:

> One recurring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury. When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law. Instead, we have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent. Specifically, we have held that a plaintiff satisfies the injury-in-fact requirement where he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder."[67]

The Court concluded that the plaintiffs (petitioners) had satisfied these standards:

> SBA and COAST contend that the threat of enforcement of the false statement statute amounts to an Article III injury in fact. We agree: Petitioners have alleged a credible threat of enforcement. . . .
>
> First, petitioners have alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest." Both petitioners have pleaded specific statements they intend to make in future election cycles. . . .
>
> Next, petitioners' intended future conduct is "arguably . . . proscribed by [the] statute" they wish to challenge. . . .
>
> Finally, the threat of future enforcement of the false statement statute is substantial. Most obviously, there is a history of past enforcement here: SBA was the subject of a complaint in a recent election cycle. We have observed that past enforcement against the same conduct is good evidence that the threat of enforcement is not "'chimerical.'" . . .
>
> The credibility of that threat is bolstered by the fact that authority to file a complaint with the [Ohio Elections] Commission is not limited to a prosecutor or an agency. Instead, the false statement statute allows "any person" with

[63] *Id.* at 495 (citations and footnotes omitted; final alteration in original).

[64] 387 U.S. 136 (1967).

[65] 134 S. Ct. 2334 (2014).

[66] *Id.* at 2338.

[67] *Id.* at 2342 (citations omitted).

> knowledge of the purported violation to file a complaint. Because the universe of potential complainants is not restricted to state officials, who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents. . . .
>
> We take the threatened Commission proceedings into account because *administrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review*. . . .
>
> Although the threat of Commission proceedings is a substantial one, we need not decide whether that threat standing alone gives rise to an Article III injury. The burdensome Commission proceedings here are backed by the additional threat of criminal prosecution. We conclude that the combination of those two threats suffices to create an Article III injury under the circumstances of this case.[68]

The fact that the Court looked to the possibility of administrative action in addition to the possibility of criminal prosecution in determining that the injury-in-fact requirement was satisfied is particularly notable for the standing issue in direct APA challenges to tax regulations.

C. *MedImmune v. Genentech*

A prior Supreme Court decision cited in *Susan B. Anthony List* that is particularly relevant for the standing issue is *MedImmune Inc. v. Genentech Inc.*[69] As described by the Court, the issue in that case was as follows:

> We must decide whether Article III's limitation of federal courts' jurisdiction to "Cases" and "Controversies," reflected in the "actual controversy" requirement of the Declaratory Judgment Act, requires a patent licensee to terminate or be in breach of its license agreement before it can seek a declaratory judgment that the underlying patent is invalid, unenforceable, or not infringed.[70]

The Court began by summarizing the state of the law concerning when a declaratory judgment action will satisfy the case or controversy requirement of Article III:

> [The Court's prior decisions] do not draw the brightest of lines between those declaratory-judgment actions that satisfy the case-or-controversy requirement and those that do not. Our decisions have required that the dispute be "definite and concrete, touching the legal relations of parties having adverse legal interests"; and that it be "real and substantial" and "admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. . . . Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."[71]

The Court then summarized why there was an Article III issue in the case:

> There is no dispute that these standards would have been satisfied if petitioner had taken the final step of refusing to make royalty payments under the 1997 license agreement. . . . The factual and legal dimensions of the dispute are well defined and, but for petitioner's continuing to make royalty payments, nothing about the dispute would render it unfit for judicial resolution. . . . [T]he continuation of royalty payments makes what would otherwise be an imminent threat at least remote, if not nonexistent. As long as those payments are made, there is no risk that respondents will seek to enjoin petitioner's sales. Petitioner's own acts, in other words, eliminate the imminent threat of harm. The question before us is whether this causes the dispute to no longer to be a case or controversy within the meaning of Article III.[72]

The Court then addressed the resolution of that issue:

> Our analysis must begin with the recognition that, where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat — for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction. . . . In each of these cases, the plaintiff had eliminated the imminent threat of harm by simply not doing what he claimed the right to do (enter into a lease, or distribute handbills at the shopping center). That did not preclude

[68] *Id.* at 2343, 2344, 2345, 2346 (citations omitted; emphasis added).
[69] 549 U.S. 118 (2007).
[70] *Id.* at 120-121 (citation omitted).
[71] *Id.* at 127.
[72] *Id.* at 128 (footnote omitted).

> subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced. The dilemma posed by that coercion — putting the challenger to the choice between abandoning his rights or risking prosecution — is "a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." . . .
>
> The only Supreme Court decision in point is, fortuitously, close on its facts to the case before us. *Altvater v. Freeman* . . . held that a licensee's failure to cease its payment of royalties did not render nonjusticiable a dispute over the validity of the patent. . . . We . . . held that the declaratory-judgment claim presented a justiciable case or controversy: "The fact that royalties were being paid did not make this a 'difference or dispute of a hypothetical or abstract character.'" The royalties "were being paid under protest and under the compulsion of an injunction decree," and "[u]nless the injunction decree were modified, the only other course [of action] was to defy it, and to risk not only actual but treble damages in infringement suits." We concluded that "the requirements of [a] case or controversy are met [not only] where payment of a claim is demanded as of right and where payment is made, but where the involuntary or coercive nature of the exaction preserves the right to recover the sums paid or to challenge the legality of the claim."[73]

Thus, *MedImmune* makes clear that refraining from engaging in conduct that would result in adverse financial consequences, as opposed to a possibility of criminal prosecution, is sufficient to satisfy the injury-in-fact requirement for standing. When a plaintiff has refrained from engaging in particular conduct because it would or could result in adverse consequences for the plaintiff as a result of the challenged action by the defendant, the injury-in-fact requirement is satisfied because "the threat-eliminating behavior was effectively coerced." *MedImmune* clarifies that this is true not only when the avoided adverse consequences are the risk of criminal prosecution but also when they are merely monetary or financial.

D. *Clapper v. Amnesty International*

Clapper v. Amnesty International USA,[74] a relatively recent Supreme Court decision dealing with the injury-in-fact requirement, has generated a great deal of commentary. *Clapper* involved a constitutional challenge to a statutory provision (50 U.S.C. section 1881a) that authorizes government surveillance of communications of specified non-U.S. persons located outside the United States who are suspected of possible involvement in terrorist activities. The challenge was brought by attorneys and human rights, labor, legal, and media organizations whose work requires them to engage in sensitive communications with persons located outside the United States. The only question before the Court was whether the plaintiffs satisfied the injury-in-fact and other requirements for standing.

The plaintiffs contended that they satisfied the injury-in-fact requirement "because there is an objectively reasonable likelihood that their communications will be acquired under section 1881a at some point in the future."[75] The Court disagreed:

> Respondents' theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be "certainly impending." And even if respondents could demonstrate that the threatened injury is certainly impending, they still would not be able to establish that this injury is fairly traceable to section 1881a. As an alternative argument, respondents contend that they are suffering present injury because the risk of section 1881a-authorized surveillance already has forced them to take costly and burdensome measures to protect the confidentiality of their international communications. But respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending. We therefore hold that respondents lack Article III standing.[76]

As noted earlier, the government may argue that the cases involving a chilling effect on the exercise of First Amendment rights are distinguishable from direct APA challenges to tax regulations because the former concerns a more weighty injury than the latter. However, part of the discussion in *Clapper* suggests that any difference between these two types of injuries weighs in favor of finding standing less readily for constitutional violations:

> The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches. In keeping with the purpose of this doctrine, "[o]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an

[73] *Id.* at 128-129, 130-131 (citations omitted; emphasis added).
[74] 133 S. Ct. 1138 (2013).
[75] *Id.* at 1143.
[76] *Id.* (citations omitted; emphasis in original).

> action taken by one of the other two branches of the Federal Government was unconstitutional.'' . . . ''Relaxation of standing requirements is directly related to the expansion of judicial power,'' and we have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs.[77]

The Court believed the potential future injury claimed by the plaintiffs was too speculative to satisfy the requirement that a future injury be certainly impending:

> To establish Article III standing, an injury must be ''concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'' . . . ''Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes — that the injury is certainly impending.'' Thus, we have repeatedly reiterated that ''threatened injury must be certainly impending to constitute injury in fact,'' and that ''[a]llegations of possible future injury'' are not sufficient.
>
> Respondents assert that they can establish injury in fact that is fairly traceable to section 1881a because there is an objectively reasonable likelihood that their communications with their foreign contacts will be intercepted under section 1881a at some point in the future. This argument fails. As an initial matter, the Second Circuit's ''objectively reasonable likelihood'' standard is inconsistent with our requirement that ''threatened injury must be certainly impending to constitute injury in fact.'' Furthermore, respondents' argument rests on their highly speculative fear that: (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under section 1881a rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will conclude that the Government's proposed surveillance procedures satisfy section 1881a's many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) [plaintiffs] will be parties to the particular communications that the Government intercepts. As discussed below, [plaintiffs'] theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending. Moreover, even if respondents could demonstrate injury in fact, the second link in the above-described chain of contingencies — which amounts to mere speculation about whether surveillance would be under section 1881a or some other authority — shows that respondents cannot satisfy the requirement that any injury in fact must be fairly traceable to section 1881a.[78]

In contrast to the ''highly attenuated chain of possibilities'' required to conclude that the plaintiffs in *Clapper* would in fact suffer any injury, there is no uncertainty that if a taxpayer-plaintiff engaged in the type of transaction to which challenged regulations would apply, it would suffer the adverse tax consequences of those regulations. And those adverse tax consequences would represent the reason why the taxpayer refrained from engaging in the transaction.

The Court in *Clapper* held that the plaintiffs could not gain any benefit from prior cases, such as *Laidlaw* and *Keene*, in which the plaintiffs suffered an injury sufficient to satisfy the injury-in-fact requirement by refraining from activity in which they would have engaged but for the challenged action:

> None of these cases holds or even suggests that plaintiffs can establish standing simply by claiming that they experienced a ''chilling effect'' that resulted from a governmental policy that does not regulate, constrain, or compel any action on their part.[79]

Thus, as in *Laird* and *Lyons*, and in contrast to *Laidlaw* and *Keene*, the plaintiffs in *Clapper* did not rely on allegations that they were refraining from specific conduct because of the adverse consequences that would or could result from engaging in it because of the challenged action. The plaintiffs in this case were clearly not among the objects of the government action they were challenging. The government action at issue did ''not regulate, constrain, or compel any action on their part.''

The Court described the difference between *Keene* and *Clapper* as follows:

> Unlike the present case, *Keene* involved ''more than a 'subjective chill''' based on speculation about potential governmental action; the

[77] *Id.* at 1146-1147 (citations omitted; emphasis added).

[78] *Id.* at 1147-1148 (citations omitted; alterations added).

[79] *Id.* at 1153.

> plaintiff in that case was unquestionably regulated by the relevant statute, and the films that he wished to exhibit had already been labeled as "political propaganda."[80]

It is significant that the Court described the plaintiff in *Keene* as "unquestionably regulated by the relevant statute," even though he had refrained from engaging in the activity that would have made him subject to the statutory requirements he was challenging. A taxpayer bringing a direct APA challenge to tax regulations should also be considered "unquestionably regulated by the relevant statute."

The commentary on *Clapper* focuses on the fact that in a footnote, the majority seemed to have relaxed somewhat the "certainly impending" requirement for an alleged future injury to be an injury in fact as articulated in the main text of the opinion, based on prior case law:

> Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a "substantial risk" that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm. But to the extent that the "substantial risk" standard is relevant and is distinct from the "clearly impending" requirement, respondents fall short of even that standard, in light of the attenuated chain of inferences necessary to find harm here. In addition, plaintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm. Plaintiffs cannot rely on speculation about "'the unfettered choices made by independent actors not before the court.'"[81]

In contrast to the situation in *Clapper*, in a direct APA challenge to tax regulations, no "unfettered choices made by independent actors not before the court" are necessary to establish the adverse tax consequences that would result for the taxpayer if it in fact engaged in the type of transaction to which the challenged regulations would apply. Instead, the adverse tax consequences would be certain to occur if the regulation were upheld.

Thus, as with *Laird* and *Lyons*, the situation in *Clapper* was substantially different from a direct APA challenge to tax regulations. Like those earlier cases, *Clapper* would provide no support for the likely government position that a taxpayer making this type of challenge would not satisfy the injury-in-fact requirement for standing.

IX. 'Zone of Interests'

The Supreme Court has said that in addition to the three standing requirements described in *Lujan*, there are prudential standing requirements that a plaintiff must satisfy in order for it to be appropriate for a federal court to hear the case. A recent decision, *Lexmark International Inc. v. Static Control Components Inc.*,[82] clarified a relevant portion of the prudential standing concept. The Court, in an opinion by Scalia, first described the state of the law:

> In recent decades . . . we have adverted to a "prudential" branch of standing, a doctrine not derived from Article III and "not exhaustively defined" but encompassing (we have said) at least three broad principles: "'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'"[83]

The *Lexmark* decision held that the zone-of-interests test should not be considered an aspect of prudential standing and should instead be viewed differently:

> Static Control . . . argues that we should measure its "prudential standing" by using the zone-of-interests test. Although we admittedly have placed that test under the "prudential" rubric in the past, it does not belong there. . . . Whether a plaintiff comes within "the 'zone of interests'" is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim. As Judge [Laurence] Silberman of the D.C. Circuit recently observed, "'Prudential standing' is a misnomer" as applied to the zone-of-interests analysis, which asks whether "this particular class of persons ha[s] a right to sue under this substantive statute."[84]

The Court made clear that the reason it is improper to consider the zone-of-interests test an element of prudential standing is that although

[80] *Id.*
[81] *Id.* at 1150 n.5 (citations omitted).
[82] 134 S. Ct. 1377 (2014).
[83] *Id.* at 1386.
[84] *Id.* at 1387 (citations and footnote omitted).

courts have discretion regarding prudential concepts, the zone-of-interests test, properly conceptualized, is a matter of pure statutory construction — an area in which courts do not exercise discretion:

> In sum, the question this case presents is whether Static Control falls within the class of plaintiffs whom Congress has authorized to sue under [15 U.S.C.] section 1125(a). In other words, we ask whether Static Control has a cause of action under the statute. That question requires us to determine the meaning of the congressionally enacted provision creating a cause of action. In doing so, we apply traditional principles of statutory interpretation. We do not ask whether in our judgment Congress should have authorized Static Control's suit, but whether Congress in fact did so. Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because "prudence" dictates.[85]

The Court in *Lexmark* noted that the zone-of-interests test originated in a 1970 decision, *Association of Data Processing Service Organizations Inc. v. Camp*,[86] "as a limitation on the cause of action for judicial review conferred by the Administrative Procedure Act."[87] That 1970 opinion phrased the test as follows:

> The question of standing . . . concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. Thus the Administrative Procedure Act grants standing to a person "aggrieved by agency action within the meaning of a relevant statute."[88]

The Court in the *Lexmark* decision elaborated on the zone-of-interests test as follows:

> We have said, in the APA context, that the test is not "'especially demanding.'" In that context we have often "conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff," and have said that the test "forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that'" Congress authorized that plaintiff to sue. That lenient approach is an appropriate means of preserving the flexibility of the APA's omnibus judicial-review provision, which permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review.[89]

In a non-transaction challenge to tax regulations, the proper application of the zone-of-interests test would seem to be as follows. The plaintiff would typically contend that the regulations are invalid under step one of the two-step *Chevron*[90] test, either because they are inconsistent with the terms of the statute that they purport to be interpreting or because they exceed the terms of a specific statutory grant of authority for the agency to issue regulations. A taxpayer making that challenge should satisfy the zone-of-interests test because in either case, the regulations would be prescribing adverse tax consequences that are outside the boundaries established by the relevant code provision. That is, the statutory provision sets boundaries that include specific transactions and exclude others.

A taxpayer that would be harmed by such an improper extension of the adverse tax consequences would be within the zone of interests for those who could legitimately complain in federal court of being aggrieved by the agency action. By establishing boundaries within which the adverse tax consequences are to apply, the statutory provision also implicitly requires that they not apply outside those boundaries. A taxpayer that engages in a transaction falling outside those prescribed boundaries is within the zone of interests that the statutory provision is meant to protect.

X. D.C. Circuit Cases

The Supreme Court decisions discussed in earlier sections of this report establish the general principles relevant in evaluating whether a taxpayer that challenges a tax regulation without having engaged in any transactions to which it would apply satisfies the injury-in-fact requirement for standing. However, lower court decisions applying these general principles in similar contexts are also illuminating. Because the D.C. Circuit hears a disproportionately large number of cases involving

[85] *Id.* at 1387-1388 (citations and footnote omitted).
[86] 397 U.S. 150 (1970).
[87] 134 S. Ct. 1388.
[88] 397 U.S. at 153 (quoting 5 U.S.C. section 702).
[89] 134 S. Ct. at 1389 (citations omitted).
[90] *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

challenges to agency actions, its decisions on application of the injury-in-fact requirement to preenforcement challenges are particularly relevant.

A recent decision, *National Association of Home Builders v. EPA*,[91] provides a good window into the D.C. Circuit's case law on standing. The majority concluded that the panel was bound by the circuit's prior decision in the same case,[92] which held that the plaintiffs did not satisfy the injury-in-fact requirement. However, a concurring opinion in the second case by two of the three judges on the panel included a good discussion of relevant D.C. Circuit case law addressing the injury-in-fact requirement.

The concurring opinion, written by Judge Laurence H. Silberman and joined by Judge David B. Sentelle, took the position that the prior panel's opinion in the case was inconsistent with D.C. Circuit case law on the injury-in-fact requirement. Although the D.C. Circuit denied the plaintiffs' petition for rehearing *en banc* in this second case, the grounds set forth in that petition were entirely different from the reasons expressed in the concurring opinion for disagreeing with the outcome in the case.

As a result, the denial of the petition should not be viewed as a rejection by the full D.C. Circuit of the views expressed in the concurring opinion. Moreover, Silberman and Sentelle did not request a vote on whether the petition should be granted.[93] Presumably, they would have done so if the petition had been grounded on the same rationale that was expressed in the concurring opinion.

In this case, trade organizations representing home builders challenged a determination by the Environmental Protection Agency and the Army Corps of Engineers that two stretches of the Santa Cruz River in southern Arizona constitute ''traditional navigable waters,'' thus bringing them within the regulatory authority of the agencies under the CWA. The discharge of any pollutant into navigable waters is prohibited by the CWA unless the person making the discharge has received a permit from the agencies to do so.

The home builders associations filed suit in D.C. district court, challenging the determination on the grounds that the agencies hadn't followed the APA's notice and comment requirements for rulemaking and that the determination was substantively unlawful. The challenge concerned the determination's effect in giving the agencies jurisdiction over dry desert washes, arroyos, and other water features of the Santa Cruz River watershed.

Some members of the home builders associations owned real estate in the watershed that they wished to develop. The associations contended that the injury-in-fact requirement for standing was satisfied because the navigability determination made it more likely that those landowners would need permits for the discharges that would be necessary in developing the land.

The panel's opinion in the first case concluded that the injury-in-fact requirement would not be satisfied until the agencies made jurisdictional determinations of navigable waters status for specific water features that directly implicated the land owned by the association members. There had been no such determinations, it said.[94]

The panel's opinion in the second case concluded that there had been no material changes in the facts since the first decision and that it thus controlled the result. The panel noted that there are procedures under which landowners can obtain jurisdictional determinations by the agencies of whether their property is subject to the navigable waters restrictions on pollutant discharges under the CWA.

The panel observed that none of the specific properties on which the associations relied for standing is in fact located on the Santa Cruz River or directly affected by the navigable waters determination under challenge. The panel further noted that there had been no showing of landowner plans for imminent discharges of pollutants for the specific properties. Based on all those considerations, the panel concluded that the prior case's holding on standing was controlling.

Concurring, Silberman maintained that the first decision had been incorrect in its application of the injury-in-fact requirement:

> Our prior opinion concluded that appellants lacked standing to challenge the alleged rule until the government took official action to assert authority over a member of appellants' associations. I believe that reasoning conflates

[91]786 F.3d 34 (D.C. Cir. 2015).

[92]667 F.3d 6 (D.C. Cir. 2011).

[93]While both these judges had senior status when the opinion was issued, senior judges have some degree of participation in connection with petitions for rehearing *en banc* when they were on the panel that heard the case. They may request a vote on whether the petition should be granted, although they are ineligible to participate in that vote. However, if the petition is granted, they are eligible to participate in the *en banc* rehearing. D.C. Circuit, *Handbook of Practice and Internal Procedures* 58-59 (June 1, 2015).

[94]In two cases from other circuits in which jurisdictional determinations were in fact obtained by the affected property owners, the circuits disagreed on whether they constituted final agency action and were thus reviewable under the APA. *See National Association of Home Builders*, *supra* note 91, at 38 n.3.

the appropriate standing analysis for an adjudicatory challenge and a challenge to a rulemaking. The latter asks only whether parties are likely covered by the regulation — or purported regulation — not whether the government has actually started an enforcement action or officially asserted a right to do so.[95]

Thus, Silberman viewed the first decision as inconsistent with the general principle that parties whose behavior will be affected by an agency regulation satisfy the injury-in-fact requirement for standing without any need to wait until the agency attempts to enforce the regulation against them. His concurring opinion continued:

> Of course, for standing purposes, we must assume the validity of appellants' challenge on the merits; i.e., we must assume that when the EPA issued a "determination" asserting that more than 50 miles of the Santa Cruz River were designated as traditional navigable waters, it should have done so through a traditional rulemaking under section 553 of the APA. This designation — it is undisputed — affected the entire watershed of the Santa Cruz River, roughly 8,600 square miles, which means that developers were more likely to encounter regulatory obstacles to development. That is because the agency is bound to apply the designation in individual jurisdictional determinations and permitting decisions. . . .
>
> To reiterate, in asking whether appellants have standing, the question is exactly the same as asking whether they would have had standing to challenge this legal position if it were embodied in an APA rule.
>
> And the law is rather clear; any party covered by an agency's regulatory action has standing to challenge a rule when it issues — it certainly need not wait until a government agency seeks to enforce a rule. *See Chamber of Commerce v. Fed. Election Comm'n*, 69 F.3d 600, 604 (D.C. Cir. 1995). That proposition is so clearly established it is beyond question. Nor do parties have to wait until the government takes preliminary steps before enforcing — clearing its throat, so to speak. It is only necessary for a potential litigant to show that it is part of the regulated class and its behavior is likely affected by the government's action.[96]

Clearly relevant in this passage is the proposition that a party challenging a regulation may satisfy the injury-in-fact requirement by showing that "its behavior is likely affected by the government's action." The taxpayer in a direct APA challenge to tax regulations is affected by the government's action because it is refraining from engaging in a transaction to which they would apply and, in their absence, it would not do so.

Silberman's concurring opinion continued as follows, citing many prior D.C. Circuit opinions supporting the general principle set forth above:

> Although it is not determinative, by virtue of the regulation, that a particular landowner is affected by the rule, it is fair to assume that a local developer would potentially fall into that category. *See JEM Broad. Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994) (holding that any person or entity within the class affected by the FCC's "hard look" rules, that is, actual or potential license applicants, had standing to challenge the rules as illegally promulgated). Essentially that was the position of appellants representing developers in our primary case.
>
> I think that would have sufficed for standing under our cases. *See Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1286-87 (D.C. Cir. 2005) ("[I]t is fairly 'self-evident' that the various appellants as representatives of the regulated parties . . . [have] Article III standing"); *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002) (if a petitioner is an object of the agency action or is directly affected by it — as is the case usually in a rulemaking — there should be little question that it has standing); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733-34 (D.C. Cir. 2003) (standing can be self-evident when the challenged rule directly regulates the disposition of a petitioner's property); *Sabre, Inc. v. Dep't of Transp.*, 429 F.3d 1113, 1119 (D.C. Cir. 2005) (previously unregulated independent computer reservation system operator had standing to challenge an FAA regulation that subjected it to the Department's regulatory authority); *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 93 (D.C. Cir. 2005) (congressmen had standing to launch a conventional administrative law claim, i.e., a facial challenge to allegedly invalid regulations affecting their interests); *Am. Trucking Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 247 (D.C. Cir. 2013) (an association created to promote and protect the interests of the trucking industry had representational standing because it had an obvious interest in challenging a rule that directly and negatively impacts its members); *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1401 (D.C. Cir. 1998) (omitting mention of standing (surely

[95]*Id.* at 44 (Silberman, J., concurring).
[96]*Id.*

> because it was so obvious), allowing trade association whose members engage in dredging and excavation to mount a facial challenge to the Corps' amendment of a regulation defining section 404's term "discharge of dredged material").[97]

The highly factual nature of whether particular land is subject to the navigable waters restrictions on pollutant discharges under the CWA makes it easy to distinguish these CWA cases from a direct APA challenge to tax regulations. Although there will often be factual issues in applying tax regulations to particular taxpayer situations, they will usually be secondary to the legal issues concerning the validity of the regulations.

While the result in these two CWA cases is thus distinguishable, Silberman's citation of the many D.C. Circuit decisions addressing the injury-in-fact requirement in pre-enforcement challenges to agency regulations is clearly relevant to the application of that requirement in a direct APA challenge to tax regulations. Some of those cited opinions warrant individual discussion.

For example, in *Sierra Club v. EPA*,[98] the D.C. Circuit noted that "in many if not most cases the petitioner's standing to seek review of administrative action is self-evident."[99] Regarding the Supreme Court's statement in *Lujan* that when the plaintiff is an object of the action (or forgone action) at issue, there should be "little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it," the D.C. Circuit noted in *dictum* that this "is the case usually in review of a rulemaking and nearly always in review of an adjudication."[100]

Silberman also cited *Fund for Animals Inc. v. Norton*,[101] a case in which organizations alleged that the Interior Department Fish and Wildlife Service violated federal law by failing to list argali sheep in Mongolia as an endangered species and by issuing permits for sport hunters to import killed argali sheep into the United States. The Natural Resources Department (NRD) of Mongolia's Ministry of Nature, Environment, and Tourism sought to intervene in support of the Fish and Wildlife Service.

The D.C. Circuit began by noting that a party that seeks to intervene in a case must show that it satisfies the constitutional requirements for standing:

> As we have explained, "because a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit, he must satisfy the standing requirements imposed on those parties."[102]

The NRD contended that it satisfied the injury-in-fact requirement and the other requirements for standing because fees paid by sport hunters are the primary source of funding for its argali conservation program, and those revenues would decline if American hunters were barred from bringing their trophies home because some of them would no longer travel to Mongolia to hunt the argali.[103]

The court agreed with this argument:

> The NRD's argument is persuasive. The threatened loss of tourist dollars, and the consequent reduction in funding for Mongolia's conservation program, constitute[s] a concrete and imminent injury.[104]

The court then quoted the observations from *Sierra Club* regarding the Supreme Court's statement in *Lujan* that when the plaintiff is an object of the government action being challenged, "there should be 'little question that the action or inaction has caused him injury,'"[105] — namely, that "in many if not most cases the petitioner's standing to seek review of administrative action is self-evident"[106] and that this "is the case usually in review of a rulemaking and nearly always in review of an adjudication."[107]

The court applied those principles as follows regarding the NRD:

> In this case, while the NRD is not itself the object of the challenged agency action, sheep

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[97] *Id.* at 44-45.
[98] 292 F.3d 895 (D.C. Cir. 2002).
[99] *Id.* at 899-900.
[100] *Id.* at 900.
[101] 322 F.3d 728 (D.C. Cir. 2003).
[102] *Id.* at 732. It is easier to understand this position when a party seeks to intervene in support of the plaintiff in a case than when, as here, it seeks to intervene in support of the defendant, because standing is a requirement imposed on the original plaintiff but not on the original defendant. However, even for a party seeking to intervene in support of the plaintiff, requiring the potential intervenor to satisfy the constitutional standing requirements is not obviously sensible in light of the rule that they are met in a case as long as any one of the plaintiffs can satisfy them. It is not necessary for each plaintiff in a case to satisfy those requirements, as long as at least one of them does. *See, e.g., Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) ("For each claim, if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim."). Thus, if the original plaintiff in a case satisfies the standing requirements, it is hard to see why an intervenor supporting the original plaintiff should also have to satisfy them.
[103] *Id.* at 733.
[104] *Id.*
[105] *Id.* at 734.
[106] *Sierra Club*, 292 F.3d at 899-900.
[107] *Id.* at 900.

> that Mongolia regards as its national property and natural resource plainly are its subject. And for the purpose of determining whether standing is self-evident, we see no meaningful distinction between a regulation that directly regulates a party and one that directly regulates the disposition of a party's property.[108]

Sierra Club and *Fund for Animals* do not address a situation in which a plaintiff challenging an agency regulation has refrained from engaging in conduct to which it would apply. However, they do support the principle that when a plaintiff is in the general category of regulated parties that might engage in conduct to which a particular agency regulation would apply, that plaintiff is an object of the regulation within the meaning of *Lujan* and thus is almost certain to satisfy the injury-in-fact requirement for standing.

A third D.C. Circuit opinion cited in Silberman's concurring opinion in *National Association of Home Builders* is *Sabre Inc. v. Department of Transportation*.[109] Challenged in that case was a Department of Transportation rule stating that an independent computer reservation system (CRS) not owned by an air carrier or foreign air carrier is a ticket agent as defined by the Federal Aviation Act (FAA) and thus subject to regulation by the department under section 411 of the FAA. Sabre Inc., an independent CRS unconnected to an airline, contended that it was not a statutory ticket agent and asked that the relevant portions of the rule be set aside.

The department asserted that Sabre did not satisfy the injury-in-fact requirement for standing. The D.C. Circuit disagreed:

> Although no regulations promulgated by the Department currently constrain Sabre's business activity and no relevant enforcement actions are pending against any independent CRS, we hold that Sabre has standing in view of the combination of three circumstances. In the Final Rule, the Department claims that it has jurisdiction over independent CRSs under section 411; its statements indicate a very high probability that it will act against a practice that Sabre would otherwise find financially attractive; and it has statutory authority to impose daily civil penalties on Sabre for violation of section 411, which the Department plausibly asserts it may enforce without prior warning by rulemaking or cease-and-desist order.[110]

The D.C. Circuit's decision in *Sabre* provides strong support for the conclusion that the injury-in-fact requirement for standing is satisfied when a taxpayer challenges the validity of tax regulations that do not apply to any transaction it has engaged in but it has refrained from engaging in any such transaction because of the adverse tax consequences that would result under the challenged regulations. The D.C. Circuit in *Sabre* held that the injury-in-fact requirement was satisfied because the government action that was challenged hurt the challenger's ability to engage in business practices it would otherwise have engaged in:

> We conclude that Sabre has demonstrated a sufficiently concrete and particularized injury in fact due to the Final Rule's immediate impact on Sabre's ability to make business decisions about the products it will offer in the market. . . .
>
> The Department's statements, taken as a whole, indicate a very high probability that it will act against a practice that Sabre would otherwise find financially attractive, namely the sale of display bias. . . .
>
> In addition, Sabre has established that this injury is actual, not conjectual or hypothetical. Sabre has proffered evidence in a sealed supplemental declaration that confirms the present existence of marketing plans, which it could otherwise implement presumably at considerable profit, that might very well result in enforcement actions and consequent civil fines.[111]

The case for concluding that the injury-in-fact requirement is satisfied is even stronger for direct APA challenges to tax regulations. The regulations have already been issued, and there is no uncertainty that adverse tax consequences would follow from engaging in a transaction to which they would apply. In contrast, the regulation in *Sabre* merely asserted jurisdiction over the party making the challenge; it did not itself impose direct and immediate adverse consequences. However, the court held that the high likelihood of action by the agency that would produce adverse consequences if Sabre engaged in the business practice at issue was sufficient to satisfy the injury-in-fact requirement.

XI. Conclusion

When taxpayers bring direct district court challenges to tax regulations under the APA without having engaged in any transactions to which they

[108] *Fund for Animals*, 322 F.3d at 734.
[109] 429 F.3d 1113 (D.C. Cir. 2005).
[110] *Id.*
[111] *Id.* at 1117, 1118.

would apply, it can be anticipated that the government will argue that those taxpayers do not satisfy the injury-in-fact requirement for standing. However, as discussed in this report, the relevant case law provides ample support for the conclusion that the injury-in-fact requirement would be satisfied in those cases.

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