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AN AMERICAN ICON IN LIMBO: HOW CLARIFYING THE STANDING DOCTRINE COULD FREE WILD HORSES AND EMPOWER ADVOCATES

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Abstract: The American wild horse has long been considered a cultural icon and an integral part of the ecosystem. In recognition of the need for wild horse protection, Congress enacted the Wild Free-Roaming Horses and Burros Act in 1971. Although the Act instructs Congress to manage the wild horse population by removing "excess" wild horses from public lands, it does not explicitly provide for the use of short- or long-term holding facilities as a means for removal. In considering the legality of the use of holding facilities in the service of wild horse removal programs that the plaintiffs deplore, two district courts have come to opposite conclusions on the standing issue of how directly the plaintiffs' injury must be linked to the particular action being challenged. This Note argues that if the wild horse dispute comes before the Supreme Court in the form of a circuit split, the Court should hear the case to resolve lingering ambiguities in standing causation. Specifically, the Court should apply proximate cause analysis to the standing causation inquiry, as this would promote many of standing's underlying functions and also benefit advocates.

INTRODUCTION

The American wild horse is considered a cultural icon.[1] Historically, wild horses populated the western plains in the millions.[2] Although the law underscores that wild horses are an integral part of the natural ecosystem,[3] current administrative practice permits only 26,500 wild horses to roam the lands.[4]

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[1] Tim Opitz, *The Tragedy of the Horse, American Icon*, 7 J. FOOD L. & POL'Y 357, 359 (2011) (citing Laura Jane Durfee, *Anti-Horse Slaughter Legislation: Bad for Horses, Bad for Society*, 84 IND. L.J. 353, 353 n.2 (2009)).

[2] Roberto Iraola, *The Wild Free-Roaming Horses and Burros Act of 1971*, 35 ENVTL. L. 1049, 1050 (2005) ("At one time numbering in the millions, by the 1960s, the horse population had declined to seventeen thousand.").

[3] Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331 (2012) ("[T]hey are to be considered in the area where presently found, as an integral part of the natural system of the public lands.").

[4] *Wild Horse and Burro Quick Facts*, BUREAU OF LAND MGMT., http://www.blm.gov/wo/st/en/prog/whbprogram/history_and_facts/quick_facts.print.html (last updated Jan. 31, 2014), *available at* http://perma.cc/996R-V6NW.

Federal population controls now place the majority of wild horses, roughly 50,000, in captivity underwritten by federal tax revenue.[5] Because the spirit, beauty, and freedom embodied in wild horses strikes a chord in Americans,[6] the government's management of their population provokes emotional, judicial, and legislative responses.[7]

Originally, Congress took control of wild horse population management to address dwindling wild horse numbers in the 1960s.[8] In recognition of the need for wild horse protection, Congress passed the Wild Free-Roaming Horses and Burros Act ("the Act") in 1971.[9] Since its enactment, however, the Act has provoked litigation by advocates on behalf of these "living symbols of the historic and pioneer spirit."[10]

Spurred by the Bureau of Land Management's (BLM) controversial management decisions and its preference of livestock grazing interests,[11] wild horse enthusiasts and animal welfare activists view the BLM's actions with skepticism.[12] Although horse advocates have in recent years brought suit challenging the BLM's management decisions, they have faced difficulties getting

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[5] *Id.* ("Congress appropriated $74.9 million to the Wild Horse and Burro Program in Fiscal Year 2012, which ended September 30, 2012. Of that year's expenditures ($72.4 million) holding costs accounted for $43 million.").

[6] DEP'T OF INTERIOR, MUSTANG COUNTRY: WILD HORSES AND BURROS 6 (undated), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/nv/field_offices/winnemucca_field_office/programs/wild_horse___burro.Par.75828.File.dat/Mustang_Country_final070313_ver3.pdf and http://perma.cc/AV7E-WQCD.

[7] Kristen H. Glover, *Managing Wild Horses on Public Lands: Congressional Action and Agency Response*, 79 N.C. L. REV. 1108, 1108–09 & 1108 n.2 (2001); Kenneth P. Pitt, *The Wild and Free-Roaming Horses and Burros Act: A Western Melodrama*, 15 ENVTL. L. 503, 504–05 (1985).

[8] Iraola, *supra* note 2, at 1050.

[9] *Id.*; 16 U.S.C. § 1331 (2012).

[10] *See id.*; Glover, *supra* note 7, at 1108–09 ("This seemingly benevolent legislation and the Bureau of Land Management's (BLM) implementation of the Act have led to more than forty suits in the federal district courts.").

[11] Joseph M. Feller, *What Is Wrong with the BLM's Management of Livestock Grazing on the Public Lands?*, 30 IDAHO L. REV. 555, 556–57 (1993–1994) (describing how critics of the BLM "argue that little has changed on the ground and that the Bureau's managers still place the interests of livestock operators above environmental values"); Andrew Cohen, *All the Pretty Horses: Ken Salazar to Leave Interior*, ATLANTIC (Jan. 16, 2013), http://www.theatlantic.com/politics/archive/2013/01/all-the-pretty-horses-ken-salazar-to-leave-interior/267234/, *available at* http://perma.cc/WUF5-4RJS (explaining that there exist "legitimate disagreements about how much damage wild horses do to the public lands upon which they graze, especially when compared to the damage that cattle and sheep do to the land").

[12] *See* In Def. of Animals v. U.S. Dep't of the Interior, 909 F. Supp. 2d 1178, 1183 (E.D. Cal. 2012) (challenging the legality of a wild horse gather in light of the Act and the National Environmental Policy Act (NEPA)); Colo. Wild Horse & Burro Coal. v. Salazar, 890 F. Supp. 2d 99, 99 (D.D.C. 2012) (challenging the legality of a BLM wild horse roundup in Colorado); Habitat for Horses v. Salazar, No. 10 Civ. 7684 (WHP), 2011 WL 4343306, at *1 (S.D.N.Y. Sept. 7, 2011) (challenging the BLM's gather of horses in violation of the Act, Administrative Procedure Act, and NEPA).

their cases heard on the merits.[13] As a result, controversies surrounding wild horse management persist and further inflame passions.[14]

This Note argues that if the issue arises, the Supreme Court should hear the wild horse dispute to resolve a potential circuit split in wild horse litigation to resolve longstanding confusion in standing causation.[15] Part I presents an overview of the BLM's management of wild horse populations.[16] Part II addresses the evolution of general standing jurisprudence and proposed solutions to ambiguities in standing causation in particular.[17] Part III discusses activists' struggles regarding the standing doctrine and highlights a potential circuit split regarding the causation requirement within standing ("standing causation").[18] Finally, Part IV argues that this potential circuit split presents an appropriate opportunity for the Court to clarify what plaintiffs must show to prove causation by adopting tort law proximate cause analysis.[19] In this way, the Court would encourage efficiency and predictability while promoting standing's gatekeeper function and separation of powers.[20] Importantly, this clarification would benefit wild horse and environmental advocates alike by enhancing their ability to weigh the benefits of pursuing costly litigation.[21]

I. Federal Management of the American Wild Horse

A. *Raising Awareness*

Advocates first expressed concern over the treatment of wild horses in the 1950s when horse meat became commercially valuable.[22] Initially, advocates were most alarmed by the inhumane practices involved in commercial horse

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[13] *See Colo. Wild Horse & Burro Coal.*, 890 F. Supp. 2d at 100, 103 (holding the organization's challenge not ripe for review); In Def. of Animals v. Salazar, 713 F. Supp. 2d 20, 29 (D.D.C. 2010) (finding no standing because the plaintiffs failed to establish causation); Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt., 460 F.3d 13, 14 (D.D.C. 2006) (holding plaintiff's NEPA claim against the BLM moot); Jay Tidmarsh, *Resolving Cases "On the Merits,"* 87 Denv. U. L. Rev. 407, 409 (2010) (defining "on the merits" as being resolved on the basis of law and facts).

[14] Pitt, *supra* note 7, at 504–05.

[15] *See infra* notes 204–260 and accompanying text.

[16] *See infra* notes 22–80 and accompanying text.

[17] *See infra* notes 81–163 and accompanying text.

[18] *See infra* notes 164–204 and accompanying text.

[19] *See* Luke Meier, *Using Tort Law to Understand the Causation Prong of Standing*, 80 Fordham L. Rev. 1241, 1241 (2011) ("Unfortunately, the Supreme Court has never clearly established the conceptual analysis necessary for making the causation determination within standing law."); *infra* notes 204–260 and accompanying text.

[20] *See infra* notes 209–235 and accompanying text.

[21] *See infra* note 222 and accompanying text.

[22] *See* Pitt, *supra* note 7, at 506 ("Commercial hunters systematically rounded up wild horses and burros and sold the animals to slaughterhouses for processing.").

hunting.[23] Using low flying planes and mounted armed cowboys, commercial contractors rounded up horses and reduced their numbers on the range.[24] The cowboys would then tie the captured horses to large truck tires to make them easier for handling.[25] En route to the slaughterhouses, the horses were packed into trucks so that only their weight supported them upright.[26] The practice of horse hunting alone reduced the wild horse population from two million to an estimated 25,000.[27]

By the late 1950s, the work of activists had gained traction.[28] In 1959, President Eisenhower signed the Wild Horse Annie[29] Act, which banned the use of aircraft or motor vehicles for commercial hunting on public lands.[30] Ultimately, the law failed to provide adequate protection.[31] The compounding lack of enforcement by local officials rendered the law ineffective, and the wild horse population decreased further to an estimated 9500.[32]

Other attempts to introduce bills protecting wild horses were met with opposition from livestock interest holders.[33] The encouragement from activists, humane societies, and school children, however, drove Congress to continue pushing for new protective measures.[34] Finally, a consolidated measure passed both the Senate and the House as the Wild Free-Roaming Horses and Burros Act ("the Act").[35] President Nixon signed the Act into law on December 15,

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[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Velma B. Johnston, *The Fight to Save a Memory*, 50 TEX. L. REV. 1055, 1055 (1972).

[28] *See* Pitt, *supra* note 7, at 506 ("[S]upport developed throughout the United States to stop the brutal and inhumane treatment of captured wild horses.").

[29] *History and Facts*, BUREAU OF LAND MGMT., http://www.blm.gov/wo/st/en/prog/whb program-/history_and_facts.html (last updated Dec. 12, 2012), *available at* http://perma.cc/65GH-ZDBJ ("The mid-20th century harvesting of wild horses for commercial purposes induced a Reno, Nevada, secretary—Velma Johnston—to begin a campaign that led to passage of a 1959 law to protect these iconic animals . . . . The campaign became known as the 'Pencil War' and Ms. Johnston was affectionately dubbed 'Wild Horse Annie.'").

[30] Wild Horse Annie Act of 1959, 18 U.S.C. § 47 ("Whoever uses an aircraft or a motor vehicle to hunt, for the purpose of capturing or killing, any wild unbranded horse, mare, colt, or burro running at large on any of the public land or ranges shall be fined under this title, or imprisoned not more than six months, or both."); Pitt, *supra* note 7, at 506–07.

[31] Pitt, *supra* note 7, at 506–07 ("[The law] did not protect them from roundups on private lands, from further encroachment upon their habitat, from target shooters, or from non-motorized roundups on public lands.").

[32] *Id.*

[33] *Id.* (explaining that livestock interest holders specifically opposed prohibitions against commercial processing of those wild horses exceeding range capacity and the release of domestic horses and burros).

[34] *Id.*

[35] 16 U.S.C. §§ 1331–1333 (2012); Pitt, *supra* note 7, at 507–08.

1971.[36] The Act expanded the BLM's jurisdiction to include wild horses.[37] It further provided that wild horses "are to be considered . . . an integral part of the natural system of the public lands."[38]

B. *Overview of the Wild Free-Roaming Horses and Burros Act*

The Act protects wild free-roaming horses and burros on public lands from "capture, branding, harassment, or death."[39] Congress passed the Act under the Property Clause in Article IV of the Constitution.[40] The Act brings all free-roaming horses and burros under the jurisdiction of the Department of the Interior and the Department of Agriculture.[41] Together, these departments and their respective agencies oversee the management and protection of wild horses and burros roaming on public lands.[42]

The Act specifically authorizes the Secretary[43] to protect wild free-roaming horses and burros as "components of the public land."[44] Ultimately, the Secretary must manage wild horse populations "in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands."[45] The Act requires the Secretary to conduct "[a]ll management activities . . . at the minimal feasible level . . . in consultation with" state wildlife agencies and advisory boards.[46]

To that end, the Secretary "may designate and maintain specific ranges on public lands as sanctuaries for [wild horse] protection and preservation."[47] The BLM in particular maintains specific ranges by setting appropriate manage-

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[36] Statement on Signing Bill to Protect Wild Horses and Burros, 1 PUB. PAPERS 1193 (Dec. 17, 1971).

[37] 16 U.S.C. § 1333; Glover, *supra* note 7, at 1109.

[38] 16 U.S.C. § 1331; Glover, *supra* note 7, at 1110.

[39] 16 U.S.C. § 1331. The Act defines horses as wild when they are "unbranded and unclaimed horses and burros on public lands of the United States." *Id.* § 1332(b).

[40] Iraola, *supra* note 2, at 1051; *see* U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

[41] 16 U.S.C. §§ 1332(a), 1332(e), 1333 (2012); Iraola, *supra* note 2, at 1051–52 (explaining that Act vests authority to the Department of the Interior (through the Bureau of Land Management) and the Department of Agriculture).

[42] Iraola, *supra* note 2, at 1052.

[43] 16 U.S.C. § 1332(a) (defining "Secretary" as the Secretaries of the Department of the Interior and the Department of Agriculture).

[44] *Id.* § 1333(a); Iraola, *supra* note 2, at 1052.

[45] 16 U.S.C. § 1333(a). "The ecosystems of public rangelands are not able to withstand the impacts from overpopulated herds, which include soil erosion, sedimentation of streams, and damage to wildlife habitat." *Wild Horse and Burro Quick Facts*, *supra* note 4.

[46] 16 U.S.C. §§ 1333(a), 1337; Iraola, *supra* note 2, at 1052.

[47] 16 U.S.C. § 1333(a) (2012).

ment levels ("AMLs") within herd management areas ("HMAs").[48] AMLs are based on the number of wild horses that a particular area can support.[49] AMLs are specifically designed to prevent deterioration of the ecological balance, pursuant to the purpose of the statute.[50] The Secretary maintains current inventories of wild horse populations to determine whether overpopulation exists.[51]

If the Secretary determines that overpopulation exists and that action is necessary to remove "excess"[52] animals, the Act explicitly prescribes three ordered steps.[53] First, the Secretary must destroy "old, sick, or lame animals . . . in the most humane manner possible."[54] Next, the Secretary must place healthy excess animals under "private maintenance and care."[55] Finally, to the extent that healthy animals have been removed and are not in demand for adoption, the Secretary must destroy those remaining excess animals "in the most humane and cost efficient manner possible."[56] In 2004, the Burns Amendment authorized the BLM to sell, "without limitation," healthy animals that have been removed and

[48] *Id.* § 1333(b)(1); U.S. GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: IMPROVEMENTS NEEDED IN FEDERAL WILD HORSE PROGRAM 51 (1990), *available at* http://www.gao.gov/assets/150/149472.pdf and http://perma.cc/T9XN-CBU9; *Herd Areas and Herd Management Areas*, BUREAU OF LAND MGMT., http://www.blm.gov/ca/st/en/prog/wild_horse_and_burro/hma-main.html (last updated Sept. 11, 2012), *available at* http://perma.cc/8QG8-MEMA ("HMAs are those areas . . . where the decision has been made, through Land Use Plans, to manage for populations of wild horses and/or burros.").

[49] *Battle Mountain Wild Horse & Burro Program*, BUREAU OF LAND MGMT., (last updated Mar. 25, 2011) http://www.blm.gov/nv/st/en/fo/battle_mountain_field/blm_programs/wild_horse_and_burro.html, *available at* http://perma.cc/59P6-L9VV; *see* 16 U.S.C. § 1333(b)(1).

[50] 16 U.S.C. § 1333(a), (b)(1).

[51] *Id.* § 1333(b)(1); *Battle Mountain Wild Horse & Burro Program*, *supra* note 49 ("The Wild Horse and Burro Specialists conduct census work using helicopters or airplanes to monitor and inventory the wild horse populations on an ongoing basis (about every 2–4 years). When it is determined that the population in a HMA has exceeded the AML, a gather is planned for that area to remove excess wild horses or burros.").

[52] 16 U.S.C. § 1332(f)(1)–(2) (defining excess animals as wild horses and burros "which have been removed" or "which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area").

[53] *Id.* § 1333(b)(2) (instructing BLM to immediately remove excess animals in a specified order); Iraola, *supra* note 2, at 1053–54.

[54] 16 U.S.C. § 1333(b)(2)(A) (2012).

[55] *Id.* § 1333(b)(2)(B); *see* Iraola, *supra* note 2, at 1054 ("Private maintenance is accomplished through an adoption program, which contemplates adopters who are both 'qualified individuals,' and also persons who 'can assure humane treatment and care . . .' of these animals.").

[56] 16 U.S.C. § 1333(b)(2)(C).

are not in demand for adoption.[57] The proceeds of these sales fund the adoption program.[58]

C. *The BLM's Controversial Use of Long-Term Holding Facilities*

As of 2013, the BLM managed approximately 37,300 wild horses and burros across ten western states.[59] Notably, as of January 2014 the BLM has decreased the acreage allotted to wild horses from 53.8 million acres to 31.6 million acres since the time of the Act's enactment.[60] A recent estimate of the free-roaming population exceeds the maximum total AML by approximately 14,000.[61] To reach target AMLs in HMAs, the BLM conducts "gathers" to remove excess animals.[62] From 1971 to 2007, the BLM removed more than 267,000 wild horses and burros.[63]

Immediately after a gather, the BLM places excess horses in temporary holding facilities for sorting.[64] In these facilities, the horses are either prepared for adoption or sale, or transferred to short- or long-term holding facilities where they will most likely live out the remainder of their lives.[65] The BLM's stated preference is that healthy animals removed from the range be adopted through the BLM's Adopt-a-Horse-or-Burro Program.[66] Since 1971, qualified

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[57] Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 142(a)(2), 118 Stat. 2809, 3070–71 (2005) (amending 16 U.S.C. § 1333); Iraola, *supra* note 2, at 1054; *Wild Horse and Burro Quick Facts*, *supra* note 4 ("[The Burns Amendment] directs the BLM to sell 'without limitation' to any willing buyers animals that are either more than 10 years old or have been passed over for adoption at least three times.").

[58] 16 U.S.C. § 1333(e)(3)(B) ("Funds generated from the sale of excess animals under this subsection shall be (A) credited as an offsetting collection to the Management of Lands and Resources appropriation for the Bureau of Land Management; and (B) used for the costs relating to the adoption of wild free-roaming horses and burros, including the costs of marketing such adoption.").

[59] *Wild Horse and Burro Quick Facts*, *supra* note 4 (citing the latest census at 33,780 horses and 6825 burros).

[60] *Id.*

[61] *Id.* ("The maximum appropriate management level (AML) is approximately 26,677.").

[62] 16 U.S.C. § 1333(b)(2) (2012); *National Wild Horse and Burro Tentative Gather/Remove/Treat Schedule Fiscal Year 2014*, BUREAU OF LAND MGMT., http://www.blm.gov/wo/st/en/prog/whbprogram/herd_management/tentative_gather_schedule.html (last updated Dec. 9, 2013), *available at* http://perma.cc/L9CM-B8CR.

[63] U.S. GOV'T ACCOUNTABILITY OFFICE, BUREAU OF LAND MANAGEMENT: EFFECTIVE LONG-TERM OPTIONS NEEDED TO MANAGE UNADOPTABLE WILD HORSES 3 (2008), *available at* http://www.gao.gov/assets/290/282664.pdf and http://perma.cc/7QDK-5MT5.

[64] *See id.* at 19 & n.22 ("When gathers are conducted, an emphasis is placed on removing the younger, more adoptable animals from the range."); U.S. GENERAL ACCOUNTING OFFICE, *supra* note 48, at 36 ("Potential adopters generally prefer horses younger than 5 years of age because of the difficulty in changing the behavior of older horses.").

[65] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 63, at 3, 19.

[66] *Id.* at 3.

individuals have successfully adopted more than 230,000 horses and burros from the BLM.[67]

Because the number of horses removed far exceeds the number of horses adopted, the unadopted horses are transferred to longer term holding facilities.[68] The BLM manages the holding facilities, which are located on both government and private lands.[69] Due in part to decreasing adoption rates,[70] the holding facility populations have swelled.[71] In 2001, the BLM's holding facilities housed 9,807 animals.[72] By June 2008, the number of animals held in short and long-term holding facilities reached close to 31,000.[73] A study in 2013 found that there are more than 50,000 wild horses and burros living off the range in short-term and long-term care.[74] At the same time, the cost of care per horse in both short-and long-term holding facilities has increased.[75] Despite warnings from the Government Accountability Office and the Department of the Interior's Office of Inspector General about the potential for escalating holding costs, the BLM's spending on long-term holding alone increased from roughly $668,000 to more than $9.1 million from 2000 to 2007.[76] In 2012, total holding costs accounted for roughly sixty percent of the BLM's entire budget for the Wild Horse and Burro program.[77]

Thus, the BLM's management budget is strained by rising costs associated with holding facilities.[78] As a result, the BLM currently faces criticism from

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[67] *Wild Horse and Burro Quick Facts*, *supra* note 4.

[68] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 63, at 40 ("Since 2001, about 74,000 animals have been removed from the range, while only about 46,400 have been adopted or sold.").

[69] *Id.* at 50 ("BLM's short-term holding facilities are mostly maintained and directly managed by BLM, either on government property or on leased property. Several are at state prisons, and a few others are maintained by contractors in privately-owned feedlots or ranches that BLM has leased."); *see id.* at 45 ("BLM pays private contractors an average of $1.27 per horse per day to maintain the animals for the remainder of their lifespan, unless removed from long-term holding for adoption or sale.").

[70] *Id.* at 8 ("Thirty-six percent fewer wild horses and burros were adopted in 2007, compared to average adoption rates in the 1990s. BLM officials attribute the steady adoption decline in recent years to the decreasing demand for horses in general and increasing hay and fuel costs associated with their care.").

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Wild Horse and Burro Quick Facts*, *supra* note 4.

[75] *See* U.S. GENERAL ACCOUNTING OFFICE, *supra* note 48, at 43. The average cost per animal in short-term holding increased from $3.00 to $5.08 per day from 2001 to 2008. *Id.* Long-term holding costs have similarly increased from $1.22 to $1.28 from 2001 to 2008. *Id.* at 45 & n.41.

[76] *Id.* at 8, 45.

[77] *See Wild Horse and Burro Quick Facts*, *supra* note 4.

[78] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 63, at 56 (describing that rising costs associated with short- and long-term holding facilities "leaves a smaller portion of the BLM's budget to go towards on the range management activities"); U.S. GENERAL ACCOUNTING OFFICE, *supra* note 48, at 40. ("[W]hile private sanctuaries offer humane disposal of unadoptable horses, rising costs and

both the media and environmental conservation groups for mismanaging its budget.[79] Advocates are also increasingly alarmed with the BLM's management of horse welfare conditions within the holding facilities.[80]

II. THE EVOLUTION OF STANDING JURISPRUDENCE

Since the enactment of the Wild Free-Roaming Horses and Burro Act ("the Act"), the Bureau of Land Management's (BLM) execution of its statutory directive has provoked litigation on a number of issues.[81] The most recent cases challenge the BLM's use of long-term holding facilities and have led to a potential circuit split regarding plaintiff standing.[82] This potential split is attributed to ambiguities surrounding the constitutional standing requirements, and specifically the causation prong of the three-part test in *Lujan v. Defenders of Wildlife*.[83]

A. *Introduction to the Standing Doctrine*

Before hearing the merits of a case, a federal court must assure itself that it has subject matter jurisdiction.[84] The standing doctrine provides jurisdiction by requiring that federal courts assess whether a plaintiff has a genuine interest

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the probable need for a long-term commitment of federal resources will require BLM to seek alternative disposal options for unadoptable wild horses removed from public rangeland.").

[79] *See* Andrew Cohen, *7 Questions About Wild Horses for Interior Secretary Nominee Sally Jewell*, ATLANTIC (Mar. 6, 2013), http://www.theatlantic.com/national/archive/2013/03/7-questions-about-wild-horses-for-interior-secretary-nominee-sally-jewell/273706/, *available at* http://perma.cc/7DR4-MTQE ("We all know that the current situation with the corralled wild horses is unsustainable as an economic or political policy.").

[80] *Id.* ("In addition to the economic burden to taxpayers of the roundup and corralling of all these horses, horse advocates are growing increasingly concerned about the conditions many of the captured horses live in.").

[81] Iraola, *supra* note 2, at 1055; *e.g.*, In Def. of Animals v. U.S. Dep't of the Interior, 909 F. Supp. 2d 1178, 1194 (E.D. Cal. 2012) (challenging the BLM's use of holding facilities as illegal under the Act); Colo. Wild Horse & Burro Coal. v. Salazar, 639 F. Supp. 2d 87, 87 (D.D.C. 2009) (challenging BLM's decision to remove *all* wild horses from a particular area); Am. Horse Prot. Ass'n v. Frizzell, 403 F. Supp. 1206, 1215–16 (D. Nev. 1975) (challenging the BLM's roundup of wild horses as illegal under the National Environmental Policy Act for lack of an environmental impact statement).

[82] *See infra* notes 160–202 and accompanying text.

[83] *See* 504 U.S. 555, 560 (1992); *infra* notes 95–115 and accompanying text.

[84] *See* FW/PBS Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) ("[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review' . . .") (quoting Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986)) (alteration in original); *see also* Robert J. Martineau, *Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse,* 1988 B.Y.U. L. REV. 1, 3 (defining subject matter jurisdiction as "the authority to adjudicate the type of controversy involved in an action").

and stake in a case.[85] Being heard on the merits implies that a case was resolved accurately based on law and fact as opposed to a procedural technicality.[86] In this way, by serving as a gatekeeper to litigation,[87] standing serves to promote judicial efficiency[88] while also supporting separation of powers.[89] By requiring that courts issue rulings only when faced with actual controversies between adverse parties, each with a personal stake in the outcome, standing also serves to improve the overall quality in judicial decisionmaking.[90]

The doctrine of standing has two components: constitutional and prudential requirements.[91] The constitutional standing doctrine is rooted in the "Case and Controversy" clause of Article III of the Constitution.[92] Because the constitutional standing doctrine is rooted in the Constitution, its requirements may not be waived or modified by Congress.[93]

Unlike constitutional standing, prudential standing is not rooted in the Constitution and is not strictly enforceable.[94] Under the prudential standing doctrine, a plaintiff must show that his or her injury is within a zone of interest

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[85] *See* Bradford C. Mank, *Informational Standing After* Summers, 39 B.C. ENVTL. AFF. L. REV. 1, 7 (2012) ("Federal courts only have jurisdiction over a case if a plaintiff has standing for the relief sought.").

[86] *See* Tidmarsh, *supra* note 13, at 409 ("[R]esolving cases on the merits meant removing procedural barriers that stood in the way of the resolution demanded by substantive law and justice.") (internal quotation marks omitted).

[87] Meier, *supra* note 19, at 1245. "The first understanding of threshold means only that jurisdictional issues such as standing must be decided *before* other issues in a lawsuit." *Id.* at 1268.

[88] Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009) ("This requirement assures that 'there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.'") (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U. S. 208, 221 (1974)); Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 3 (2010) ("[S]tanding improves efficiency by allocating scarce judicial resources to the most pressing cases.").

[89] *Summers*, 555 U.S. at 493 (reasoning that where the need to exercise judicial review "does not exist, allowing courts to oversee legislative or executive action would significantly alter the allocation of power . . . away from a democratic form of government") (internal quotation marks omitted); Mank, *supra* note 85, at 7–8; Pushaw, *supra* note 88, at 23 ("The Court also declared that its approach to standing promoted the Constitution's original separation-of-powers design, because in our democracy the Judiciary had a uniquely limited role vis-a-vis the political branches.").

[90] Baker v. Carr, 309 U.S. 186, 204 (1961); Pushaw, *supra* note 88, at 3 (contrasting concrete disputes between adverse parties with "mere intellectual or ideological interest in the law").

[91] Blake R. Bertagna, Comment, *"Standing" Up for the Environment: The Ability of Plaintiffs to Establish Legal Standing to Redress Injuries Caused by Global Warming,* 2006 B.Y.U. L. REV. 415, 419. This Note focuses exclusively on constitutional standing.

[92] U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases . . . to Controversies . . . ."); Heather Elliott, *Standing Lessons: What We Can Learn When Conservative Plaintiffs Lose Under Article III Standing Doctrine*, 87 IND. L.J. 551, 556 (2012).

[93] Joshua L. Sohn, *The Case for Prudential Standing*, 39 U. MEM. L. REV. 727, 732 (2009) (explaining that Congress may not waive the constitutional standing requirement).

[94] *Id.* (explaining that "[t]he prudential requirements are merely 'judicially self-imposed limits' that are waivable by Congress") (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

that the statute or constitutional provision serves to protect.[95] Prudential standing also specifically prohibits plaintiffs from asserting generalized grievances or third-party legal rights.[96]

B. *The Modern Constitutional Standing Doctrine*

The requirements within constitutional standing are discussed in *Lujan v. Defenders of Wildlife*.[97] In *Lujan*, the Supreme Court in 1992 considered whether plaintiffs lacked legal standing to challenge a regulation enacted by the government under the Endangered Species Act (ESA).[98] Section 7(a)(2) of the ESA provides that a federal agency must carry out its functions without threatening any endangered species.[99] In 1978, the Department of the Interior had promulgated a regulation applying the provisions of that pertinent section to foreign nations.[100] A few years later, however, the Department revised the promulgation to apply only to actions taken in the United States or on the high seas.[101] Defenders of Wildlife ("Defenders") challenged this narrowing and sought to restore the initial regulation's equal application globally.[102]

In evaluating these members' standing, the Court articulated the modern standing test.[103] First, the plaintiff must have suffered an injury in fact "which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[104] Second, the plaintiff must assert "a causal connection between the injury and the conduct complained of."[105] Specifically, the injury must be "fairly . . . trace[able] to the challenged action of the defendant, and

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[95] Bennett v. Spear, 520 U.S. 154, 155 (1997) (holding that the zone of interest test "requires that a plaintiff's grievance arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit"); Ass'n of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 157 (1970) (implicitly applying the zone of interest test to find prudential standing).

[96] *See* Sohn, *supra* note 93, at 728, 732. Generalized grievances is "a term used to refer to suits involving large segments of the public, or those where a citizen lacking a personal injury seeks to force the government to obey a duly enacted law." Mank, *supra* note 85, at 9.

[97] 504 U.S. at 560–61.

[98] *Id.* at 557–58; Bertagna, *supra* note 91, at 421.

[99] 16 U.S.C. § 1536(a)(2) (2012) ("Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical."); *Lujan*, 504 U.S. at 558.

[100] *Lujan*, 504 U.S. at 558.

[101] *Id.* at 558–59.

[102] *Id.* at 559.

[103] *Id.* at 560–61; Bertagna, *supra* note 91, at 421.

[104] *Lujan*, 504 U.S. at 560 (citations omitted) (internal quotation marks omitted).

[105] *See id*.

not . . . th[e] result [of] the independent action of some third party not before the court."[106] Third, it must be "likely . . . that the injury will be redressed by a favorable decision."[107] The party bringing suit bears the burden of establishing these three elements.[108] In *Lujan*, the Defenders relied on the aesthetic and recreational injury of two of their members to prove standing.[109] Applying this three-part test to the facts, the Court held that it could not proceed to the merits of the case because the members did not meet the imminent injury requirement.[110]

Thus, the modern constitutional standing doctrine provides for three constitutional requirements, without which a court will refuse to consider the merits of a case.[111] First, the litigant must demonstrate an injury in fact.[112] Second, the injury must also be "fairly traceable" to the defendant.[113] Third, the litigant must show that the injury is likely to be redressed by a favorable decision by a court.[114]

C. *Scholarly Review of Standing Doctrine Clarity*

1. Ambiguities in Standing Causation Despite an Articulated Test

Although an articulated test for constitutional standing exists, the Supreme Court has varied its construction and interpretation of the various requirements.[115] The Supreme Court's jurisprudence on standing has often been

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[106] *Id.* (internal quotation marks omitted); David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37, 45 ("[C]ausation was first expressly recognized as an article III requirement in the 1973 decision of *Linda R.S. v. Richard D.*"); Meier, *supra* note 19, at 1253 (attributing the requirement of "fairly traceable" to *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973)).

[107] *See Lujan*, 504 U.S. at 561 (internal quotation marks omitted).

[108] *See id.* ("The party invoking federal jurisdiction bears the burden of establishing these elements.").

[109] *See id.* at 562–64; Bertagna, *supra* note 91, at 421. One member asserted that she would suffer harm from a federal project that would endanger the Nile crocodile's habit and her ability to observe the creatures in their natural habitat. *Lujan*, 504 U.S. at 563. The second member alleged injury from a federal project that threatened the habitat of endangered species such as the Asian elephant and the leopard. *Id.*

[110] *See Lujan*, 504 U.S. at 564; Bertagna, *supra* note 91 at 421–22 ("The Court could not see how damage to a species so remote in location from the two members would cause them imminent injury. This finding was bolstered by the member's lack of 'concrete plans' to return to the actual locations in the near future.").

[111] Elliott, *supra* note 92, at 556.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] Pushaw, *supra* note 88, at 49 ("The injury, causation, and redressability standards are hopelessly vague, despite the Court's efforts to make them sound clear and objective."); Joshua E. Gardner, Note, *At the Intersection of Constitutional Standing, Congressional Citizen-Suits, and the Hu-*

criticized for suffering from "inconsistency, unreliability and inordinate complexity."[116] For these reasons, the standing doctrine has been called largely discretionary with little foundation in Article III's history, text, or structure.[117] The variation in interpretation and application explains why the standing doctrine is considered "one of the most amorphous concepts in the entire doctrine of public law."[118]

Legal scholars in particular have widely criticized the standing doctrine for its ambiguity.[119] Their criticism, however, has focused primarily on the first prong of injury and has left the second prong of causation generally ignored.[120] Due in part to this academic disinterest, the analysis involved in the causation inquiry remains unclear.[121] The Supreme Court has not provided helpful guidance on the precise analysis involved in the causation prong of standing.[122] Indeed, the Court's "fairly traceable" language provides little concrete guidance.[123]

This lack of consistency in the Court's standing causation jurisprudence is compounded by the Court's reluctance to tackle politically contentious issues.[124] For example, in *Massachusetts v. Environmental Protection Agency*, the Court was forced to deal with a political controversy surrounding climate

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mane Treatment of Animals: Proposals to Strengthen the Animal Welfare Act, 68 GEO. WASH. L. REV. 330, 338–39 (2000).

[116] 3 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.2, at 7 (3d ed. 1994); *compare* Sierra Club v. Morton, 405 U.S. 727, 738–39 (1972) (limiting the previous understanding of aesthetic and recreational injury by holding that an organization's assertion of interest is insufficient to establish standing unless accompanied by an individual member's injury in fact), *with* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688–90 (1973) (distinguishing the holding of *Sierra Club* to find that a group of law students had standing because the potential for environmental damage in the Washington D.C. area was a "specific and perceptible harm that distinguished them from other citizens who has not used the natural resources").

[117] Pushaw, *supra* note 88, at 8, 105.

[118] Elliott, *supra* note 92, at 558 (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968)).

[119] Meier, *supra* note 19, at 1243; Pushaw, *supra* note 88, at 105 (suggesting "refinements of the existing elements of standing to make them clearer, better grounded in Article III's text and history.").

[120] Meier, *supra* note 19, at 1243–44.

[121] *Id.* at 1244.

[122] *Id.* at 1245 ("[T]he actual analysis employed by the Court under this element of standing is far less clear."); Pushaw, *supra* note 88, at 51 (contrasting two cases to show courts' varying interpretation of causation).

[123] Meier, *supra* note 19, at 1248 (explaining that the Supreme Court has had difficulties "in developing the fairly traceable requirement of standing"); *id.* at 1252 (arguing that "the Court would be hard-pressed to pick a term that could better obfuscate"); Pushaw, *supra* note 88, at 38 (explaining that that the "Court further confused Article III standing analysis by adding the requirements that the injury must be 'fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief'") (quoting *Allen*, 468 U.S. at 751).

[124] *See* Meier, *supra* note 19, at 1296.

change.[125] Massachusetts alleged that greenhouse gases (GHG) contributed to rising sea levels and that the EPA's refusal to regulate GHGs threatened state-owned coastal land.[126] The Court found that Massachusetts asserted a sufficient injury because the state was losing coastal lands to rising seas.[127] Turning to causation, the Court acknowledged that the EPA's failure contributed to Massachusetts's injury.[128] The Court sidestepped a causation analysis, however, by relying on the EPA's stipulation as to a causal link between GHG emissions and global warming.[129] Finally, the Court found that that the plaintiffs met the redressability requirement because ordering the EPA to regulate GHG emissions would provide relief.[130]

2. Tort Law as a Suggested Approach

In contemplating the appropriate remedy for ambiguities surrounding standing causation, some academics argue that tort law serves as a "perfect springboard" for discussion.[131] Tort law provides relief for those who have been injured by the actions of others.[132] A successful tort claim requires proof of the defendant's duty to the victim, and proof that the defendant's action breached the duty and caused an actual injury to the victim.[133] In tort law, causation guides a court's understanding of fair compensation and distribution.[134] The tort law causation inquiry consists of a two-part framework.[135] First, a

[125] 549 U.S. 497, 504–05 (2007); Meier, *supra* note 19, at 1296 ("Obviously, global warming is one of the more contentious contemporary issues in American politics. One understands why the Court desired to avoid the issue and thus eagerly grasped onto the stipulation made by the EPA.").

[126] *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. at 504–05, 522 ("According to petitioners' unchallenged affidavits, global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming. These rising seas have already begun to swallow Massachusetts' coastal land.") (citations omitted).

[127] *Id.* at 521–23.

[128] *Id.* at 523.

[129] *Id.*; Meier, *supra* note 19, at 1296 ("Turning to causation, the Court ducked some of the incredibly difficult cause in fact hurdles inherent in linking the EPA's alleged misconduct to the plaintiff's harm by accepting the EPA's stipulation.").

[130] *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. at 526 ("The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek.").

[131] Meier, *supra* note 19, at 1246.

[132] Philip Desai, Note, Donovan v. Philip Morris USA, Inc.*: The Best Approach to Satisfying the Injury Requirement in Medical Monitoring Claims,* 38 B.C. ENVTL. AFF. L. REV. 95, 97 (2011).

[133] *Id.* at 97–98 ("The four elements for a successful tort claim are known as duty, breach, causation, and actual loss or damage.").

[134] Michelle Adams, *Causation and Responsibility in Tort and Affirmative Action*, 79 TEX. L. REV. 643, 646 (2001) ("Causation is the key that turns the lock on a host of other issues—compensation, fairness, distribution, and incentive creation—that have long animated the law of tort.").

[135] Meier, *supra* note 19, at 1247.

court must ask whether the defendant's conduct was a "cause in fact" for the harm.[136] Next, if appropriate, a court may consider whether the defendant's conduct was a "proximate cause."[137]

A cause in fact inquiry turns on the "but-for" test.[138] In tort law, if the plaintiff's damages would have occurred even if the defendant had not acted in a negligent manner, then the defendant's actions are not a cause in fact of the plaintiff's damages, and the defendant is not liable.[139] This type of causal inquiry is fact-intensive[140] and consistent with a notion of retributive compensation.[141] The inquiry addresses whether the defendant's misconduct is responsible for the plaintiff's injury.[142]

The proximate cause inquiry, on the other hand, *assumes* that the defendant's conduct was a cause in fact of the injury.[143] A court applies the proximate cause analysis when considering the fairness of holding the defendant responsible for the injury.[144] Proximate cause concedes that there are infinite consequences arising from every act.[145] When invoking proximate cause analysis, courts often use one of two tests, "foreseeability" and "scope of the risk."[146] Both of these tests ask whether the plaintiff's injury is one of the foreseeable consequences that render the defendant's conduct inherently unreasonable or illegal.[147]

Advocates of the tort law approach to standing causation argue that cause in fact and proximate cause analysis should be applied to resolve confusion surrounding the requirement.[148] According to their theory, the word "traceable"

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[136] *Id.*; David F. Partlett, *Symposium: A Tribute to David Fisher*, 73 MO. L. REV. 281, 282 (2008) (explaining that the cause in fact analysis is only the beginning of the two-part framework).

[137] *See* Meier, *supra* note 19, at 1249 (explaining that proximate cause assumes that the defendant's actions are a cause in fact, and asks whether the defendant "should nevertheless be shielded from liability").

[138] *Id.* at 1247 (explaining that the cause in fact requirement turns on a but for test: "But for the defendant's negligent behavior, would the plaintiff's damages have occurred?").

[139] *See id.* at 1247–48.

[140] *Id.* at 1245.

[141] *Id.* at 1248 (explaining that one of tort law's primary objectives is to compensate those who have been harmed by the blameworthy conduct of others, and that cause in fact analysis establishes that link through the but for test).

[142] *Id.*

[143] *Id.* at 1249.

[144] *Id.* "[P]roximate cause serves a limiting function within Negligence law." *Id.* at 1278.

[145] *Id.* at 1249–50.

[146] *Id.* at 1250.

[147] *Id.* at 1250, 1278.

[148] *Id.* at 1241.

inherently connotes a cause in fact inquiry.[149] Alternatively, "fairly" suggests a proximate cause inquiry.[150]

Under this theory, a court would apply cause in fact and proximate cause analysis to establish standing causation.[151] Applying proximate cause to standing cases involving statutory violations requires an understanding of legislative intent.[152] Specifically, a court would consider the purpose of the law at issue and the sort of harms that the law seeks to prevent.[153] Ultimately, proximate cause is a fairness analysis, and a court is guided by public policy considerations.[154]

Advocates of this theory argue that a careful reading of the Supreme Court's standing jurisprudence reveals that the Court has often applied a proximate cause inquiry despite its suggestion of cause in fact analysis.[155] They argue, for example, that although the Court in *Linda R.S. v. Richard D.* suggested a cause in fact inquiry, the Court actually invoked proximate cause reasoning.[156] In *Linda R.S.*, a mother sued the state of Texas and a Dallas County District Attorney under the Equal Protection Clause.[157] Specifically, she argued that a Texas state policy of not prosecuting fathers for failing to pay child support was unconstitutional.[158] The Court held that the plaintiff had failed to establish a sufficient causal link between the plaintiff's injury, stemming from the father's failure to pay, and the state's alleged Equal Protection violation in

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[149] *Id.* at 1252 ("A fundamental aspect of [traceability] is that it involves a connection *between* two things or ideas. As has already been discussed, cause in fact connects the defendant's inappropriate behavior with the plaintiff's injury.").

[150] *Id.* at 1252–53 ("An important consideration in the decision to impose liability is fairness to the actor.").

[151] *See id.* at 1245.

[152] *Id.* at 1280.

[153] *Id.* ("To apply a proximate cause analysis in a case involving a statute or an administrative regulation requires an understanding of the reasons the issuing body created that law and the types of injuries that it intended to address.").

[154] Rory Bahadur, *Almost a Century and Three Restatements After Green It's Time to Admit and Remedy the Nonsense of Negligence*, 38 N. KY. L. REV. 61, 75–76 (2011).

[155] Meier, *supra* note 19, at 1282 ("In early cases after the introduction of the fairly traceable prong of standing, the Court would often use cause in fact language, but perform a proximate cause analysis.").

[156] 410 U.S. at 618–19 (holding that a citizen's standing was guided by the policy underlying the court's previous decisions); Meier, *supra* note 19, at 1258 (explaining that in *Linda R.S.*, "Justice Marshall's conclusion that the plaintiff is without standing is based on an implicit understanding about the types of harms against which the Equal Protection Clause protects," which is proximate cause reasoning).

[157] 410 U.S. at 614–15, 616.

[158] *Id.* at 615–16.

enforcing the child support regime only on behalf of children not born out of wedlock.[159]

In rejecting that the *Linda R.S.* decision was based on cause in fact analysis, tort law scholars point to the evidence that would have been required for such an inherently fact-intensive inquiry, but was not a part of the Court's reasoning.[160] Because fact-intensive evidence is not present at the outset of litigation, scholars argue this renders cause in fact analysis incompatible with standing's gatekeeper function.[161] Instead, scholars argue that the Court's analysis was driven by an implicit concern with the underlying purpose of the Equal Protection Clause, suggesting that a proximate cause inquiry was actually applied.[162] In deferring to the underlying purpose of the statute or clause, application of proximate cause analysis also serves to promote the separation of powers.[163]

III. A Potential Circuit Split on Standing Causation in the Wild Horse Dispute

The Supreme Court considers and resolves major standing issues infrequently.[164] Although *Lujan v. Defenders of Wildlife* articulated a three-part standing test, the Court has yet to tackle standing causation explicitly.[165] Returning to the wild horse cause, the ambiguity surrounding standing causation analysis has recently led to a potential circuit split on the issue.[166]

A. *Eastern District of California: Finding Sufficient Standing Causation*

In 2011, the U.S. District Court for the Eastern District of California in *In Defense of Animals v. U.S. Department of the Interior* held that animal advocacy groups and individual plaintiffs had standing to challenge the Bureau of

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[159] *Id.* at 617–18 ("[A]ppellant has failed to allege a sufficient nexus between her injury and the government action which she attacks to justify judicial intervention.").

[160] Meier, *supra* note 19, at 1284 (reasoning that in *Linda R.S.*, a cause in fact analysis would have required details about, inter alia, the child's father's statements about preference for paying child support or serving jail time).

[161] *Id.* at 1245, 1265 (describing proximate cause as a great fit with standing's gatekeeper role because the court is saved from drawing inferences at the outset of litigation).

[162] *Id.* at 1284 ("In Linda R.S., Justice Marshall's conclusion that the plaintiff is without standing is based on an implicit understanding about the types of harms against which the Equal Protection Clause protects.").

[163] *Id.* at 1298 (explaining that proximate cause analysis furthers standing's promotion of the separation of powers because it requires an implicit understanding of legislative intent).

[164] Pushaw, *supra* note 88, at 6 ("[T]he Court only issues major standing opinions every few years.").

[165] *See* 504 U.S. 555, 560 (1992); *supra* note 116 and accompanying text.

[166] *See infra* notes 167–203 and accompanying text.

Land Management's (BLM) roundup of horses and use of holding facilities.[167] In district court, the plaintiffs challenged the BLM roundup, gather, and removal of wild horses and burros in northeast California and northwest Nevada as violations of the Wild Free-Roaming Horses and Burros Act ("the Act") and another federal statute.[168] Only a few of the horses removed during the gather were returned to the range, with the remainder transferred to holding corrals.[169] The plaintiffs alleged that the BLM had violated several provisions of the Act during this roundup.[170] Further, the plaintiffs contended that the relocation of excess horses to long-term holding facilities after the roundup was illegal under the Act.[171]

Before hearing the case on the merits, the court considered the threshold doctrine of standing.[172] The court invoked the test from *Lujan*.[173] As to the injury requirement for standing, plaintiffs maintained that their injury in fact arose from the lost enjoyment and interaction with wild horses in their natural habitat.[174] The court upheld this argument and found that the plaintiffs had established a concrete and particularized injury in fact.[175]

For the second requirement of causation, the court considered whether the plaintiff's stated injury of diminished enjoyment of wild horses was fairly traceable to the relocation of the horses to long-term holding facilities.[176] The plaintiffs argued that the scope of the BLM's roundups would have been limited, if the BLM had been prohibited from using long-term holding facilities.[177]

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[167] 808 F. Supp. 2d 1254, 1264 (E.D. Cal. 2011) (finding that plaintiffs satisfied the *Lujan* test for standing).

[168] *Id.* at 1260; *see* 16 U.S.C. §§ 1331–1333 (2012).

[169] *In Def. of Animals v. U.S. Dep't of the Interior*, 808 F. Supp. 2d at 1258 ("The roundup took place on September 19, 2010 and resulted in the gathering of 1,637 horses and 160 burros. After the round-up, 58 horses and one burro were returned to the range and the remainder were transferred to corrals where they will be either housed in short-term holding facilities where they will be available for adoption, or transferred to long-term pastures on private lands.").

[170] *Id.* at 1260.

[171] *Id.* (alleging "violations of §§ 1331 and 1339, which prohibit BLM from relocating horses to public lands where horses do not presently exist, and did not exist in 1971").

[172] *Id.* at 1261 ("Under Article III of the United States Constitution, a federal court can only adjudicate an actual live 'case or controversy,' which requires a plaintiff to demonstrate standing.") (citing Summers v. Earth Island Inst., 555 U.S. 488 (2009)).

[173] *Id.* ("In order to establish standing, the plaintiff must demonstrate an injury in fact, which is defined as a concrete and particularized invasion of a legally protected interest; causation which is fairly traceable between the alleged injury in fact and alleged conduct of the defendant; and redressability.").

[174] *See id.* at 1262.

[175] *In Def. of Animals v. U.S. Dep't of the Interior*, 808 F. Supp. 2d at 1262 ("Plaintiffs need not establish the complete elimination of the animals they seek to conserve in order to have a recognized injury-in-fact in the lost ability to observe and enjoy those animals.").

[176] *Id*. at 1263.

[177] *Id.*

They alleged that long-term holding facilities were restricted by the statute altogether.[178] In response, the BLM argued that the plaintiffs faced the same outcome regardless of whether horses were transported to holding facilities, given away for adoption, or destroyed.[179] The court sided with the plaintiffs and held that the BLM's removal of the animals to holding facilities caused the plaintiffs' stated injury.[180]

For the third standing requirement, the plaintiffs argued that the Act provides an opportunity for redress because the Act permits the BLM to designate additional ranges on public lands.[181] The court agreed again with the plaintiffs and found that the plaintiffs had met their burden on all three requirements and the case could proceed on the merits.[182]

With the plaintiffs' standing established, the court heard the case on the merits in November 2012.[183] The court considered the more narrow issue of whether the BLM's use of long-term holding facilities was illegal under the Act.[184] The court found that although the Act does prevent the transport of "wild horses and burros 'to areas of the public lands where they do not presently exist,'" the Act does not prohibit relocation of horses to private lands.[185] Further, because the BLM generally receives no funding for euthanizing healthy excess horses, relocation to private facilities is a necessary avenue for the BLM's management of excess horses.[186] The court found that congressional approval of funding for the BLM's use of long-term private holding facili-

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[178] *Id.* The plaintiffs argued that outside adoption, the only expressly permitted means of disposal of the excess animals under the Wild Horse Act is to have them destroyed or sold. 16 U.S.C. §§ 1333(b)(2), (e) (2012); *In Def. of Animals v. U.S. Dep't of the Interior*, 808 F. Supp. 2d at 1263. Therefore, had long-term holding facilities been unavailable, the defendants would not have removed more animals than they could have feasibly succeeded in adopting out. *In Def. of Animals v. U.S. Dep't of the Interior*, 808 F. Supp. 2d at 1263.

[179] *In Def. of Animals v. U.S. Dep't of the Interior*, 808 F. Supp. 2d at 1283.

[180] *Id.* at 1264.

[181] *Id.* ("Plaintiffs cite to 16 U.S.C. § 1333(a), which authorizes Defendant BLM to designate additional ranges on public lands as sanctuaries for the protection and preservation of wild horses and burros. Plaintiffs argue that even if the animals cannot be returned . . . they can still live in the West as Defendant BLM has the authority and discretion to designate additional ranges for horses and burros.").

[182] *Id.*

[183] *See* In Def. of Animals v. U.S. Dep't of the Interior, 909 F. Supp. 2d 1178, 1183–84, 1194 (E.D. Cal. 2012).

[184] *Id.* at 1194.

[185] *See id.* (implicitly finding that because the holding facilities in question were privately owned, the Act did not prohibit the relocation of horses to those holding facilities).

[186] *Id.* ("In 1990, for example, the Appropriations Committee stated that it 'continues to support the use of private sanctuaries as a method of removing unadopted wild horses and burros,' and directs BLM to 'continue to investigate private sanctuary proposals that are found to be humane and cost effective.'").

ties supported this conclusion.[187] Accordingly, the court held that the BLM's manner of gathering the horses and placing them into holding facilities did not violate the provisions of the Act.[188]

B. *District of Columbia: Finding Lack of Standing Causation*

In contrast, the U.S. District Court for the District of Columbia in *In Defense of Animals v. Salazar* came to a different conclusion came to a different conclusion on plaintiff's standing to challenge the BLM's use of holding facilities in 2009.[189] There, the BLM had developed a plan to capture all horses exceeding the appropriate management level ("AML") in the Calico Mountains Complex in Nevada.[190] The majority of the excess horses were to be moved to long-term holding facilities located in Kansas, Oklahoma, and South Dakota.[191] The plaintiffs brought suit seeking a preliminary injunction against the BLM's decision to conduct the gather and place horses in holding facilities.[192]

The district court denied the plaintiffs' preliminary motion.[193] Plaintiffs then challenged the BLM's transporting of the removed horses to long-term holding facilities.[194] The court reviewed the plaintiffs' standing before considering the amended complaint on the merits.[195] The court invoked the test from *Lujan* and required that the plaintiffs show a concrete injury in fact, that the injury is fairly traceable to the challenged action, and that the injury would be redressed.[196]

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[187] *Id.* at 1194–95.

[188] *Id.* at 1195.

[189] 675 F. Supp. 2d 89, 89 (D.D.C. 2009).

[190] *Id.* at 92 ("The 3,040 horses currently estimated to live within the Complex exceed the . . . maximum AML of 952 by 2,088. To bring the horse population below the maximum AML, BLM has developed a plan to capture most of the Complex's horses and take them from the range.").

[191] In Def. of Animals v. Salazar, 713 F. Supp. 2d 20, 23–24 (D.D.C. 2010) (referring to the BLM's 2009 planned gather and explaining that the "BLM conducted the proposed gather of horses from the Complex between December 28, 2009 and February 5, 2010. Approximately 2,000 wild horses were herded together and placed in a temporary holding facility in Fallon, Nevada, where they will remain at least until May 26, 2010, after which they may be relocated to long-term holding facilities in the Midwest"); *In Def. of Animals v. Salazar*, 675 F. Supp. 2d at 96.

[192] *See In Def. of Animals v. Salazar*, 675 F. Supp. 2d at 91, 96.

[193] *Id.* at 103.

[194] *In Def. of Animals v. Salazar*, 713 F. Supp. 2d at 24–25 (explaining that after the Court in 2009 denied the plaintiffs' preliminary motion, the court allowed intervening parties and the plaintiffs to amend their complaint); *In Def. of Animals v. Salazar*, 675 F. Supp. 2d at 104 (denying the preliminary injunction because the plaintiffs' first claim was unlikely to succeed on the merits because it relied on a misunderstanding of the relevant statute and legislative intent, and indicating on the second claim that the plaintiffs failed to "establish imminent irreparable injury").

[195] *In Def. of Animals v. Salazar*, 713 F. Supp. 2d at 26.

[196] *Id.*

Like in the Eastern District of California, the plaintiffs here claimed that they had suffered aesthetic and professional injury in fact by the removal of a number of horses from the Calico Mountains Complex.[197] Although the court recognized this as an asserted injury, the court held that the plaintiffs had failed to show a sufficient causal nexus between the long-term holding and the asserted injury.[198] To reach that conclusion, the court considered whether the plaintiffs were able to show that the removal of excess horses from the Complex was fairly traceable to the agency's plan to place some horses in long-term holding facilities.[199]

In support of standing causation, the plaintiffs alleged that the BLM's use of holding facilities permanently displaces wild horses from the range in which plaintiffs observed them before the gather.[200] The district court found that whether or not the BLM used the holding facilities, some "excess" horses would necessarily be permanently removed from the range.[201] The court concluded that plaintiffs had failed to establish sufficient causation between the loss of personal enjoyment and the BLM's use of long-term holding facilities.[202] For this reason, the court held that the plaintiffs lacked standing to confer subject matter jurisdiction on the court.[203]

IV. Advocating for the Wild Horse Cause: Applying Proximate Cause Analysis to Standing Causation Issues

In considering whether plaintiffs had standing to challenge the Bureau of Land Management's (BLM) use of holding facilities, two courts came to opposite conclusions on the question of standing causation.[204] The U.S. District Court for the Eastern District of California held that the plaintiffs had met the requirement for standing causation because the BLM's use of the holding facil-

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[197] *Id.* at 27 ("They maintain that they intend to visit the Complex in the future to view the wild horses in the animals' natural habitat, both for personal enjoyment and to further their professional interests in wild horses, and they contend that those interests will be impaired by the greatly reduced size of the herds in the Complex resulting from the gather of excess horses.").

[198] *Id.* at 27–28 ("[T]he causal relationship between *long-term* holding and the removal of many horses from the range has not been established; the plaintiffs have not shown that the removal of excess horses from the Complex was or is 'fairly traceable' to the agency's plan to place some horses in long-term holding facilities in the Midwest.").

[199] *See id.* at 28.

[200] *See id.*

[201] *Id.* (explaining that it is an "undisputed fact that BLM's determination that a certain number of gathered horses are 'excess' results in the permanent separation of those horses from the range").

[202] *Id.* at 28–29 (finding insufficient causation for standing because the plaintiffs could only speculate as to whether the BLM would be prevented from using holding facilities).

[203] *Id.* at 29.

[204] *See supra* notes 198–200 and accompanying text.

ities was fairly traceable to the plaintiff's injury.[205] Alternatively, in the District of Columbia, where standing analysis tends to be read more narrowly,[206] the district court found that the plaintiffs failed to establish that the BLM's use of holding facilities was fairly traceable to the plaintiff's injury.[207] As further evidenced by these cases and the ensuing potential circuit split, the ambiguities in the standing doctrine illustrate a need for the Supreme Court's clarification.[208]

A. *Benefits of Clarifying Standing Causation*

The lack of guidance in standing causation has affected the consistency of judicial reasoning among the lower courts.[209] This inconsistency, however, does not comport with judicial efficiency, one of the underlying purposes of the standing doctrine.[210] The inconsistency also presents obstacles for litigants who are prevented from getting their cases heard on the merits depending on the court in which they file.[211] Consider that without a favorable finding on standing causation in the Eastern District of California, In Defense of Animals

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[205] In Def. of Animals v. U.S. Dep't of the Interior, 808 F. Supp. 2d 1254, 1264 (E.D. Cal. 2011).

[206] Coal. for Responsible Regulation, Inc. v. Envtl. Prot. Agency, 684 F.3d 102, 146 (D.C. Cir. 2012) (per curiam) (holding that state petitioners must show a concrete and particularized injury in fact); North Carolina v. Envtl. Prot. Agency, 587 F.3d 422, 426 (D.C. Cir. 2009) (holding that states must show Article III standing even if owed special solicitude); Ctr. for Biological Diversity v. U.S. Dep't of the Interior, 563 F.3d 466, 478–79 (D.C. Cir. 2009) (finding causation too speculative for standing); WildEarth Guardians v. Salazar, 859 F. Supp. 2d 83, 96 (D.D.C. 2012) (finding redressability too speculative for standing); Charles Riordan, Comment, *Barring the Gates: Timing and Tailoring Environmental Standing and Greenhouse Gas Regulation After* Corri v. EPA, 40 B.C. ENVTL. AFF. L. REV. 567, 575 (2013).

[207] In Def. of Animals v. Salazar, 713 F. Supp. 2d 20, 28–29 (D.D.C. 2010).

[208] *See* Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 456 (2001) (explaining that when circuits come to different interpretations on a statute, for example, the Supreme Court can agree to hear a case to resolve the split).

[209] *See* Meier, *supra* note 19, at 1244–45 (explaining that "[l]ower federal courts routinely struggle to apply the causation prong of standing because of uncertainty as to which analysis is required"); Pushaw, *supra* note 88, at 52 (arguing that, regarding standing, "the Court has reached inconsistent (even contradictory) results in cases that presented materially indistinguishable facts").

[210] *See supra* note 89 and accompanying text.

[211] *See In Def. of Animals v. U.S. Dep't of the Interior*, 808 F. Supp. 2d at 1264 (holding that because the plaintiffs had standing, they could proceed to the merits); *In Def. of Animals v. Salazar*, 713 F. Supp. 2d. at 29 (holding that because plaintiffs failed to meet the causation prong of standing, the litigation could not proceed to the merits); *supra* notes 166–202 and accompanying text. These two cases illustrate how litigants can achieve varying outcomes depending on the forum in which they file. *See* Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 168 (2000) (explaining that generally "litigants can regularly affect the outcome of their dispute by where they file suit and how they cast their claims"). Forum shopping is "the practice of choosing the most favorable jurisdiction or court in which a claim might be heard." BLACK'S LAW DICTIONARY 726 (9th ed. 2010).

would not have had its case against the BLM heard on the merits.[212] As a result of the favorable finding, however, In Defense of Animals was allowed the opportunity to litigate its issues and present support for the wild horse cause.[213]

Embracing clarity in judicial decisionmaking, especially regarding jurisdictional issues such as standing, would be beneficial to both litigants and courts.[214] Clarification on standing causation would benefit litigants by enhancing the predictability of success and promoting the efficient use of resources.[215] In other words, as a result of clarification, litigants could better assess the probability of success before engaging in costly litigation.[216] This in turn would support judicial efficiency because it would conserve judicial resources.[217] Thus, if the issue is appealed, the Supreme Court should consider clarifying the standing causation issue in the wild horse dispute to support judicial efficiency and promote predictability at the outset of litigation.[218]

The wild horse dispute serves an optimal platform for promoting efficiency and predictability by addressing standing causation.[219] The Court has been reluctant to address standing causation for political reasons even through to its most recent standing case, *Massachusetts v. Environmental Protection Agency*.[220] The Court in 2007 avoided a politically charged issue altogether by

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[212] *See In Def. of Animals v. U.S. Dep't of the Interior*, 808 F. Supp. 2d at 1264 (holding that plaintiffs could proceed to the merits because they had standing); *supra* notes 175–179 and accompanying text.

[213] In Def. of Animals v. U.S. Dep't of the Interior, 909 F. Supp. 1178, 1183 (E.D. Cal. 2012); *see supra* notes 184–189. Until a case is heard on the merits, litigants are prevented from asserting "proofs and reasoned arguments" in support of their cause. Tidmarsh, *supra* note 13, at 412–13 ("It is the guarantee of a full opportunity—unfettered by concerns for expense, delay, or advancing certain political interests—that defines the 'on the merits' principle.").

[214] Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 3 (2011) (explaining that both the court and litigants would be better served if resources were primarily spent litigating the merits as opposed to establishing subject matter jurisdiction, a situation which arises from judicial uncertainty).

[215] *See id.* at 7 ("A jurisdictional defect raised late in the proceedings can undo all of the litigation time and effort the parties and court have spent."); Richard L. Hurford, *The Business Case for Smart Dispute Resolution Processes*, MICH. B.J., June 2010, at 42, 43 ("Predicting the outcome of litigation requires evaluating the reaction of a judge and jury to the merits.").

[216] *See* Dodson, *supra* note 214, at 8 ("stating that "jurisdictional clarity generally reduces litigant costs"); Tidmarsh, *supra* note 13, at 408 (explaining that procedural reform, generally, can prevent costly litigation).

[217] Dodson *supra* note 214, at 8 ("[W]hen the court does resolve a jurisdictional issue under clear doctrine, that decision is likely to be accurate, causing fewer appeals and fewer reversals."); *see supra* note 89 and accompanying text.

[218] *See infra* notes 221–222 and accompanying text.

[219] *See infra* notes 220–221 and accompanying text.

[220] *See* 549 U.S. 497, 504–05 (2007); *supra* notes 125–131 and accompanying text.

agreeing to the EPA's stipulation of causation.[221] Here, the Court could review the wild horse dispute because it provides a less politically contentious platform to clarify the Court's analysis of standing causation.[222] This clarification would particularly benefit wild horse and environmental advocates by enhancing their ability to weigh the costs and benefits of pursuing costly litigation on their particular issues.[223]

B. *Justifications for Proximate Cause Analysis in Wild Horse Litigation*

If the issue presents itself, the Court should use tort law to resolve standing causation ambiguities in the wild horse dispute.[224] The Court's language in standing jurisprudence already suggests that the Court has invoked tort law theories in its analysis.[225] Although the Court's language suggests that it uses a cause in fact analysis, a proximate cause inquiry runs throughout the Court's decisions.[226] Application of proximate cause analysis in this context would promote the gatekeeper function of the standing doctrine as well as separation of powers.[227]

Application of proximate cause analysis to standing ambiguities in the wild horse dispute would first promote standing's role as a gatekeeper to litigation. Given the limited availability of factual evidence at the outset of litigation, the fact-intensive cause in fact inquiry would not be appropriate in the standing causation determination of the wild horse dispute.[228] Consider again *Linda R.S.* In a thorough cause in fact analysis, the Court would have considered circumstantial evidence such as information about the father and his testimony.[229] Since there is no mention of this evidence in the opinion, scholars

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[221] *See Massachusetts v. Envtl. Prot. Agency*, 549 U.S. at 523; Meier, *supra* note 19, at 1296 (calling global warming a controversial modern issue in national politics); *supra* notes 125–131 and accompanying text.

[222] *See Massachusetts v. Envtl. Prot. Agency*, 549 U.S. at 505 (identifying global warming as the most urgent environmental issue today).

[223] *See* Marisa L. Ugalde, *The Future of Environmental Citizen Suits After* Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Services, 8 ENVTL. L. 589, 610 (2002) (explaining that "[e]nvironmental litigation is extremely costly and requires substantial resources rarely at the disposal of environmental public interest groups"); Walter B. Russell, III, Note, *Awards of Attorney's Fees in Environmental Litigation: Citizen Suits and the "Appropriate" Standard*, 18 GA. L. REV. 307, 327 (1984) (explaining that public interest groups are limited in their pursuit of environmental litigation due to lack of funding).

[224] *See infra* notes 229–235 and accompanying text.

[225] *See supra* note 156 and accompanying text.

[226] *See supra* note 155 and accompanying text.

[227] *See supra* notes 160–161, 163 and accompanying text.

[228] *See supra* notes 160–161 and accompanying text.

[229] Meier, *supra* note 19, at 1294 (developing a hypothetical set of facts—not written in the actual decision—necessary for a court to apply cause in fact analysis to determine standing causation).

argue that the Court most likely could not perform a true cause in fact analysis.[230] Accordingly, due to the inherent limitations of a fact-intensive inquiry before reaching the merits of the wild horse dispute, the Court should instead apply a proximate cause inquiry to resolve standing causation.[231]

Applying a proximate cause inquiry to standing causation in the wild horse dispute would also promote the separation of powers. Standing fundamentally derives from a concern for the separation of powers.[232] A proximate cause analysis would maintain separation of powers by requiring a federal court to consider the congressional intent behind the Wild Free-Roaming Horses and Burros Act ("the Act").[233] Ultimately, the Court considers whether the substantive law was designed to be used in the way the plaintiff applies it.[234] Thus, applying a proximate cause analysis to standing causation in the wild horse dispute would promote both standing's gatekeeper function and the separation of powers.[235]

C. *Applying Proximate Cause Analysis to the Standing Causation Ambiguity in Wild Horse Litigation*

To apply proximate cause analysis to the litigation of wild horse holding facilities, the Supreme Court would invoke the foreseeability or scope of the risk tests.[236] Using either test, the Court would ask whether the plaintiff's harm is one of the foreseeable consequences of the BLM's use of holding facilities.[237] Because the holding facility issue involves a potential violation of a federal statute,[238] the Court would inquire into the legislative intent of the Act.[239] The Court would ask why Congress created the Act and the types of injuries that the Act was intended to address.[240]

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[230] *Id.* at 1283, 1294.

[231] *See id.* at 1249 (explaining that applying a proximate cause inquiry assumes the presence of sufficient factual support for a cause in fact analysis).

[232] *See* Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009); Mank, *supra* note 85, at 7–8; Pushaw, *supra* note 88, at 23; *supra* note 90 and accompanying text.

[233] *See* Meier*, supra* note 19, at 1280 (applying proximate cause analysis to standing causation cases involving statutory violations requires an understanding of legislative intent); *supra* notes 153 and accompanying text.

[234] *See* Meier*, supra* note 19, at 1280.

[235] *See supra* notes 227–234 and accompanying text

[236] *See* Meier, *supra* note 19, at 1250 (explaining that courts can use either of two proximate cause tests: scope of the risk and foreseeability).

[237] *See id.*

[238] 16 U.S.C. §§ 1331–1340 (2012).

[239] *Id.* §§ 1331–1333; Meier, *supra* note 19, at 1280.

[240] *See* 16 U.S.C. §§ 1331–1333; Meier, *supra* note 19, at 1280.

The Act was a response to nationwide concern regarding the plight of American wild horses, which were at that time quickly disappearing.[241] The language of the Act's preamble provides that wild horses are protected because "they contribute to the diversity of life forms within the Nation and enrich the lives of the American people."[242] The Act also serves to protect horses "from capture, branding, harassment, or death."[243]

Applying the proximate cause test to this language, the Court would consider the harm sought to be prevented by the law.[244] Although the Act explicitly protects against harm to the wild horses themselves,[245] the wild horse dispute does not involve allegations of harm to the animals, but rather to the human interests involved.[246]

As a result, in the wild horse dispute, the Court would consider whether the harm to the plaintiff also falls within the scope of harms protected against by the legislation.[247] The Court would ask whether the plaintiff's harm attributed to the BLM's use of the holding facilities implicates public policy concerns.[248] To that end, the Court would find that the Act protects wild horses that "contribute to . . . and enrich the lives of the American people."[249] As

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[241] 16 U.S.C. § 1331; Pitt, *supra* note 7, at 507.

[242] 16 U.S.C. § 1331.

[243] *Id.*

[244] *See* Meier, *supra* note 19, at 1280.

[245] 16 U.S.C. § 1331 (2012) ("The Act serves to protect horses from capture, branding, harassment, or death.").

[246] *Id.*; *In Def. of Animals v. Dep't of the Interior*, 808 F. Supp. 2d at 1262 (alleging injury in the diminished enjoyment of the wild horse on the range); *In Def. of Animals v. Salazar*, 713 F. Supp. 2d at 27 (same). Application of proximate cause analysis to the explicit language of the Act would require the horses to allege injury in fact to themselves. *See* Meier, *supra* note 19, at 1280. The issue of animals serving as their own representatives remains a source of debate. *See* Palila v. Haw. Dep't of Land & Natural Res., 852 F.2d 1106, 1107 (9th Cir. 1988) (dictum) ("As an endangered species under the Endangered Species Act . . . the bird (*Loxioides bailleui*), a member of the Hawaiian honeycreeper family, also has legal status and wings its way into federal court as a plaintiff in its own right."). *Contra* Joseph Mendelson, III, *Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795, 806 (1997) ("[C]ourts routinely have denied animals standing to serve as plaintiffs."). Although plaintiffs could have alleged standing on behalf of the horses in these cases, they did not. *See* Jan G. Laitos, *Standing and Environmental Harm: The Double Paradox*, 31 VA. ENVTL. L.J. 55, 90 (2013) ("[If] animals cannot raise their own interests, there are competent, well-funded, dedicated animal rights organizations that do have the expertise, resources, and commitment to seek redress for the injuries of these animals."); Mendelson, *supra*, at 817 (suggesting that third-party representatives of animals might be able to bring a case on behalf of an animal as long as they meet standing requirements of *Lujan v. Defenders of Wildlife*). The potential for this line of litigation and analysis is beyond the scope of this Note.

[247] *See* Meier, *supra* note 19, at 1280.

[248] *See* Bahadur, *supra* note 154, at 75–76 (explaining that public policy drives the permissible scope of liability within proximate cause analysis).

[249] 16 U.S.C. § 1331 ("It is the policy of Congress that wild free-roaming horses and burros shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be con-

such, the Court would most likely find that the plaintiffs' lives are enriched by the aesthetic and recreational enjoyment of the species.[250] As a matter of public policy, the Court would find that the plaintiff's injury, the diminished enjoyment of wild horses, falls within the law's scope of protection.[251] The Court should conclude that the plaintiff's harm is one of the foreseeable consequences of the BLM's use of the holding facilities, which makes the BLM's conduct unreasonable in the first place.[252]

In evaluating standing causation in the wild horse dispute, the Court would consider that instead of returning horses to public lands, the BLM placed horses in holding facilities for the rest of the horses' lives.[253] In so doing, the plaintiffs were harmed by the loss of aesthetic and recreational enjoyment of the species in their natural habitat.[254] Considering the legislative intent behind the Act, the Court would find that the BLM's use of holding facilities is fairly traceable to the plaintiff's enjoyment.[255] As a policy consideration, the Court should find it is fair to hold the BLM liable for the harm it has caused to plaintiffs.[256]

Thus, if the issue arises, the Court should apply proximate cause analysis to resolve standing causation in the wild horse dispute.[257] In so doing, the Court would first clarify long-standing ambiguities in the standing causation doctrine to the benefit of efficiency and predictability.[258] In applying proximate cause analysis specifically, the Court would promote both standing's gatekeeper function and the separation of powers.[259] Unlike more potentially contentious cases such as *Massachusetts v. Environmental Protection Agency*,

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sidered in the area where presently found, as an integral part of the natural system of the public lands.").

[250] *See* Laitos, *supra* note 246, at 90 (suggesting "diminished opportunities to view healthy, happy animals" can cause sadness to the plaintiff).

[251] *See* 16 U.S.C. § 1331 (2012) (including in the "Congressional findings and declaration of policy" that wild horses "contribute to . . . and enrich the lives of the American people"); Bahadur, *supra* note 154, at 75–76; Meier, *supra* note 19, at 1280.

[252] *See* Meier, *supra* note 19, at 1280.

[253] U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 63, at 3, 19.

[254] *See In Def. of Animals v. Dep't of Interior*, 808 F. Supp. 2d at 1262; *In Def. of Animals v. Salazar*, 713 F. Supp. 2d at 27.

[255] *See* 16 U.S.C. §§ 1331–1333; Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Meier, *supra* note 19, at 1280.

[256] *See* Bahadur, *supra* note 154, at 75–76 (explaining that the proximate cause fairness analysis is driven by public policy considerations).

[257] *See supra* notes 209–235 and accompanying text.

[258] *See* Dodson, *supra* note 214, at 7–8; *supra* notes 209–223 and accompanying text.

[259] *See* Meier, *supra* note 19, at 1245, 1298; *supra* notes 224–235 and accompanying text.

the wild horse dispute serves as an appropriate platform for this clarification.[260]

CONCLUSION

The American wild horse is an American icon and an integral part of the western ecosystem. Through the Wild Free-Roaming Horses and Burros Act of 1971, Congress has embodied these sentiments by explicitly protecting against wild horse abuse. Although the Act provides for the removal of horses above the population limit, it does not necessarily provide for the use of holding facilities in which horses live out the remainder of their lives off the range.

When activists challenged the BLM's use of these holding facilities, two courts came to opposite conclusions on plaintiff standing. Specifically, the courts' conclusions differed in respect to standing causation, the analysis of which the Supreme Court has not yet clarified for lower courts. If the issue rises to the level of a circuit split, the Court should hear the wild horse dispute to clarify standing causation and provide greater consistency for lower courts and litigants. In that case, the Court should employ proximate cause analysis to promote standing's gatekeeper function and separation of powers. The clarification would further benefit wild horse and environmental advocates by enhancing their ability to weigh the costs and benefits of pursuing costly litigation.

[260] *See* 549 U.S. at 523; Meier, *supra* note 19, at 1296 (calling global warming a controversial modern issue in national politics); *supra* notes 125–131, 223 and accompanying text.