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MONSANTO V. GEERTSON FARMS: CONGRESSIONAL INTENT, JUDICIAL INFIDELITY, AND THE NATIONAL ENVIRONMENTAL POLICY ACT

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INTRODUCTION

In April 2010, the Supreme Court heard oral argument in *Monsanto Co. v. Geertson Seed Farms*,¹ a challenge by organic alfalfa growers to the Animal and Plant Health Inspection Service's ("APHIS") decision to deregulate a particular variety of genetically engineered alfalfa.² Among other things, the growers argued that APHIS's deregulation decision was invalid for failure to comply with the National Environmental Policy Act ("NEPA").³ The growers alleged that the agency failed to conduct an Environmental Impact Statement ("EIS"), which NEPA requires for most major federal agency actions.⁴ They alleged that the agency improperly found that its deregulation decision would have "No Significant Impact."⁵

By a vote of 7–1,⁶ the Supreme Court ruled against the organic and traditional growers. In the wake of the decision, the Court's explication of the proper standard for granting preliminary injunctive/equitable relief has drawn the most attention from commentators.⁷ Less noted, but perhaps just as important, was the Court's interpretation of NEPA. Specifically, the Court interpreted NEPA so as to implicitly expand the "zone of interests" protected under the EIS requirement.⁸ Prior to *Monsanto*, it appeared clear that the sole purpose of the EIS requirement was to prevent avoidable

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¹ 130 S. Ct. 2743 (2010).

² *Monsanto*, 130 S. Ct. at 2743.

³ *Monsanto*, 130 S. Ct. at 2750–51. See generally 42 U.S.C. §§ 4321–4370 (2006).

⁴ *Monsanto*, 130 S. Ct. at 2750.

⁵ *Id.* at 2750–51.

⁶ Justice Stevens filed a dissenting opinion. Justice Breyer took no part in the decision. *Id.* at 2748.

⁷ See, e.g., Anthony Disarro, *Freeze Frame: The Supreme Court's Reaffirmation of the Substantive Principles of Preliminary Injunctions*, 47 GON. L. REV. 51, 84 (2011); Nate Hausman, Note, *Monsanto Co. v. Geertson Seed Farms: Breathing a Sigh of Equitable Relief*, 25 TUL. ENVTL. L.J. 155, 180–203 (2011).

⁸ See *Monsanto*, 130 S. Ct. at 2755–56.

environmental harms. Yet as *Monsanto* interpreted NEPA, the EIS requirement also protects the interest of plaintiffs who assert purely economic injuries.⁹ Under *Monsanto*, plaintiffs with no environmental interests whatsoever will be able to challenge agency decisions regarding the execution of an EIS.¹⁰

This Note argues that the Court's interpretation of NEPA runs counter to Congressional intent in ways that could ultimately undermine NEPA's efficacy. Congress designed the EIS requirement to increase intragovernmental focus on the potential environmental effects of proposed federal action.¹¹ By expanding the base of plaintiffs eligible to challenge agency EIS decisions to those asserting only economic or commercial injuries, the Court "risk[ed] that the outcome could, even assuming technical fidelity to law, in fact thwart the congressional goal."¹² NEPA is unambiguous in its aim: the prevention of unnecessary environmental harms. The Court risks doing violence to this purpose by authorizing plaintiffs to use NEPA as a shield from economic competition.

Part I of this Note provides some historical and legal context for the *Monsanto* decision. Part I.A reviews the history and policy goals of NEPA and the EIS requirement. Part I.B tracks the Court's approach to the "zone of interests" test and its application to NEPA. Part I.C examines the factual and procedural history leading up to *Monsanto*. Part I.D looks more closely at the decision itself. More precisely, Part I.D examines the standing aspect of the Court's decision, as applied to NEPA.

Part II of this Note argues that the Court's ruling has broader implications for judicial application of NEPA, the EIS requirement, and future federal agency action. Part II.A argues that despite Justice Alito's aversions to the contrary, his majority opinion clearly expanded the base of plaintiffs eligible to challenge agency EIS decisions. Part II.B argues that *Monsanto* runs counter to Congressional intent. Congress never intended for NEPA to act as a statutory shield to commercial competition. Rather, Congress intended only to prevent unnecessary environmental harm. By expanding the statute beyond its intended scope, the Court risks doing violence to NEPA's ultimate purpose. Finally, Part II.C argues that

⁹ *Id.*

¹⁰ *Id.*

¹¹ See 42 U.S.C. § 4332; *Marsh v. Oregon Natural Res. Def. Council*, 490 U.S. 360, 370–74 (1989).

¹² See *Hazardous Waste Treatment Council v. EPA* ("*HWTC II*"), 861 F.2d 277, 283 (D.C. Cir. 1988) (noting that "judicial intervention may defeat statutory goals if it proceeds at the behest of interests that coincide only accidentally with those goals").

the Court missed an opportunity to clarify its own confused standing doctrine regarding environmental injuries. In a prior opinion, Justice Breyer outlined an alternative approach to environmental injury: the “realistic threat” test.¹³ Had the *Monsanto* Court taken Justice Breyer’s approach, it could have adequately protected environmental interests, limited the ability of economic competitors to bring suit under NEPA, and clarified the Court’s standing doctrine. This Note argues that the *Monsanto* Court missed an opportunity to adopt the “realistic threat” test.

I. NEPA, STANDING, AND THE MONSANTO DECISION

A. *An Overview of the National Environmental Policy Act and the Environmental Impact Statement Requirement*

The National Environmental Policy Act went into effect in 1970.¹⁴ Its enactment was the product of growing Congressional concern during the 1960s over national environmental deterioration.¹⁵ The statute’s authors stated its goals in sweeping terms, declaring it the policy of the United States,

[T]o use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.¹⁶

The legislative history of NEPA reflects its drafters’ concern with mitigating environmental damage. Principally, they were concerned with the effects of economic development and the indifference of federal agencies to these effects.¹⁷ Their concern is evidenced by a report the House

¹³ *Summers v. Earth Island Inst.*, 555 U.S. 488, 501–10 (2009) (Breyer, J., dissenting).

¹⁴ Pub. L. No. 91-190 § 2 (1970) (codified as amended at 42 U.S.C. § 4321 (2006)).

¹⁵ William L. Andreen, *In Pursuit of NEPA’s Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND. L.J. 205, 212 (1989).

¹⁶ 42 U.S.C. § 4331(a).

¹⁷ Andreen, *supra* note 15, at 205. *See also* *Geertson Seed Farms v. Johanns*, No. C 06-01075 CRB, 1, 19 (N. D. Cal., 2007) (mem.), *rev’d sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), available at <http://www.aphis.usda.gov/biotechnology>

Subcommittee on Science and Aeronautics published prior to NEPA's passage. In that report, the subcommittee detailed the danger that unrestrained pursuit of economic development posed to the environment.¹⁸ The subcommittee report found that "[our] well intentioned but poorly informed society is haphazardly deploying a powerful, accelerating technology in a complex and somewhat fragile environment. The consequences are only vaguely discernible."¹⁹ The subcommittee report concluded that one way to mitigate these consequences was to require federal agencies to collect additional scientific data before undertaking major projects.²⁰

NEPA pursues its goals through certain procedural requirements; principally the Environmental Impact Statement requirement.²¹ The EIS requirement reflects Congress's concern with ensuring that agencies act with complete and accurate information.²² The statute requires federal agencies to prepare an EIS for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment."²³ Specifically, NEPA provides that:

The Congress authorizes and directs that, to the fullest extent possible . . . (2) all agencies of the Federal Government shall . . . (C) include in every recommendation [for] . . . Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and

/downloads/alfalfa/gealfalfa_Feb07_courtdecision.pdf ("NEPA is our basic national charter for protection of the environment. NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.") (internal citations and quotations omitted).

¹⁸ Andreen, *supra* note 15, at 212 (citing SUBCOMM. ON SCIENCE, RESEARCH AND DEV. TO THE HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, 90TH CONG., 2D SESS., MANAGING THE ENV'T. 1–3 (1968)).

¹⁹ *Id.*

²⁰ *Id.*

²¹ See 42 U.S.C. § 4332(2)(C) (2006).

²² See *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989).

²³ 42 U.S.C. § 4332(2)(C).

the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.²⁴

The EIS thus serves as the mechanism through which Congress ensures that agencies consider and report the expected environmental impacts of their actions before moving forward.²⁵ Specifically, the agency must explain the “purpose and need for a proposed action, describe[] the affected environment, identif[y] and examine[] alternatives . . . [and] analyze[] the environmental impacts and consequences of each alternative”²⁶ The agency must also consider “appropriate mitigation measures.”²⁷

The EIS is a purely procedural requirement. That is, it requires the agency to fully consider the impact of its proposed action, but does not mandate any particular substantive outcome.²⁸ In the words of one observer, NEPA simply “inject[s] environmental concerns into the calculus of federal decisionmaking.”²⁹ Thus, when reviewing the actions of federal agencies, courts must strike a balance between enforcing NEPA’s procedural mandates while avoiding undue interference with the agency’s substantive decisions.³⁰

However, to say that the EIS requirement is “procedural” is not to denigrate the critical role it plays in implementing Congress’s sweeping environmental goals. Rather, the EIS requirement is arguably the “linchpin” of NEPA’s statutory structure.³¹ The EIS requirement ensures that federal agencies carefully examine the environmental impacts of

²⁴ *Id.*

²⁵ *See id.*

²⁶ Kenneth J. Warren, *Judicial Review Under NEPA: A Look at Two Recent Decisions*, THE LEGAL INTELLIGENCER 1 (Jul. 15, 2010), <http://www.hangleyley.com/ufiles/judicial-review-under-nepa-eprint.pdf?phpMyAdmin=322c4d6299c6t40879e47&phpMyAdmin=YWw3mr2zITNeJsyIpdcoIwbjDu6>.

²⁷ *Id.*

²⁸ *Id.*; *see also* Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 371 (1989) (“NEPA does not work by mandating that agencies achieve particular substantive environmental results. Rather, NEPA promotes its sweeping commitment to prevent or eliminate damage to the environment and biosphere by focusing Government and public attention on the environmental effects of proposed agency action.”) (internal citations and quotations omitted).

²⁹ Andreen, *supra* note 15, at 206.

³⁰ Warren, *supra* note 26, at 1.

³¹ Andreen, *supra* note 15, at 207.

their actions.³² An EIS serves as evidence that the agency has taken a “hard look” at those impacts.³³ In this way, the EIS requirement ensures that “the ambitious goals of NEPA do not wither at the hands of administrative hostility or passivity.”³⁴

B. A Review of Article III Standing Doctrine and the “Zone of Interests” Requirement

Article III of the United States Constitution limits the federal judiciary’s function by requiring an actual “case or controversy” as a predicate to the exercise of judicial power.³⁵ The U.S. Supreme Court has derived its standing doctrine from this “case or controversy” requirement.³⁶ In *Lujan v. Defenders of Wildlife*,³⁷ the Court explained that standing doctrine requires would-be plaintiffs to show (1) injury-in-fact, (2) causation, and (3) redressability.³⁸ These requirements are constitutionally founded and non-waivable.³⁹ Congress cannot abrogate Article III standing requirements.⁴⁰

In addition to Article III’s requirements, the Supreme Court has developed certain “prudential” requirements.⁴¹ Prudential requirements are not constitutionally based, and so are subject to Congressional

³² *See id.*

³³ *Id.*

³⁴ *Id.*

³⁵ U.S. CONST. art. III § 2 cl. 1.

³⁶ *E.g.*, *Ass’n Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151 (1970) (noting that “the question of standing in the federal courts is to be considered in the framework of Article III which restricts judicial power to ‘cases’ and ‘controversies’”).

³⁷ 504 U.S. 555 (1992).

³⁸ *Id.* at 560 (“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 . . . traceable to the challenged action of the defendant, and not . . . the 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.’”) (internal citations and brackets omitted).

³⁹ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 63 (3d. ed. 2006).

⁴⁰ *Id.*

⁴¹ *Data Processing*, 397 U.S. at 154 (describing prudential requirements as “rule[s] of self-restraint”).

abrogation.⁴² Among these requirements is the “zone of interests” requirement. Also referred to as “statutory standing,”⁴³ the “zone of interests” test is, at bottom, a method by which courts limit the scope of a statute to fit Congressional intent.⁴⁴ In other words,

Congress often fails to specify who may and who may not invoke the power of the courts to enforce the terms of a statute. It follows that the judiciary has to supply a principle by which to infer Congress’s intent on that often critical question. The zone of interests test is the result.⁴⁵

The Supreme Court has applied the “zone of interests” test liberally while remaining focused on effecting Congressional intent. In *Association of Data Processing Service Organizations v. Camp*, the Court explained that the question under the zone of interests test is “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.”⁴⁶ This is not a particularly demanding requirement,⁴⁷ as the facts of *Data Processing* indicate. That case involved the question of who had standing to sue under the Bank Service Corporation Act (“BSCA”).⁴⁸ In broad terms, BSCA prohibits banks from engaging in certain non-banking activities.⁴⁹ The petitioners were a group of data processing services. They sought standing to challenge a decision by the Office of the Comptroller of the Currency, which permitted national banks to provide data processing services.⁵⁰ The Court found that the petitioners had standing.⁵¹ Reading the statute liberally, the Court found that Congress “arguably” intended to protect

⁴² *Id.* (“Congress can, of course, resolve the question one way or another, save as the requirements of Article III dictate otherwise.”).

⁴³ See generally Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 OKLA. L. REV. 89 (2009).

⁴⁴ *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 921–22 (D.C. Cir. 1989) (citing *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 400 (1987)).

⁴⁵ *Id.* at 921–22.

⁴⁶ *Data Processing*, 397 U.S. at 153.

⁴⁷ See *Greer v. Ill. Hous. Dev. Auth.*, 524 N.E.2d 561, 574 (Ill. 1988) (citing CHARLES KOCH, ADMINISTRATIVE LAW AND PRACTICE § 10.9, 170 (1985) (arguing that the zone of interests test has proven to be a “feeble barrier to standing.”)).

⁴⁸ See generally *Data Processing*, 397 U.S. 150 (1970). See also 12 U.S.C. §§ 1861–1867 (2006).

⁴⁹ *Data Processing*, 397 U.S. at 155.

⁵⁰ *Id.* at 151.

⁵¹ *Id.* at 158.

competitors' interests under the statute.⁵² This was enough to pass the zone of interests test.⁵³

Similarly, in *Clarke v. Securities Industry Association*, the Court explained that it would deny standing under the "zone of interests" test only when "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress intended to permit the suit."⁵⁴ The Court held that Congress need not express a specific intent to benefit a particular future plaintiff.⁵⁵ Rather, the crucial element is what interest the plaintiff seeks to vindicate.⁵⁶

This is not to say that the "zone of interests" test is completely toothless. The Court has refused standing to plaintiffs when it is clear Congress did not intend to protect their interests under a particular statute. For instance, in *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*,⁵⁷ the respondent union challenged the Postal Service's decision to suspend its statutory monopoly over certain

⁵² *Id.* at 156. It is important to note that *Data Processing* does not stand for the proposition that the Court will generally allow plaintiffs with solely economic interests to vindicate non-economic statutes. The *Data Processing* Court read the Bank Service Corporation Act as encompassing Congress's concern with certain competitive and economic interests. The Court favorably quoted the First Circuit's rationale, finding that

[s]ection 4 had a broader purpose than regulating only the service corporations. It was also a response to the fears expressed by a few senators, that without such a prohibition, the bill would have enabled "banks to engage in a nonbanking activity," and thus constitute "a serious exception to the accepted public policy which strictly limits banks to banking." We think Congress has provided the sufficient statutory aid to standing even though the competition may not be the precise kind Congress legislated against.

Id. at 155 (citing *Arnold Tours, Inc. v. Camp*, 408 F.2d 1147, 1153 (1st Cir. 1969)) (internal citations omitted). More to the point, the Court has subsequently interpreted *Data Processing* as being premised on the fact that Congress "arguably legislated against [competitive injury] by limiting the activities available to national banks." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 397 (1987) (comparing *Data Processing* to *Inv. Co. Inst. v. Camp*, 401 U.S. 617 (1971)). *Data Processing* also has limited precedential value in cases not involving challenges under Section 702 of the Administrative Procedure Act ("APA"). The Court has noted that *Data Processing* involved a challenge under the APA, and that "what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so for other purposes." *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (internal citations and quotations omitted).

⁵³ *Data Processing*, 397 U.S. at 156.

⁵⁴ 479 U.S. 388, 399 (1987).

⁵⁵ *Id.* at 399-400.

⁵⁶ *See id.* at 399.

⁵⁷ 498 U.S. 517 (1991).

postal routes and allow private couriers to deliver letters to foreign postal services.⁵⁸ The Court held that the union's interest in preserving the jobs of its members was not within the "zone of interests" protected by the relevant statute.⁵⁹ The Court reasoned that Congress was concerned with maintaining sufficient revenue for the Post Office, not with postal workers' job security.⁶⁰ Likewise, in *Block v. Community Nutrition Institute*,⁶¹ the Court held that consumers had no standing to challenge the Department of Agriculture's issuance of "milk market orders."⁶² It held that allowing consumers to challenge the orders would disrupt Congress's carefully constructed statutory scheme.⁶³ These decisions demonstrate the Court's willingness to deny standing where Congress clearly did not intend to protect a would-be plaintiffs' interests.

The appropriate inquiry under the "zone of interests" test is a narrow one. In *Bennett v. Spear*, the Court held that whether a plaintiff's interest falls within those "arguably protected" by a statute is determined not by reference to the purpose of the statute as a whole, "but by reference to the particular provision of law upon which the plaintiff relies."⁶⁴ Thus, it is not the overarching Congressional motivation driving the enactment of a statute that is relevant. Rather, only the purpose of the particular provision the plaintiff is suing under is relevant.⁶⁵

As the foregoing cases should make clear, the scope of the "zone of interests" test is defined by Congressional intent. Following from this conclusion, courts must make a two-step inquiry when applying the test.⁶⁶ First, courts must determine what the prospective plaintiff's interests are.⁶⁷ Second, courts must determine "whether Congress arguably intended to protect those interests" under the particular statutory provision the plaintiff alleges has been violated.⁶⁸ If the plaintiff's interests do not fall within

⁵⁸ *Id.* at 519–20.

⁵⁹ *Id.* at 530.

⁶⁰ *Id.* at 518.

⁶¹ 467 U.S. 340 (1984).

⁶² *Id.* at 345–53.

⁶³ *Id.* at 345–48.

⁶⁴ 520 U.S. 154, 175–76 (1997).

⁶⁵ *Id.* at 176 ("[T]he plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.") (emphasis in original) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990)).

⁶⁶ Michael J. Ritter, *Standing in the Way of Animal Welfare: A Reconsideration of the Zone-of-Interest "Gloss" on the Administrative Procedures Act*, 29 REV. LITIG. 950, 970–71 (2010).

⁶⁷ *Id.* (citing *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970)).

⁶⁸ *Id.* at 971 (citing *Data Processing*, 397 U.S. at 153).

the scope of Congressional intent, courts should refuse to find the plaintiff has standing.⁶⁹

C. *A Review of the Background and Procedural History
Leading to Monsanto*

The dispute in *Monsanto* centered around “Roundup Ready Alfalfa” (“RRA”), a genetically altered breed of alfalfa designed to resist pesticides.⁷⁰ Specifically, RRA’s designers engineered it to be glyphosate-tolerant by inserting synthetic genes into the alfalfa genome.⁷¹ Glyphosate is an active ingredient in Roundup pesticide.⁷² Petitioner Monsanto Corp. owned the intellectual property rights to RRA.⁷³ Monsanto licensed RRA to co-petitioner Forage Genetics International (“FGI”).⁷⁴ FGI was the exclusive developer of RRA seed.⁷⁵

The Plant Protection Act (“PPA”)⁷⁶ tasks the Secretary of Agriculture with developing and promulgating regulations to “prevent the introduction of plant pests into the United States or the dissemination of plant pests within the United States.”⁷⁷ The secretary delegated this authority to APHIS.⁷⁸ Acting pursuant to that authority, APHIS promulgated rules governing the introduction of genetically engineered plant products.⁷⁹ The rules presume that genetically modified plants are “plant pests” until APHIS determines otherwise.⁸⁰ Such “plant pests” are subject to

⁶⁹ *See id.*

⁷⁰ *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2750 (2010).

⁷¹ ANIMAL AND PLANT HEALTH INSPECTION SERVICE, GLYPHOSATE TOLERANT (ROUNDUP READY) ALFALFA DRAFT ENVIRONMENTAL IMPACT STATEMENT 1 (2009), *available at* http://www.aphis.usda.gov/publications/biotechnology/content/printable_version/fs_alfalfa.pdf.

⁷² *Id.*

⁷³ *Monsanto*, 130 S. Ct. 2750.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ 7 U.S.C. §§ 7701–7786 (2006).

⁷⁷ § 7711(a).

⁷⁸ 7 C.F.R. §§ 2.22(a), 2.80(a) (2010).

⁷⁹ *See* §§ 340.0–340.9.

⁸⁰ § 340.1(a) (defining “plant pests” to include “any processed, manufactured, or other products of plants” and “regulated article” as “[a]ny organism which has been altered or produced through genetic engineering, if the donor organism, recipient organism, or vector or vector agent belongs to any genera or taxa designated in § 340.2 and meets the definition of plant pest . . . or any other organism or product altered or produced through genetic engineering which the Administrator determines is a plant pest or has reason to believe is a plant pest . . .”).

APHIS's regulations.⁸¹ The regulations permit any person to file a petition for deregulation with APHIS on the ground that a particular regulated product does not pose a plant pest risk.⁸²

As a genetically engineered plant product, RRA fell within the scope of APHIS's regulations.⁸³ In 2004, petitioners Monsanto and FGI sought deregulated status for RRA.⁸⁴ In response to petitioners' request, APHIS prepared a preliminary Environmental Assessment ("EA") to examine the environmental impact of deregulating RRA.⁸⁵ The agency published its draft EA in the federal register and solicited public comment.⁸⁶ The agency received 663 public comments, 520 of which opposed deregulation.⁸⁷ Among the most prevalent concerns commenters expressed was the possibility that RRA could cross-pollinate with organic and traditionally grown alfalfa, contaminating non-RRA crops.⁸⁸ Cross-pollination can occur at ranges of up to two miles.⁸⁹ Organic farmers complained that because of the cross-pollination risk, "they [would] no longer be able to market their products as 'organic,' or at least as non-genetically engineered."⁹⁰ They also argued that deregulation would harm the alfalfa export market.⁹¹ Roughly seventy-five percent of the United States' alfalfa exports go to Japan.⁹² Because Japan does not permit the importation of glyphosate-tolerant alfalfa, the farmers' access to the export market would have been severely restricted.⁹³ The commenters also raised concerns that widespread use of RRA would lead to the development of glyphosate-tolerant weeds and to the increased use of Roundup pesticide overall.⁹⁴

Despite these negative comments, APHIS approved Monsanto's deregulation petition.⁹⁵ As a result, the petitioners were to be able to market

⁸¹ See § 340.0(a)(2) at n.1.

⁸² 7 C.F.R. § 340.6.

⁸³ *Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743, 2750–51 (2010).

⁸⁴ *Id.*

⁸⁵ USDA/APHIS, ENVIRONMENTAL ASSESSMENT AND FINDING OF NO SIGNIFICANT IMPACT (2005).

⁸⁶ *Monsanto*, 130 S. Ct. at 2750.

⁸⁷ *Geertson Seed Farms v. Johanns*, No. C 06-01075 CRB, at 3 (N. D. Cal. 2007) (mem.), *rev'd sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), *available at* http://www.aphis.usda.gov/biotechnology/downloads/alfalfa/gealfalfa_Feb07_courtdecision.pdf.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Johanns*, No. C 06-01075 CRB, at 3.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

and sell RRA without conforming to APHIS's regulations.⁹⁶ The agency issued a contemporaneous finding of "no significant impact."⁹⁷ The agency acknowledged that once it deregulated RRA, users of the genetically engineered seeds would not be subject to regulatory "isolation distance" requirements.⁹⁸ That is, users of RRA would not be required to grow their genetically engineered crops more than two miles from any non-RRA field.⁹⁹ The agency nevertheless concluded that the risk of cross-pollination was not significant.¹⁰⁰ It determined that organic and traditional farmers bore the burden of "develop[ing] and maintain[ing] an organic production system plan that outlines the steps [they] will take to avoid cross pollination from neighboring operations."¹⁰¹ The agency also concluded that it was unlikely that cross-pollination would occur to an extent that would significantly harm exports to Japan.¹⁰² The agency concluded that organic and traditional alfalfa farmers would not be significantly impacted by its decision because: "(1) non-genetically engineered alfalfa will likely still be sold and available to those who wish to plant it; and (2) farmers purchasing seed will know what they are purchasing because the seed will be labeled as glyphosate tolerant."¹⁰³ Finally, the agency agreed with the commenters that the development of glyphosate-tolerant weeds was likely.¹⁰⁴ However, it did not view this development as significant, because the same thing happens with every widely used herbicide.¹⁰⁵

The respondents in *Monsanto* were a mix of traditional alfalfa growers and public interest groups concerned with food safety. They filed suit to challenge APHIS's decision to deregulate RRA. Most relevant to this Note, the respondents challenged the agency's decision to forego an EIS.¹⁰⁶ The respondents alleged several potentially significant environmental impacts. These included "biological contamination" of non-RRA alfalfa crops,¹⁰⁷

⁹⁶ *Id.*

⁹⁷ *Johanns*, No. C 06-01075 CRB, at 3.

⁹⁸ *Id.* at 3–4.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 4 (quoting APHIS's administrative record).

¹⁰² *Johanns*, No. C 06-01075 CRB, at 4.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Johanns*, No. C 06-01075 CRB, at 4–5. Petitioners also alleged violations of the Endangered Species Act and the PPA. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2751 (2010).

¹⁰⁷ *Johanns*, No. C 06-01075 CRB at 7. "Biological contamination" occurs when genetically engineered plants cross-pollinate with non-genetically engineered plants, mixing engineered seed with non-engineered seed. *Id.*

the development of glyphosate-tolerant weeds,¹⁰⁸ and environmental damage resulting from an increased use in glyphosate.¹⁰⁹ The respondents “did not seek preliminary injunctive relief.”¹¹⁰ As a result, over 3000 farmers planted RRA while the respondents’ claims proceeded in federal court.¹¹¹

The Federal District Court of the Northern District of California granted injunctive relief to the respondents. Based on Ninth Circuit precedent, the district court held that “an EIS *must* be prepared if ‘substantial questions are raised as to whether a project *may* cause significant degradation of some human environmental factor.’”¹¹² The court explained that the respondents did not have to show that the alleged potential environmental harm would in fact occur if the agency failed to complete an EIS.¹¹³ Rather, the respondents only had to raise a “substantial question” as to whether the proposed action would have a significant effect on the environment.¹¹⁴

Importantly, the district court found that the plaintiffs had standing to assert a challenge to the agency’s failure to complete an EIS.¹¹⁵ The agency argued that the plaintiffs lacked standing because the nature of their injury was economic.¹¹⁶ The agency relied on the Ninth Circuit’s decision in *Ashley Creek Phosphate v. Norton*,¹¹⁷ which held that “purely financial” interests did not fall within the “zone of interests” protected under NEPA.¹¹⁸ The district court distinguished *Ashley Creek* on the ground that the alfalfa plaintiffs’ injury was not “purely financial.”¹¹⁹ Rather, their “potential economic injury [arose] directly from the environmental impact of APHIS’s decision to deregulate Roundup Ready Alfalfa.”¹²⁰ The

¹⁰⁸ *Id.* at 3. Deregulation of RRA would facilitate the increased use of Roundup pesticide. *Id.*

¹⁰⁹ *Id.* at 7–8.

¹¹⁰ *Monsanto*, 130 S. Ct. at 2751.

¹¹¹ *Id.*

¹¹² *Johanns*, No. C 06-01075 CRB, at 6 (citing *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998) (emphasis in original)).

¹¹³ *Id.* (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 17.

¹¹⁶ *Id.*

¹¹⁷ 420 F.3d 934 (9th Cir. 2005).

¹¹⁸ *Id.* at 940 (“The bottom line is that Ashley Creek’s interest in the EIS analysis is purely financial. NEPA, on the other hand, is directed at environmental concerns, not at business interests. For reasons closely related to its lack of a concrete injury, Ashley Creek’s challenge does not fall within NEPA’s zone of interests . . . [W]e hold that Ashley Creek lacks standing under the prudential standing requirement.”).

¹¹⁹ *Id.*

¹²⁰ *Johanns*, No. C 06-01075 CRB, at 17.

district court enjoined all planting of RRA pending APHIS's completion of an EIS.¹²¹ On appeal, the Ninth Circuit affirmed.¹²² The Supreme Court granted certiorari on January 15, 2010.¹²³

D. A Review of the Monsanto Decision

The Supreme Court handed down its opinion on June 21, 2010. Justice Alito authored the majority opinion. Both parties challenged the other party's standing in the case. The Court addressed those challenges in turn.

Justice Alito began by addressing the respondents' argument. The respondents contended that even if the Supreme Court ordered the district court to lift its injunction, the district court would have to remand the matter to the agency to prepare an Environmental Assessment.¹²⁴ They argued that the petitioners failed to show the agency would rule in favor of deregulation on remand.¹²⁵ Therefore, their asserted injury was "speculative" and not "imminent."¹²⁶ Justice Alito disagreed, noting that the petitioners had a petition for partial deregulation pending before the agency, awaiting its decision on an EIS.¹²⁷ There was no doubt that granting this petition would redress the respondents' asserted injuries.¹²⁸ He found "more than a strong likelihood" that the agency would approve the respondents' deregulation petition if the district court were to lift the injunction.¹²⁹ He therefore rejected the respondents' argument that the injunction did not cause the petitioners actual or imminent harm.¹³⁰

Justice Alito then addressed the petitioners' argument that the respondents did not have standing to challenge APHIS's deregulation decision. The respondents asserted several injuries, including the risk of gene contamination.¹³¹ At least one respondent asserted that his alfalfa farm was in a prominent seed-growing region.¹³² He alleged that he faced

¹²¹ *Geertson Seed Farms v. Johanns*, 541 F.3d 938, 943 (9th Cir. 2008).

¹²² *Id.* at 948.

¹²³ *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 1133 (2010) (granting petition for certiorari).

¹²⁴ *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2753 (2010).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 2754.

¹²⁸ *Id.*

¹²⁹ *Monsanto*, 130 S. Ct. at 2754.

¹³⁰ *Id.* at 2753–54.

¹³¹ *Id.* at 2754–55.

¹³² *Id.* at 2754–55 n.3.

a significant risk that his crops would be contaminated by the RRA strain.¹³³ Justice Alito noted that this and other statements in the district court record indicated a “significant risk of contamination to respondents’ crops.”¹³⁴

However, Justice Alito did not find injury-in-fact based on the risk of cross-pollination and gene contamination. Rather, he focused on the injuries the respondents would suffer “even if their crops are not actually infected with the Roundup ready gene.”¹³⁵ Specifically, Justice Alito looked to the steps the respondents would have to take to minimize the likelihood of contamination.¹³⁶ APHIS’s decision to deregulate RRA would cause the respondents to incur “increased cost[s] of alfalfa breeding due to potential for genetic contamination,” including “contracting with growers outside of the United States to ensure that [they could] supply genetically pure, conventional alfalfa seed.”¹³⁷ In Justice Alito’s view, these increased costs, i.e., economic harms, were sufficient to establish constitutional injury-in-fact.¹³⁸

Justice Alito rejected the petitioners’ contention that this economic injury did not fall within the “zone of interests” protected under NEPA. The petitioners contended that the respondents’ “commercial” interests were “not . . . interest[s] that NEPA was enacted to address.”¹³⁹ Justice Alito rejected this argument summarily, writing that,

That argument is unpersuasive because, as the District Court found, *respondents’ injury has an environmental as well as an economic component*. In its ruling on the merits of respondents’ NEPA claim, the District Court held that the risk that the RRA gene conferring glyphosate resistance will infect conventional and organic alfalfa is a significant environmental effect within the meaning of NEPA.

¹³³ *Id.* (quoting the district court record) (“Since alfalfa is pollinated by honey, bumble and leafcutter bees, the genetic contamination of the Roundup Ready seed will rapidly spread through the seed growing regions. Bees have a range of at least two to ten miles, and the alfalfa seed farms are much more concentrated.”).

¹³⁴ *Monsanto*, 130 S. Ct. at 2754–55 n.3.

¹³⁵ *Id.* at 2755.

¹³⁶ *Id.*

¹³⁷ *Id.* (citing Declaration of Phillip Geertson in Support of Plaintiffs’ Motion for Summary Judgment at 3, *Geertson Seed Farms v. Johanns* (N.D. Cal 2007) (No. 306CV01075), 2006 WL 5820363).

¹³⁸ *Id.* at 2756.

¹³⁹ *Monsanto*, 130 S. Ct. at 2755–56 (quoting *Bennett v. Spear*, 520 U.S. 154, 162–63 (1997)).

Petitioners did not appeal that part of the court's ruling, and we have no occasion to revisit it here.¹⁴⁰

Justice Alito noted that the district court determined that the risk of gene contamination was a "significant environmental concern for purposes of NEPA."¹⁴¹ The respondents sought the very same injunctive relief before the Supreme Court as they had in district court.¹⁴² Justice Alito wrote that "[t]he mere fact that respondents also seek to avoid certain economic harms that are tied to the risk of gene flow does not strip them of prudential standing."¹⁴³

In sum, Justice Alito found that the respondents had constitutional standing to challenge APHIS's decision based on injuries they were sure to suffer even if cross-pollination did not occur. These injuries were commercial in nature. Justice Alito then tried to dodge the question of whether such commercial injuries could satisfy the "zone of interests" test under NEPA. He relied on the district court's finding of a significant environmental impact based on the risk of cross-pollination and increased pesticide use.¹⁴⁴ He wrote that these findings showed the respondents' claim had an "environmental component."¹⁴⁵

II. MONSANTO'S IMPLICATIONS FOR STANDING UNDER NEPA AND A BETTER WAY FORWARD

Part I of this Note reviewed the purposes of the National Environmental Policy Act. In passing NEPA, Congress was primarily concerned with mitigating environmental damage caused by federal action. Part I also reviewed the Supreme Court's approach to the "zone of interests" prudential standing requirement. Part I then examined the procedural and factual backdrop of the Supreme Court's *Monsanto* decision and Justice Alito's approach to the "zone of interests" under NEPA.

Part II makes the case that Justice Alito implicitly expanded the zone of interests under NEPA to include purely economic and commercial interests. Part II argues that this expansion is out of step with Congressional intent. Justice Alito's approach in *Monsanto* eschews the Court's prior adherence to Congressional intent in favor of a more flexible, less

¹⁴⁰ *Id.* at 2756 (citations omitted) (emphasis added).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Monsanto*, 130 S. Ct. at 2756.

¹⁴⁵ *Id.*

principled approach. This more flexible approach is likely to have significant collateral consequences. By permitting plaintiffs to litigate pure commercial and economic issues under NEPA, the Court expanded the statute's coverage beyond its original purpose. In doing so, Justice Alito increased the risk that litigants will put NEPA to use for purposes other than environmental protection. Part II contends that it is so far unclear whether *Monsanto* will make it easier for those with legitimate environmental interests to satisfy the injury-in-fact requirement. What is clear is that the decision expands litigation under NEPA in a way not congruous with Congress's intent. Finally, Part II argues that the *Monsanto* Court missed a prime opportunity to clarify its own confused standing doctrine in environmental harm cases.

A. *Monsanto Expands the Zone of Interests under NEPA to Embrace Plaintiffs Who Would Use the Statute as a Commercial/Economic Shield*

While Justice Alito's majority opinion takes pains to avoid explicitly recognizing economic or competitive injury as sufficient grounds to satisfy the "zone of interests" requirement under NEPA, that is inarguably his result. Justice Alito alluded to the possibility that the petitioners could establish Article III standing by alleging an environmental injury.¹⁴⁶ However, he did not actually find that they established such an injury. He did not even find that such an injury was cognizable under the facts of the case as pled in their complaint. Rather, he found injury-in-fact based on the petitioners' alleged economic and competitive injuries.¹⁴⁷

Given this threshold finding, Justice Alito's subsequent discussion of the "zone of interests" requirement is unconvincing. Justice Alito wrote that petitioners satisfied the "zone of interests" test because the "respondents' injury has an environmental as well as an economic component."¹⁴⁸ However, given that Justice Alito *did not recognize* the petitioners' environmental injuries in his "injury-in-fact" discussion, this "environmental component" could not have been a factor in his "zone of interests" analysis. The petitioners could not satisfy the "zone of interests" test with an injury they did not effectively plead or prove. They could not proceed to satisfy the "zone of interests" test with an injury that was insufficient to satisfy the injury-in-fact requirement. Justice Alito *must* therefore have based

¹⁴⁶ *Id.* at 2754–55 n.3.

¹⁴⁷ *Id.* at 2756.

¹⁴⁸ *Id.*

his resolution of the “zone of interests” test on the respondents’ alleged economic and competitive injuries.¹⁴⁹

In seeing why this must be the case, it is helpful to understand the alternative approaches available to Justice Alito. First, he could have found that the petitioners established Article III and NEPA injuries based on their alleged environmental injuries. This would have had the effect of granting the respondents constitutional standing while respecting NEPA’s purely environmental character.¹⁵⁰ On the other hand, this option would arguably have expanded the scope of Article III standing. Finding a sufficiently concrete environmental injury based on the petitioners’ allegations would arguably have been inconsistent with some of the Court’s standing precedent in environmental cases.¹⁵¹ There is some indication that at least one of the other Justices, Justice Scalia,¹⁵² was

¹⁴⁹ Some commentators have argued that the Court recognized a “hybrid” environmental and commercial injury, which allowed the petitioners to overcome both Article III’s injury-in-fact requirement and the “zone of interest” requirement. For instance, Prof. Mank has argued that, “Because the *Monsanto* respondents had legitimate environmental concerns, they had the right to prudential standing under the zone of interests test even if they also had economic motivations as well.” Bradford Mank, *Standing in Monsanto Co. v. Geertson Seed Farms: Using Economic Injury as a Basis for Standing When Environmental Harm Is Difficult to Prove*, 115 PENN ST. L. REV. 307, 336 (2010). He argues that the district court’s finding of significant environmental harm foreclosed any attempt to compare the case with *HWTC II*. In that case, the D.C. Circuit denied standing to a trade association based on its alleged competitive injuries. *Hazardous Waste Treatment Council v. EPA* (“*HWTC II*”), 861 F.2d 277, 337 (D.C. Cir. 1988). However, Prof. Mank’s argument overlooks the fact that Justice Alito’s opinion never adopted the district court’s findings regarding environmental harm. Rather, as detailed in Part I.D, the Court based its finding of Article III injury solely on the petitioners’ alleged economic injury.

¹⁵⁰ Andreen, *supra* note 15, at 205–06 (noting Congress’s overriding environmental purpose in enacting NEPA) (“NEPA represented an unprecedented attempt to protect the human environment by broadly injecting environmental concerns into the calculus of federal decisionmaking.”).

¹⁵¹ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“[T]he 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.’”) (internal citations omitted); *Whitmore v. Arkansas*, 495 U.S. 149, 154–56 (1990); *Los Angeles v. Lyons*, 461 U.S. 95, 125 (1983) (denying standing for failure to establish a sufficiently “concrete” injury); *Summers v. Earth Island Inst.*, 555 U.S. 488, 493–501 (2009) (holding that the plaintiffs failed to establish a sufficiently “imminent” injury when they failed to show the specific times and places that the government’s policy would cause them harm). See also Mank, *supra* note 149 (noting criticism of Justice Scalia for allegedly requiring greater proof of injury in environmental cases).

¹⁵² Mank, *supra* note 149, at 328, 330 (arguing that “[i]t is fair to read the oral argument transcript as indicating that Justice Scalia was not convinced that the respondents-plaintiffs had demonstrated an actual injury necessary for standing” and “the overall tone

hostile toward such an expansion of Article III standing.¹⁵³ While the language of Justice Alito's majority opinion indicates he does not share that hostility,¹⁵⁴ he may have been hesitant to stray from his fellow Justice's stance on the issue.¹⁵⁵ Indeed, he may have been concerned that doing so would cost him Justice Scalia's influential vote.¹⁵⁶

Justice Alito's second option was to dismiss the case for lack of constitutional standing. Doctrinally, this option may have been the easiest option available. On the other hand, the use of standing doctrine to avoid addressing a case on the merits has been the subject of criticism from commentators¹⁵⁷ and members of the Court.¹⁵⁸ An overly restrictive approach toward standing may have the effect of denying plaintiffs with legitimate injuries and meritorious claims the benefit of judicial redress.¹⁵⁹ A strict approach to standing also seems antiquated and out of step with modern pleading practices.¹⁶⁰ Much of the Court's modern standing jurisprudence displays an awareness of these issues and an inclination toward liberalized

of his questions and remarks about standing suggest that he was, at a minimum, skeptical of the respondents-plaintiffs' standing argument, or that he had tentatively concluded that their standing argument was likely to fail.”).

¹⁵³ *Id.* at 329 (noting that Justice Scalia indicated during oral argument that he did not believe the plaintiffs established that cross-contamination would occur and that the petitioners' statistical evidence did not prove “how many unwilling farmers are going to have infected fields.”) (internal quotations omitted). Justice Scalia also indicated during oral arguments that he was “sure” the market would respond to the threat of cross-pollination by producing companies that “advertise: [w]e only cut natural seed fields,” thereby expressing his skepticism that the plaintiffs could establish injury-in-fact based on cross-pollination. *Id.*
¹⁵⁴ See *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2754–55 (2010) (noting with apparent sympathy to the respondents' claims that “[a] substantial risk of gene flow injures respondents in several ways.”).

¹⁵⁵ Mank, *supra* note 149, at 330 (arguing that Justice Alito's “somewhat convoluted analysis may have been designed to win the vote of Justice Scalia, who . . . was not convinced that the respondents-plaintiffs could show an actual injury from the activities of the petitioners in selling RRA that is then planted by numerous alfalfa farmers.”).

¹⁵⁶ *Id.*

¹⁵⁷ *E.g.*, CHEMERINSKY, *supra* note 39, at 62.

¹⁵⁸ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 593 (1992) (Blackmun, J., dissenting) (objecting to what he viewed as the majority's overly formalistic approach to standing requirements).

¹⁵⁹ CHEMERINSKY, *supra* note 39, at 62 (arguing that “standing requirements might be quite unfair if they prevent people with serious injuries from securing judicial redress.”).

¹⁶⁰ *Lujan*, 504 U.S. at 593 (Blackmun, J., dissenting) (“I fear the Court's demand for detailed descriptions of future conduct will do little to weed out those who are genuinely harmed from those who are not. More likely, it will resurrect a code-pleading formalism in federal court summary judgment practice, as federal courts, newly doubting their jurisdiction, will demand more and more particularized showings of future harm.”).

standing requirements.¹⁶¹ Justice Alito no doubt was aware of these issues. His decision not to deny standing may also indicate his concern with setting overly restrictive precedent in the field of Article III standing.

Finally, Justice Alito had the option of finessing his rationale to recognize the petitioners' more "concrete" economic injuries to satisfy Article III's injury requirement, while ostensibly preserving NEPA's environmental integrity by citing the district court's finding of "significant environmental injury" in his "zone of interests" analysis. This was the avenue Justice Alito chose to pursue.¹⁶² In doing so, he was able to coalesce a majority of Justices, some of whom had been on opposite sides in previous environmental standing cases.¹⁶³ The result of this approach was largely unsatisfying and potentially damaging. Justice Alito's attempt to navigate this middle path effectively opened the door to plaintiffs alleging purely economic or competitive injuries to bring actions under NEPA.

The ultimate impact of Justice Alito's chosen path is admittedly difficult to forecast. Some commentators have suggested that *Monsanto* makes it easier for environmental plaintiffs to overcome traditional Article III standing hurdles by pleading an ancillary economic or commercial injury.¹⁶⁴ Others have argued that *Monsanto* will make it easier for plaintiffs to satisfy the injury-in-fact requirement based on a risk of environmental injury, so long as that risk will cause them to incur economic expenditures.¹⁶⁵ Whether or not these predictions prove accurate

¹⁶¹ See, e.g., *Mass. v. U.S. Env'tl. Prot. Agency*, 549 U.S. 497, 522–23 (2007) (holding that Massachusetts had standing to challenge the Environmental Protection Agency's decision not to regulate greenhouse gases based on the injury global warming would cause to the state's coastlines); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 19–26 (1998) (holding that the petitioners had standing to challenge the FEC's decision not to require the disclosure of certain information from certain Political Action Committees under the Federal Election Campaign Act).

¹⁶² See *supra* Part I.D.

¹⁶³ Mank, *supra* note 149, at 338 ("In *Monsanto*, Justice Alito wrote an opinion that joined together Justices that had often disagreed in the past regarding environmental standing cases. For example, Justice Ginsburg, the author of *Laidlaw* and a dissenting Justice in *Summers*, joined Justices Scalia and Thomas, who both dissented in *Laidlaw* and were in the majority in *Summers*."). (internal citations omitted).

¹⁶⁴ See Mank, *supra* note 149, at 336 ("A plaintiff or petitioner that has both economic and environmental injuries may have an easier time establishing standing than a litigant who only has one or the other interest.").

¹⁶⁵ Lisa A. Cutts, *What's the Big Deal? The Letdown That Is the Landmark Monsanto v. Geertson Case*, 20 S.J. AGRIC. L. REV. 117, 139 (2011) ("The court's statement opens the door to plaintiffs who are neither harmed, nor imminently to be harmed, but subject to some, as yet undefined, level of risk of harm where they incur some cost to mitigate or identify the risk.").

will be determined in future cases. That inquiry is beyond the scope of this Note.

Assuming for the sake of argument that *Monsanto* did loosen Article III's standing requirements, that says nothing about the decision's effect on NEPA. Properly understood, *Monsanto* is a double-edged sword. Even if the decision lowers the hurdles environmental plaintiffs must overcome to satisfy Article III's injury-in-fact requirement, it also lowers the hurdles economic plaintiffs face in overcoming the "zone of interests" test. As a result, NEPA is no longer limited to plaintiffs seeking to vindicate Congress's environmental goals. Indeed, in the Court's words, "[t]he mere fact that respondents also seek to avoid certain economic harms that are tied to the risk of gene flow does not strip them of prudential standing."¹⁶⁶

B. Monsanto's Expansion of the "Zone of Interests" Under NEPA Was Contrary to Congressional Intent

There are several significant objections to loosening the "zone of interests" test under NEPA to embrace economic plaintiffs. First and foremost is that such an expansion is contrary to Congressional intent.¹⁶⁷ The "zone of interests" test is, at bottom, a method of assuring judicial fidelity to Congressional intent.¹⁶⁸ By venturing too far from Congress's goals, courts risk frustrating the statute's purpose and overstepping their role.¹⁶⁹

A good illustration of this concern is the United States Court of Appeals for the District of Columbia Circuit's decision in *HWTC II*.¹⁷⁰ In that case, the court of appeals dealt with the issue of competitor standing and the "zone of interests" test. An industry group had challenged an EPA rule¹⁷¹ regulating "hazardous" used oil pursuant to its authority

¹⁶⁶ *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010).

¹⁶⁷ See Andreen, *supra* note 15, at 205–06.

¹⁶⁸ *Cement Kiln Recycling Coal. v. Envtl. Prot. Agency*, 255 F.3d 855, 870 (D.C. Cir. 2001) ("Under this 'zone of interests' test, the 'essential inquiry is whether Congress intended for a particular class of plaintiffs to be relied upon to challenge agency disregard of the law.'") (quoting *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987)); *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 921–22 (1989) ("Congress often fails to specify who may and who may not invoke the power of the courts to enforce the terms of a statute. It follows that the judiciary has to supply a principle by which to infer Congress's intent on that often critical question. The zone of interests test is the result.").

¹⁶⁹ *Hazardous Waste Treatment Council v. EPA* ("*HWTC II*"), 861 F.2d 277, 283–84 (D.C. Cir. 1988).

¹⁷⁰ *Id.*

¹⁷¹ 50 Fed. Reg. 49, 164 (1985) (codified at 40 C.F.R. pts. 261, 264–66, 271).

under the Used Oil Recycling Act of 1980 ("UORA") and the Resource Conservation and Recovery Act of 1976 ("RCRA").¹⁷² The industry group represented several manufacturers of hazardous treatment equipment.¹⁷³ The thrust of the group's complaint was that the final rule was not "comprehensive and strict enough" to comply with UORA and RCRA's statutory mandate.¹⁷⁴ The group asserted three types of claims: consumer claims,¹⁷⁵ competitor claims,¹⁷⁶ and claims of supply diminution.¹⁷⁷ Addressing the "apparent anomaly of regulated entities demanding stricter regulation," the court of appeals held that the group had standing to challenge the rule insofar as its members would suffer environmental injuries.¹⁷⁸ The court found that the group's "consumer" claims alleged environmental injuries, and thus were entitled to standing, despite their "commercial" nature.¹⁷⁹ However, the court denied the challenger standing insofar as its members would suffer "competitive losses" as a result of the regulation.¹⁸⁰ The court interpreted the Supreme Court's holding in *Clarke* to require "less than a showing of congressional intent to benefit but more than a marginal relationship to the statutory purposes."¹⁸¹ The court found no congressional intent to benefit the manufacturers of hazardous waste treatment equipment.¹⁸² The court explained the danger involved in

¹⁷² 42 U.S.C. §§ 6921–6939a (2011).

¹⁷³ *HWTC II*, 861 F.2d at 280.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 281. The challenger alleged that one of its members, BVER Environmental, would suffer damage to its storage tanks from the receipt of contaminated oil.

¹⁷⁶ *Id.* at 281. Three group members alleged that the rule would damage the market for their high-tech control services.

¹⁷⁷ *Id.* at 281. Some group members alleged that the EPA's lax regulations would cause their supply of oil to be directed elsewhere.

¹⁷⁸ *HWTC II*, 861 F.2d at 280.

¹⁷⁹ *Id.* at 282. The court compared the alleged consumer injuries to the injury suffered by a hypothetical lake owner who licenses the lake's use to fisherman and boaters. *Id.* The court held that this sort of environmental injury was cognizable, regardless of the lake owner's commercial interest in preventing the pollution. "That the injury is commercial is no obstacle. 'Sneering at commercial gains by adding 'mere' to them does not make them go away.'" *Id.* (quoting *U.S. Dep't of the Air Force v. Fed. Labor Relations Auth.*, 838 F.2d 229, 233 (7th Cir. 1988)) (brackets omitted).

¹⁸⁰ *HWTC II*, 861 F.2d at 285.

¹⁸¹ *Id.* at 283 (internal citations and quotations omitted).

¹⁸² *Id.* The group argued that Congress's clear intent to promote the proper disposal and recycling of hazardous waste brought the group's interests into line with Congressional intent. *Id.* at 283. The court rejected this argument, reasoning that the fact that Congress intended to ensure proper disposal did not imply that it meant to protect the manufacturers of disposal equipment. "Whenever Congress pursues some goal, it is inevitable that firms capable of advancing that goal may benefit But in the absence of either some explicit

granting standing to plaintiffs asserting claims outside the zone of protected interests:

It is worth remembering that judicial intervention may defeat statutory goals if it proceeds at the behest of interests that coincide only accidentally with those goals. . . . When we grant standing to a party with only an oblique relation to the statutory goal, we run the risk that the outcome could, even assuming technical fidelity to law, in fact thwart the congressional goal. Further, of course, technical fidelity to law cannot be assumed; judges err.¹⁸³

The court of appeals recognized that when courts allow plaintiffs to assert interests outside the protected zone, they allow plaintiffs to pursue goals that may not result in the furtherance of Congress's purpose. For instance, the court speculated that tighter regulations could conceivably improve the group's members' profits while actually harming the environment.¹⁸⁴

The *HWTC II* court distinguished its facts from those in *Clarke* and *Data Processing*. In those cases, the Supreme Court allowed competitors to vindicate statutory interests despite the absence of any clear congressional intent to protect their interests.¹⁸⁵ The *HWTC II* court reasoned that in those cases, the Supreme Court found that the persons whom Congress explicitly protected made "relatively unsuitable plaintiffs."¹⁸⁶ In the case before it, the court of appeals saw no reason why plaintiffs suffering actual environmental injuries could not bring suit to enforce the relevant statutes.¹⁸⁷

The D.C. Circuit's rationale in *HWTC II* is useful for analyzing the Supreme Court's *Monsanto* decision in two ways. First, the concerns

evidence of an intent to benefit such firms, or some reason to believe that such firms would be unusually suitable champions of Congress's ultimate goals, no one would suppose them to have standing to attack regulatory laxity." *Id.* at 283.

¹⁸³ *Id.* at 283–84.

¹⁸⁴ *HWTC II*, 861 F.2d at 284.

¹⁸⁵ *See id.*

¹⁸⁶ *Id.* ("For example, it is hard to picture a person or firm that could assert injury in the form of 'the dangers of possible loss of public confidence in banks and the danger to the economy as a whole of speculation fueled by bank loans for investment purposes.'" (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 397 n.13 (1987)).

¹⁸⁷ *Id.* at 284 ("As the consumers of the environmental purity afforded by RCRA seem highly suitable champions of enforcement, and we find no clue of congressional intent to rely on other champions, we find [*Data Processing* and *Clarke*] inapplicable.").

the D.C. Circuit expressed about fidelity to congressional intent apply with equal force to the facts of *Monsanto*. Just as commercial injuries fell outside the protected “zone of interests” under UORA and RCRA in *HWTC II*, the *Monsanto* respondents’ commercial injuries fell outside the protected “zone of interests” under NEPA. As previously discussed,¹⁸⁸ Congress’s purpose in enacting NEPA was to minimize the environmental impacts of federal action.¹⁸⁹ Congress did not manifest any intent to protect the competitors of regulated entities.

It is not difficult to imagine a scenario in which the interests of competitors would not align with NEPA’s environmental purposes. The facts of *Monsanto* provide a good example. A decision to deregulate “plant pests” will not always pose environmental risks. Where the plant pest itself poses no environmental threat, such as where contagion or cross-pollination would be unlikely, deregulating the pest without conducting an EIS would pose no environmental threat. Allowing competitors to challenge deregulation in such a scenario would benefit competitors’ bottom lines while failing to vindicate NEPA’s environmental purpose. The plaintiffs’ interests would align only “accidentally” with NEPA’s goals, just as the *HWTC II* plaintiff’s goals only accidentally aligned with UORA and RCRA’s goals.¹⁹⁰

Second, like the scenario in *HWTC II*, the facts in *Monsanto* are distinguishable from those in *Data Processing*. Unlike the consumers Congress sought to protect with BSCA, there is no apparent reason that individuals who suffer environmental injuries under NEPA would make particularly unsuitable plaintiffs. For example, the district court found that the *Monsanto* petitioners suffered environmental injuries.¹⁹¹ If the petitioners were suitable plaintiffs to assert their commercial injuries, they were surely also suitable plaintiffs to assert their environmental injuries. The respondents’ situation demonstrates that those who suffer commercial or competitive injuries have no advantage as effective plaintiffs over those who suffer environmental injuries, as they can be the exact same entities. Both the petitioners’ economic and environmental injuries stemmed from the exact same threat: the risk of cross-pollination. Thus, there is no reason to make an exception under NEPA allowing competitors

¹⁸⁸ See *supra* Part I.A.

¹⁸⁹ *Id.*

¹⁹⁰ See *HWTC II*, 861 F.2d at 283–84.

¹⁹¹ *Geertson Seed Farms v. Johanns*, No. C 06-01075 CRB, at 19 (N. D. Cal., 2007) (mem.), *rev’d sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), available at http://www.aphis.usda.gov/biotechnology/downloads/alfalfa/gealfalfa_Feb07_courtdecision.pdf.

to bring suit as stand-ins for those suffering injuries within the statute's protected zone. Environmental plaintiffs are perfectly capable of asserting their own injuries under NEPA.

C. *The Monsanto Court Missed an Opportunity to Clarify Its Confused Environmental Injury Standing Doctrine*

The Supreme Court did not have to make a choice between expanding NEPA's "zone of interests" and denying the respondents constitutional standing. There was another option available to the Court. The Court could have applied a version of the "realistic threat" test Justice Breyer proposed in his *Summers v. Earth Island Institute* dissent.¹⁹² By adopting this test, the Court could have recognized the respondents' environmental injuries as sufficient to satisfy Article III's injury-in-fact requirement, despite the difficult issues of proof the case presented.¹⁹³ This approach would have relieved Justice Alito of the need to engage in theoretical gymnastics to justify his conclusion in his "zone of interests" discussion. The Court could have recognized the respondents' environmental harms as Article III injuries, and such environmental injuries clearly fall within NEPA's zone of protection.

The "realistic threat" test is not a novel concept. In *Summers*, the Court denied standing to several environmental groups challenging a United States Forest Service rule¹⁹⁴ exempting small fire remediation projects from impact statement requirements.¹⁹⁵ Justice Scalia's majority opinion appeared to reject the use of statistical probabilities to establish injury-in-fact.¹⁹⁶ In dissent, Justice Breyer proposed a "realistic threat" test for determining injury-in-fact.¹⁹⁷ Justice Breyer wrote that he would grant an environmental organization Article III standing whenever it could establish a "realistic threat" that one of its members would be harmed in the near future by the defendant's action.¹⁹⁸ Justice Breyer de-emphasized the Court's requirement that an asserted injury be "imminent," focusing instead on ensuring that the asserted injury was not "hypothetical" or "conjectural."¹⁹⁹ He wrote that "a threat of future harm

¹⁹² 555 U.S. 488, 501–10 (2009) (Breyer, J., dissenting).

¹⁹³ Mank, *supra* note 149, at 309 (noting that during oral arguments, Justice Scalia was skeptical that the petitioners could prove they *would* suffer from cross pollination).

¹⁹⁴ 36 C.F.R. § 215.4(a).

¹⁹⁵ 555 U.S. 488, 494–97 (2009).

¹⁹⁶ *Id.* at 497–98.

¹⁹⁷ *Id.* at 505 (Breyer, J., dissenting).

¹⁹⁸ *Id.* at 509–10 (Breyer, J., dissenting).

¹⁹⁹ *Id.* at 505–06 (Breyer, J., dissenting).

may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates.”²⁰⁰ Rather, the “realistic threat” standard requires no more proof than the term “realistic” suggests.²⁰¹

Applying the “realistic threat” test in *Monsanto* would have solved the respondents’ Article III standing problem. The district court recognized that the respondents established a significant likelihood of cross-pollination.²⁰² APHIS admitted that after deregulation, it would have been unable to impose isolation distances on RRA growers.²⁰³ The court also found a significant likelihood in the increased use of Roundup pesticide.²⁰⁴ These harms were surely “realistic,” in that they were not “hypothetical” or “conjectural.” The respondents had proven them to the satisfaction of the district court. By applying the “realistic threat” test, Justice Alito could have found the respondents had Article III standing without resorting to their economic/commercial injuries.

In addition, by adopting the “realistic threat” test, the Court could have brought coherence to its standing doctrine regarding environmental injuries. As it stands, the Court’s doctrine is somewhat confused. This confusion is a product of the apparent discrepancy between *Summers* and the Court’s decision in *Friends of the Earth v. Laidlaw*.²⁰⁵ In *Laidlaw*, a plaintiff group established injury-in-fact by proving they held “reasonable concerns” about future health injuries resulting from pollution.²⁰⁶ These concerns caused them to forego recreational activities.²⁰⁷ The Court recognized these concerns as sufficiently concrete to satisfy the injury-in-fact requirement.²⁰⁸ However, *Summers* refused to recognize a statistical probability of harm as a sufficiently concrete injury.²⁰⁹ Despite the apparent inconsistency between the holdings, *Summers* did not overrule *Laidlaw*.²¹⁰ The discrepancy has left the requirements to establish standing in significant

²⁰⁰ *Summers*, 555 U.S. at 506 (Breyer, J., dissenting).

²⁰¹ *Id.* at 505 (Breyer, J., dissenting).

²⁰² *Geertson Seed Farms v. Johanns*, No. C 06-01075 CRB, at 3 (N. D. Cal., 2007) (mem.), *rev’d sub nom.* *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), available at http://www.aphis.usda.gov/biotechnology/downloads/alfalfa/gealfalfa_Feb07_courtdecision.pdf.

²⁰³ *Id.* at 8.

²⁰⁴ *Id.* at 15–16.

²⁰⁵ 528 U.S. 167 (2000).

²⁰⁶ *Id.* at 181–83.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Summers v. Earth Island Inst.*, 555 U.S. 488, 497–98 (2009).

²¹⁰ Bradford Mank, *Summers v. Earth Island Institute Rejects Probabilistic Standing, But a “Realistic Threat” of Harm Is a Better Standing Test*, 40 ENVTL. L. 89, 91–92 (2010).

doubt.²¹¹ By expressly adopting the test, Justice Alito could have clarified what is a confused area of the Court's jurisprudence.²¹²

CONCLUSION

Monsanto is a frustrating case. In his majority opinion, Justice Alito found that a group of organic and traditional alfalfa growers had standing to challenge APHIS's decision to deregulate RRA. In doing so, Justice Alito may have lowered the hurdles environmental plaintiffs face in overcoming Article III's injury-in-fact requirement. Whether or not this will prove to be true will be borne out in future cases. What is less speculative is the decision's impact on the "zone of interests" protected under NEPA. *Monsanto* undoubtedly extends NEPA's protection to plaintiffs vindicating purely economic/commercial interests. Justice Alito's aversions to the contrary are terse and frustratingly inadequate.

More frustrating is that *Monsanto*'s extension of NEPA's protection is clearly unwarranted by Congressional intent. Congress's unambiguous concern in enacting NEPA was to mitigate unnecessary environmental impacts.²¹³ It did not intend to erect a shield for the economic/commercial competitors of regulated entities. *Monsanto* is also inconsistent with the Court's own precedent. Prior to *Monsanto*, the Court uniformly applied the "zone of interests" test in accord with congressional intent.²¹⁴ Justice Alito's majority opinion does not even recognize this departure, let alone attempt to rationalize it.

Perhaps most frustrating of all, the Court missed an excellent opportunity to clarify its confused standing doctrine in environmental injury cases. The Court could have resolved the problems *Monsanto* presented by explicitly adopting the "realistic threat" test. This test was not a new concept. Justice Breyer fully explicated the test in *Laidlaw*. The Court's failure to reach out and seize this opportunity leaves its standing doctrine frustratingly adrift.

²¹¹ *Id.* at 92 (noting that "[t]he *Summers* decision's blanket rejection of probabilistic standing is in considerable tension with *Laidlaw*'s reasonable concerns test, which *Summers* did not question").

²¹² Prof. Mank has suggested that the "realistic threat" test is superior to both the *Summers* and *Laidlaw* approaches. *Id.* at 93 ("The realistic threat test . . . offers a better approach to standing than either *Summers*'s unrealistic demand that plaintiffs precisely predict the future or *Laidlaw*'s focus on whether a plaintiff avoided recreational activities rather than whether the defendant's activities caused actual harm.").

²¹³ 42 U.S.C. § 4321 (2006).

²¹⁴ See *supra* Part II.B.