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# DECIDING NOT TO DECIDE: FEDERAL COURTS' DISCRETION TO DECLINE REVIEW AND *MILLER V. CITY OF WICKLIFFE*

*Tommy Tobin\**

## I. INTRODUCTION

The case or controversy requirement mandates that cases in federal courts be justiciable.<sup>1</sup> Unfortunately, it is far from a simple task for courts to determine whether any particular dispute is one that is “appropriately resolved through the judicial process.”<sup>2</sup> The Sixth Circuit’s March 2017 decision in *Miller v. City of Wickliffe*<sup>3</sup> provides insight into just how difficult and divisive justiciability analysis can be for federal jurists.

Federal courts are courts of limited jurisdiction, which are constitutionally confined to adjudicating actual cases or controversies.<sup>4</sup> One of the core components of this case or controversy requirement is the threshold issue of standing.<sup>5</sup> If a plaintiff lacks standing, the claim fails on the threshold issue of justiciability.<sup>6</sup> Put another way, the doctrine of standing restricts the courts to resolving actual disputes

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1. See U.S. CONST. art. III, § 2, cl. 1; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559-60 (1992).

2. *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990); see also *Miller v. City of Wickliffe*, 852 F.3d 497, 502 (6th Cir. 2017) (citing *Whitmore*, 495 U.S. at 154-55).

3. 852 F.3d 497 (6th Cir. 2017).

4. See U.S. CONST. art. III, § 2, cl. 1. Federal courts are further limited as cases involving probate matters or domestic relations are not within their jurisdiction. See *Marshall v. Marshall*, 547 U.S. 293, 308 (2006). These exclusions draw from both Supreme Court precedent and language from the Judiciary Act of 1789. *Id.*

5. See *Lujan*, 504 U.S. at 560.

6. See *Cooksey v. Futrell*, 721 F.3d 226, 234-39 (4th Cir. 2013).

“rather than emit[ting] random advice.”<sup>7</sup> Standing is “an indispensable part of the plaintiff’s case.”<sup>8</sup>

In *Miller*, a split appellate panel disagreed as to which justiciability standard to apply.<sup>9</sup> As described in further detail below, the case involved a motel attempting to secure a nightclub tenant for its lounge space and local city ordinances that allegedly frustrated that effort.<sup>10</sup> The majority dismissed the case using Article III standing analysis, which addresses injury, causation, and redressability.<sup>11</sup> Finding that the plaintiffs lacked a concrete injury, the *Miller* court ruled that the plaintiffs had no standing to bring the suit.<sup>12</sup>

Writing in a separate concurrence, Judge John M. Rogers would have dismissed the case based not on Article III standing, but instead on judge-made prudential standards for the court to decline judicial review. As he put it, the plaintiffs’ “request for pre-performance judicial review of [the ordinance] is not ripe—not in the constitutional sense of the doctrine, but based on the court’s equitable discretion to decline review.”<sup>13</sup>

Recent Supreme Court precedent has labeled it a “virtually unflagging” obligation for federal courts to hear and decide cases within their jurisdiction.<sup>14</sup> While acknowledging this line of precedent, Judge Rogers noted that prudential discretion is not a dead doctrine, at least not yet.<sup>15</sup> Accordingly, this Essay examines prudential standing, and prudential standards more generally, within the context of this case. Part II discusses the role of standing in general and provides an overview of the well-known Article III standing analysis. Part III examines prudential justiciability, or judge-made limitations on the exercise of jurisdiction. Part IV examines the importance of the distinction between Article III and prudential justiciability analysis. Part V details the *Miller* case itself and evaluates prudential standards, particularly prudential standing, in light of the Sixth Circuit’s recent ruling. Part VI concludes.

7. *Bryant v. Cheney*, 924 F.2d 525, 529 (4th Cir. 1991); *see also* *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 20 (1998).

8. *Lujan*, 504 U.S. at 561.

9. *See infra* notes 11–13 and accompanying text.

10. *See infra* Part V.

11. *See Miller v. City of Wickliffe*, 852 F.3d 497, 502–03 (6th Cir. 2017); *see also Lujan*, 504 U.S. at 560–61 (articulating the three-part test for standing).

12. *See Miller*, 853 F.3d at 507.

13. *Id.* at 507 (Rogers, J., concurring).

14. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Sprint Commc’ns Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013)); *see also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (quoting *Lexmark*, 134 S. Ct. at 1386).

15. *See Miller*, 852 F.3d at 507–08. For another expression of this point, *see* MONTY PYTHON AND THE HOLY GRAIL (Michael White Productions 1975) (“[H]e says he’s not dead [yet].”).

## II. JUSTICIABILITY STANDARDS: THRESHOLD ISSUES FOR THE COURTS

Article III justiciability is embedded in the Constitution's requirement that federal courts are restricted to addressing "cases or controversies."<sup>16</sup> As the Supreme Court has noted, Article III justiciability analysis has an "iceberg quality," containing beneath its "surface simplicity submerged complexities which go to the very heart of our constitutional form of government."<sup>17</sup> Outlining the difficulties in "giving precise meaning and form to the concept of justiciability," Chief Justice Earl Warren noted that justiciability itself is of "uncertain meaning and scope," with its reach best illustrated by areas where it has found inapplicable: political questions, advisory opinions, questions rendered moot by later developments, and when standing is lacking.<sup>18</sup>

Justiciability is a defining feature of the federal judiciary's role in the constitutional system.<sup>19</sup> Standing is "perhaps the most important condition for a justiciable claim."<sup>20</sup> Standing determines whether a plaintiff is the proper party to bring a suit,<sup>21</sup> and its central purpose is to "ensure that the parties before the court have a concrete interest in the outcome of the proceedings such that they can be expected to frame the issues properly."<sup>22</sup> Unfortunately, it is a far from simple task for courts to determine whether any particular dispute is one that is "appropriately resolved through the judicial process."<sup>23</sup>

The Supreme Court has articulated a three-part test for standing,<sup>24</sup> which has these essential elements: injury, causation, and redressability.<sup>25</sup> First, the party invoking federal jurisdiction must prove that they have suffered an "injury in fact," a term of art related to a

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16. *Flast v. Cohen*, 392 U.S. 83, 94 (1968).

17. *Id.*

18. *Id.* at 95; *see also* *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does.").

19. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." (citing *Flast*, 392 U.S. at 94)).

20. *Zargarpur v. Townsend*, 18 F. Supp. 3d 734, 737 (E.D. Va. 2013) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

21. *See* *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citing *Simon*, 426 U.S. at 38 (1976)).

22. *ProEnglish v. Bush*, 70 F. App'x 84, 87 (4th Cir. 2003) (quoting *Harris v. Evans*, 20 F.3d 1118, 1121 (11th Cir. 1994)).

23. *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-76 (1982)); *see also* *Miller v. City of Wickliffe*, 852 F.3d 497, 502-03 (6th Cir. 2017) (quoting *Whitmore*, 495 U.S. at 154-55).

24. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

25. *Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir. 1997).

concrete, particularized, actual, and imminent invasion of a legally protected interest.<sup>26</sup> Such an injury must actually exist and cannot be merely hypothetical or conjectural.<sup>27</sup> Second, the party must show a causal connection between the injury alleged and the conduct of the defendant.<sup>28</sup> Third, it must be “likely,” rather than speculative, that the injury will be redressed if the court were to deliver a favorable decision.<sup>29</sup> The party invoking federal jurisdiction has the burden to establish each of the elements of the three-part test.<sup>30</sup>

The doctrine of standing, specifically its injury-in-fact requirement, contrasts with two impermissible types of suits in federal courts: “generalized grievances” and advisory opinions. Cases presenting “generalized grievances” common to all members of the public and an undifferentiated impact are impermissible.<sup>31</sup> Put another way, taxpayers—just by virtue of their tax paying status—do not have sufficient standing to challenge every government action or expenditure.<sup>32</sup> One important, yet narrow, exception is that of *Flast v. Cohen*,<sup>33</sup> which provides taxpayer standing to challenge the use of federal funds that allegedly violate the Establishment Clause.<sup>34</sup> Advisory opinions are similarly impermissible. Unlike many state courts, federal courts lack the power to render advisory opinions.<sup>35</sup> Drawing from the Article III “case or controversy” requirement, federal courts have “neither the power to render advisory opinions nor ‘to decide questions that cannot affect the rights of litigants in the case before them.’”<sup>36</sup>

26. *Lujan*, 504 U.S. at 560 (quoting *Allen v. Wright*, 468 U.S. 737, 756 (1984)).

27. *Id.* (citing *Whitmore*, 495 U.S. at 155).

28. *Id.*

29. *Id.* at 561 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

30. *Id.* (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990)).

31. *Id.* at 570. While many courts analyze this “generalized grievance” test within its Article III standing analysis, Professor Craig A. Stern has noted that this test can (and has) been used under both Article III and prudential standing rubrics. Craig A. Stern, *Another Sign from Hein: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?*, 12 LEWIS & CLARK L. REV. 1169, 1214 (2008) (finding that the generalized grievance doctrine “has variously been categorized as constitutional, prudential, or perhaps both, for nearly its entire history, including up to the present”).

32. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593 (2007) (“It has long been established, however, that the payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government.”).

33. 392 U.S. 83 (1968).

34. *Id.* at 103-06. In *Hein*, the Court reaffirmed the existence of this narrow *Flast v. Cohen* exception, writing, “We do not extend *Flast*, but we also do not overrule it. We leave *Flast* as we found it.” 551 U.S. at 615.

35. See, e.g., *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947) (“As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.”).

36. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (quoting *North Carolina v. Rice*, 404 U.S.

Federal court judgments must address “a real and substantial controversy admitting of specific relief through a decree of a conclusive character.”<sup>37</sup>

Closely related to the injury-in-fact test, cases in federal court must also be ripe for decision and not premature or speculative.<sup>38</sup> This ripeness doctrine represents another constitutional prerequisite to the exercise of federal jurisdiction.<sup>39</sup> This ripeness requirement ensures that the federal courts address definite and concrete disputes, not hypothetical or abstract ones.<sup>40</sup> As the Ninth Circuit noted en banc, “ripeness is ‘peculiarly a question of timing,’” designed to “prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.”<sup>41</sup> Unfortunately, as the Ninth Circuit noted, “[s]orting out where standing ends and ripeness begins is not an easy task,” and is made that much more difficult as courts often treat the constitutional component of ripeness under the rubric of standing analysis, particularly in applying its injury-in-fact prong.<sup>42</sup> The Supreme Court and leading scholars have suggested that Article III standing and ripeness concerns may “boil down to the same question.”<sup>43</sup>

### III. PRUDENTIAL PRINCIPLES: A SECOND LEG TO STAND ON?

While Article III is a primary source of justiciability doctrines, these doctrines may also draw from prudential, or judge-made, sources.<sup>44</sup> Even if a suit meets the Article III case or controversy requirement, a court may decline review under a second strain of prudential justiciability jurisprudence.<sup>45</sup> This second strand encompasses “judicially

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244, 246 (1971)).

37. *Id.* at 395 (quoting *Rice*, 404 U.S. at 246).

38. *Shields v. Norton*, 289 F.3d 832, 834-35 (5th Cir. 2002) (citing *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000)).

39. *Id.* (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)); *see also* *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 835 (9th Cir. 2012) (“Ripeness is one component of the Article III case or controversy requirement.”).

40. *See Ry. Mail Ass’n v. Corsi*, 326 U.S. 88, 93 (1945).

41. *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (first quoting *Reg’l Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974); and then quoting *Abbott*, 387 U.S. at 148).

42. *Id.*

43. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 n.5 (2014) (quoting *Meadow Immune, Inc. v. Greentech, Inc.*, 549 U.S. 118, 128 n.8 (2007)); Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 682-83 (1990); Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 172 (1987) (“[When] measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing . . .”).

44. *See Portman v. Cty. of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993) (“The ripeness inquiry contains both a constitutional and a prudential component.”).

45. *Ansley v. Warren*, No. 116-CV-54, 2016 WL 5213937, at \*9 (W.D.N.C. Sept. 20, 2016)

self-imposed limits on the exercise of federal jurisdiction.”<sup>46</sup> Under this prudential justiciability rubric, courts may decline to review cases based on prudential standing or prudential ripeness, along with other related judge-made doctrines.<sup>47</sup> As examples, prudential concerns could be useful for the courts to avoid political questions or compromising national security.<sup>48</sup>

Prudential standing has not been “exhaustively defined” but has encompassed several general principles in the past, namely: “[T]he general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.”<sup>49</sup> Given the general nature of the prudential standing principles, courts have crafted certain inquiries, such as that of the zone of interests, and certain specialized tests, such as those developed for Lanham Act cases and bankruptcy appeals.<sup>50</sup>

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(quoting *Doe v. Va. Dep’t. of State Police*, 713 F.3d 745, 753 (4th Cir. 2013)).

46. *Id.* (quoting *Doe*, 713 F.3d at 753).

47. For example, abstention doctrines also provide for judge-made determinations as to whether to abstain from exercising their jurisdiction in certain situations. There are four main abstention doctrines, each given an eponymous name: *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-17 (1976) (“*Colorado River*” Abstention); *Younger v. Harris*, 401 U.S. 37, 43-44 (1971) (“*Younger*” Abstention); *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943) (“*Burford*” Abstention); and *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941) (The “*Pullman*” Doctrine).

48. *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (discussing the significance of political questions); *Jewel v. Nat’l Sec. Agency*, 673 F.3d 902, 913 (9th Cir. 2011) (“To be sure, prudential concerns may weigh against standing in certain cases affecting national security interests, but the national security context does not, in itself, erect a new or separate prudential bar to standing.”). Prudential concerns are not the only limitation on the role of the judiciary in deciding national security matters; for example, the government could also assert the state secrets doctrine. See Tommy Tobin, Abilt v. CIA: *The Secret Case of the Sleepy Spy*, WAKE FOREST L. REV.: 4TH CIR. BLOG (Feb. 15, 2017), <http://wakeforestlawreview.com/2017/02/guest-post-abilt-v-cia-the-secret-case-of-the-sleepy-spy>.

49. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12, (2004) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)), partially abrogated by *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386-88 & n.3 (2014); see also *Warth*, 422 U.S. at 499-500 (1975).

50. S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95, 101 (2014). The Lanham Act concerns commercial trademarks. In a recent Lanham Act case, the Court emphasized the importance of avoiding the “premature adjudication of constitutional questions” and stressed that courts “ought not to pass on questions of constitutionality unless such adjudication is unavoidable.” *Matal v. Tam*, 137 S. Ct. 1744, 1755 (2017) (first quoting *Clinton v. Jones*, 520 U.S. 681, 690 (1997); and then quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

As noted elsewhere, prudential standing is technically not standing at all.<sup>51</sup> In *The Story of Prudential Standing*, Professor Todd Brown defined it as “merely a judicially crafted set of exceptions to the obligation to hear and decide matters that are within the court’s jurisdiction.”<sup>52</sup> At least one article has argued that the lines between prudential standing and Article III standing “should be erased” and that all standing requirements should be prudential.<sup>53</sup> As detailed below, the distinction remains between the two strands of standing, and the continuing vitality of prudential standing has been called into question.<sup>54</sup>

Related to prudential standing concerns, prudential ripeness is also a separate inquiry from its Article III counterpart. As the Supreme Court detailed, “[r]ipeness reflects constitutional considerations that implicate ‘Article III limitations on judicial power,’ as well as ‘prudential reasons for refusing to exercise jurisdiction.’”<sup>55</sup> Courts analyzing cases for prudential ripeness examine “‘the fitness of the issues for judicial decision’ and ‘the hardship to the parties of withholding court consideration.’”<sup>56</sup> A court may raise prudential ripeness concerns on its own motion.<sup>57</sup>

#### IV. DOES THE ARTICLE III OR PRUDENTIAL JUSTICIABILITY DISTINCTION MATTER?

Federal courts may distinguish between justiciability doctrines derived from Article III or judge-made sources and provide separate strains of analysis for each source.<sup>58</sup> Unfortunately, distinguishing the

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51. *Am. Civil Liberties Union v. Nat’l Sec. Agency*, 493 F.3d 644, 677 (6th Cir. 2007) (“Because these prudential principles are ‘limits’ on standing, they do not themselves create jurisdiction; they exist only to remove jurisdiction where the Article III standing requirements are otherwise satisfied.”).

52. Brown, *supra* note 50, at 96.

53. Joshua L. Sohn, *The Case for Prudential Standing*, 39 U. MEM. L. REV. 727, 728, 749-56 (2009).

54. See *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014); see also Bradford C. Mank, *Prudential Standing Doctrine Abolished or Waiting for a Comeback*: *Lexmark International, Inc. v. Static Control Components, Inc.*, 18 U. PA. J. CONST. L. 213 (2015).

55. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 670 n.2 (2010) (quoting *Reno v. Catholic Social Servs., Inc.* 509 U.S. 43, 57 n.18 (1993)).

56. *Id.* at 670-71 n.2 (quoting *Nat’l Park Hospitality Ass’n v. Dep’t of the Interior*, 538 U.S. 803, 808 (2003)); *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1141 (9th Cir. 2000) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

57. *Reno*, 509 U.S. at 57 n.18 (“Even when a ripeness question in a particular case is prudential, we may raise it on our own motion, and ‘cannot be bound by the wishes of the parties.’” (quoting *Reg’l Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974))).

58. See *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838-39 (9th Cir. 2012) (analyzing prudential ripeness separately from constitutional ripeness).



true source between related justiciability doctrines can be a difficult process.<sup>59</sup> Recent Supreme Court decisions have called into doubt the continued vitality of prudential justiciability doctrines, writing that a federal court has a “virtually unflagging” obligation to hear cases within its jurisdiction.<sup>60</sup> The Court has gone so far as to note that federal courts “cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates.”<sup>61</sup> With this strong language from the Court, it can be a fraught process for jurists to distinguish between prudential or constitutional aspects of related justiciability doctrines.

Articulating the source of a justiciability doctrine may be outcome determinative in some cases. Article III standing, for example, may be raised *sua sponte* by a court if it is not raised by the parties as a matter of the court’s jurisdiction.<sup>62</sup> Put another way, the case cannot progress without constitutional standing as the court must have standing in order to exercise its jurisdiction. Prudential standing, by contrast, is subject to a circuit split as to whether the court must fulfill its requirements in order to exercise jurisdiction. As shown below, prudential standing is a jurisdictional requirement in only a minority of circuits.<sup>63</sup> In at least three circuits, the court must have prudential standing in order to exercise jurisdiction.<sup>64</sup> In the plurality of circuits, prudential standing considerations are waived by the parties if not raised, meaning that these concerns are non-jurisdictional.<sup>65</sup> By contrast, Article III standing is undeniably jurisdictional and cannot be waived, meaning that appellate courts may dismiss actions *sua sponte* for lack of Article III standing.<sup>66</sup>

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59. *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 596 n.3 (6th Cir. 2014) (“As with standing and ripeness, there are constitutional and prudential aspects to the mootness doctrine as well, but it is not always easy to distinguish the constitutional aspects of mootness, grounded in Article III, from the prudential ones, grounded in policy . . .” (first citing *Allen v. Wright*, 468 U.S. 737, 750 (1984); and then citing *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 420 n.15 (1980))).

60. *See Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)); *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Sprint*, 134 S. Ct. at 591); *see also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (quoting *Lexmark*, 134 S. Ct. at 1386).

61. *Lexmark*, 134 S. Ct. at 1388.

62. *See Doe v. Tangipahoa Par. Sch. Bd.*, 494 F.3d 494, 496 & n.1 (5th Cir. 2007).

63. *See infra* Table 1.

64. *See infra* Table 1.

65. *See infra* Table 1.

66. *See, e.g., Doe*, 494 F.3d at 496 (“Standing is a jurisdictional requirement and not subject to waiver. A federal court must consider its jurisdiction *sua sponte*.” (citations omitted) (first citing *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996); and then citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93 (1998))); *Cooks v. Pye*, 43 F. App’x 108, 109 (9th Cir. 2002) (“Where a party lacks standing, this Court must address the issue *sua sponte*.” (citing *Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002))).

A recent D.C. Circuit case, *Grocery Manufacturers Association v. E.P.A.*<sup>67</sup> (“GMA”), demonstrates the importance of distinguishing between a prudential justiciability source and one derived from the constitutional requirements of Article III. In that case, the appellate panel split, with the majority finding that the parties before it had Article III standing but lacked prudential standing.<sup>68</sup> Finding that prudential standing was a jurisdictional requirement, the majority determined that the court lacked jurisdiction to hear the case.<sup>69</sup> In that case, the panel found that the plaintiff group failed the zone of interests test.<sup>70</sup> Under that test, a party “must show that the interest it seeks to protect is arguably within the zone of interests to be protected or regulated by the statute . . . in question or by any provision integrally related to it.”<sup>71</sup>

There is ample scholarly debate about whether the rules of prudential standing are jurisdictional.<sup>72</sup> At least two articles have argued that prudential standing is not jurisdictional, unlike Article III standing, which is jurisdictional.<sup>73</sup> If prudential standing is not jurisdictional, it can be waived if not invoked by the parties.<sup>74</sup> Such a view is supported by recent Supreme Court dicta, which lumped prudential ripeness concerns along with the doctrine against third-party standing—a prudential standing concern—and found neither to be jurisdictional and thus deemed both to be waived.<sup>75</sup>

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67. 693 F.3d 169 (D.C. Cir. 2012).

68. *Id.* at 179 (“Hypothetical prudential standing to challenge action . . . does not give the food petitioners prudential standing to petition for review of action taken pursuant to [Clean Air Act] Section 211(f)(4).”). In this case, Judge Tatel, writing in concurrence, and Judge Kavanaugh, writing in dissent, found that the entity has Article III standing, but the case was ultimately dismissed as Judge Tatel and Judge Santelle agreed that the parties lacked jurisdiction due to the prudential standing issue. *See id.* at 180 (Tatel, J., concurring); *id.* at 183 (Kavanaugh, J., dissenting).

69. *Id.* at 179-80.

70. *Id.* at 179.

71. *Id.* (quoting *Nat’l Petrochemical Refiners Ass’n. v. E.P.A.*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (per curiam)).

72. *See generally* Bradford C. Mank, *Is Prudential Standing Jurisdictional?*, 64 CASE W. RES. L. REV. 413 (2013) (discussing the treatment of prudential standing as jurisdictional versus non-jurisdictional).

73. *See id.* at 442-53; Micah J. Revell, Comment, *Prudential Standing, the Zone of Interests, and the New Jurisprudence of Jurisdiction*, 63 EMORY L.J. 221, 251-59 (2013).

74. *See* Revell, *supra* note 73, at 258.

75. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 729 (2010); *see also* Revell, *supra* note 73, at 258.

A circuit split has developed as to the issue of the jurisdictional nature of prudential standing. As detailed in Judge Tatel's concurrence in *GMA*, the D.C. Circuit has found for decades that prudential standing is indeed jurisdictional.<sup>76</sup> The Second and Sixth Circuits have also decided that prudential standing is a non-waivable issue of jurisdiction.<sup>77</sup>

Writing in the *GMA* dissent, Judge Kavanaugh argued that Supreme Court precedent made clear that prudential standing is not jurisdictional.<sup>78</sup> He decried the "sloppy and profligate use of the term 'jurisdiction' by lower courts" and even the Supreme Court itself.<sup>79</sup> As the respondent in *GMA* did not raise the prudential standing issue, Judge Kavanaugh's dissent argued that the issue was waived.<sup>80</sup> Judge Kavanaugh found that reaching the merits would have reversed the outcome in the case—with the Environmental Protection Agency ("EPA") likely to fail on the merits, but instead emerging as the victor on the dismissal due to the prudential standing finding.<sup>81</sup>

Judge Kavanaugh's dissent labeled the circuit split on prudential standing "deep and important."<sup>82</sup> Collecting cases, he found that the Fifth, Seventh, Ninth, Tenth, Eleventh, and Federal Circuits each ruled that prudential standing is non-jurisdictional and may be waived if not

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76. *Grocery Mfrs.*, 693 F.3d at 180 (Tatel, J., concurring) ("Prudential standing is of course, like Article III standing, a jurisdictional concept." (quoting *Steffan v. Perry*, 41 F.3d 677, 697 (D.C. Cir. 1994))); *Animal Legal Def. Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994) ("Standing, whether constitutional or prudential, is a jurisdictional issue which cannot be waived or conceded.").

77. See, e.g., *City of Cleveland v. Ohio*, 508 F.3d 827, 835 (6th Cir. 2007) (finding that the court has an "independent obligation to police [its] own jurisdiction" and analyzing Article III and prudential standing *sua sponte* (quoting *S.E.C. v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 665 (6th Cir. 2001))); *Wight v. BankAmerica Corp.*, 219 F.3d 79, 90 (2d Cir. 2000); *Thompson v. Cty. of Franklin*, 15 F.3d 245, 247-48 (2d Cir. 1994); *Cnty. First Bank v. Nat'l Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994) ("We find no authority for the plaintiffs' argument that prudential standing requirements may be waived by the parties. Recognizing a distinction between prudential and constitutional standing requirements in this context might give careless parties power to override congressional intent.").

78. *Grocery Mfrs.*, 693 F.3d at 183 (Kavanaugh, J., dissenting).

79. *Id.*

80. *Id.* at 185 ("In short, respondent EPA has not raised prudential standing. EPA has thus forfeited the argument.").

81. *Id.* at 186, 192 ("On the merits, EPA's E15 waiver is flatly contrary to the plain text of the statute.").

82. *Id.* at 185.

raised.<sup>83</sup> In addition, the Fourth Circuit has also deemed prudential standing to be non-jurisdictional.<sup>84</sup>

Table 1 summarizes the circuit split.<sup>85</sup> In addition, three circuits have either expressly declined to deliver a view or not rendered a clear holding on the topic. The Third and Eighth Circuits have expressly declined to choose a side in this split.<sup>86</sup> The First Circuit has been less than clear on its view.<sup>87</sup> Even so, the First Circuit has previously noted

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83. *Id.* at 184-85 (“Unlike constitutional standing, prudential standing arguments may be waived.” (quoting *Bd. of Miss. Levee Comm’rs v. E.P.A.*, 674 F.3d 409, 417 (5th Cir. 2012))) (“Unlike the Article III standing inquiry, whether ILC maintains prudential standing is not a jurisdictional limitation on our review. By failing to articulate any argument challenging ILC’s prudential standing, the Director has waived that argument.” (quoting *Indep. Living Ctr. of S. Ca., Inc. v. Shewry*, 543 F.3d 1050, 1065 n.17 (9th Cir. 2008))) (“Prudential-standing doctrine is not jurisdictional in the sense that Article III standing is.” (quoting *Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 756 (7th Cir. 2008))) (“Prudential standing is not jurisdictional in the same sense as Article III standing. . . . We could therefore decline to address this argument, as it was not raised in the court below.” (quoting *Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007))) (“In the end, we do not need to reach or decide the question whether Gilda satisfies the standing requirements of the Administrative Procedure Act, because the government did not contend in its brief that Gilda’s complaint should be barred by the zone of interests test. The government has thus waived that argument.” (quoting *Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1280 (Fed. Cir. 2006))) (“We can pretermitt the more difficult question regarding whether the Doctors’ members’ interests fall within the zone of interests protected by the OSH Act because prudential standing is flexible and not jurisdictional in nature.” (quoting *Am. Iron & Steel Inst. v. O.S.H.A.*, 182 F.3d 1261, 1274 n.10 (11th Cir. 1999))).

84. *United States v. Day*, 700 F.3d 713, 721 (4th Cir. 2012) (“Unlike Article III standing, issues of prudential standing are non-jurisdictional and may be pretermitted in favor of a straightforward disposition on the merits.” (quoting *Finstuen*, 496 F.3d at 1147)).

85. See *infra* Table 1.

86. See *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 938 (8th Cir. 2013) (finding that the Eighth Circuit “has never directly decided whether prudential standing is a waivable exercise in judicial self-restraint or a jurisdictional bar ‘determining the power of the court to entertain the suit.’” (quoting *Urban Contractors All. of St. Louis v. Bi-State Dev. Agency*, 531 F.2d 877, 881 (8th Cir. 1976))). The *Lucas* Court went on cite Judge Kavanaugh’s *GMA* dissent and noted that the panel was “reluctant—without the benefit of dedicated briefing, which the parties have not provided—to venture into the ‘deep and important circuit split on this important issue.’” *Id.* (quoting *Grocery Mfrs.*, 693 F.3d at 185 (Kavanaugh, J., dissenting)); *Lewis v. Alexander*, 685 F.3d 325, 340 n.14 (3d Cir. 2012) (“We have previously acknowledged the divide in our sister circuits . . . but we have thus far not decided the issue. Because we hold that Plaintiffs have satisfied the requirements for prudential standing, we similarly decline to decide the issue now.” (citing *UPS Worldwide Forwarding, Inc. v. U.S.P.S.*, 66 F.3d 621, 626 n.6 (3d Cir. 1995))).

87. In one 2001 case, the First Circuit acknowledged a then-existent circuit split and expressly declined to reach a decision on whether prudential jurisdiction was waivable. *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 73 n.3 (1st Cir. 2001), *aff’d sub nom.* *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003). A later case suggested in dicta that prudential jurisdiction was non-jurisdictional. See *Latin Am. Music Co. v. Archdiocese of San Juan of Roman Catholic & Apostolic Church*, 499 F.3d 32, 46 (1st Cir. 2007) (“A question of who may assert an otherwise justiciable claim is a question of prudential standing that does not implicate the court’s jurisdiction.” (citing *Baena v. KPMG LLP*, 453 F.3d 1, 5 (1st Cir. 2006))). In another case, the First Circuit noted that prudential standing considerations were important but “not as inexorable as their Article III counterparts.” *Pagán v. Calderón*, 448 F.3d 16, 27 (1st Cir. 2006) (citing *United States v.*

that the prudential standing issue of third-party standing was “unnecessary” for the purpose of determining jurisdiction.<sup>88</sup> The Supreme Court has never specifically decided whether prudential standing is non-jurisdictional.<sup>89</sup>

*Table 1: Circuit Split on the Jurisdictional Nature of Prudential Standing*

Prudential Standing is Jurisdictional (Non-Waivable)	Prudential Standing is not Jurisdictional (Waivable if not raised by parties)
<p>D.C. Circuit</p> <ul style="list-style-type: none"> <li>Representative Case: <i>Ass’n of Battery Recyclers, Inc. v. E.P.A.</i>, 716 F.3d 667 (D.C. Cir. 2013)</li> </ul> <p>Second Circuit</p> <ul style="list-style-type: none"> <li>Representative Case: <i>Wright v. BankAmerica Corp.</i>, 219 F.3d 79 (2nd Cir. 2000)</li> </ul> <p>Sixth Circuit</p> <ul style="list-style-type: none"> <li>Representative Case: <i>Cnty. First Bank v. Nat’l Credit Union Admin.</i>, 41 F.3d 1050 (6th Cir. 1994)</li> </ul>	<p>Fourth Circuit</p> <ul style="list-style-type: none"> <li>Representative Case: <i>United States v. Day</i>, 700 F.3d 713 (4th Cir. 2012)</li> </ul> <p>Fifth Circuit</p> <ul style="list-style-type: none"> <li>Representative Case: <i>Bd. of Miss. Levee Comm’rs v. EPA</i>, 674 F.3d 409 (5th Cir. 2012)</li> </ul> <p>Seventh Circuit</p> <ul style="list-style-type: none"> <li>Representative Case: <i>Rawoof v. Texor Petroleum Co.</i>, 521 F.3d 750 (7th Cir. 2008)</li> </ul> <p>Ninth Circuit</p> <ul style="list-style-type: none"> <li>Representative Case: <i>Indep. Living Ctr. of S. Cal. v. Shewry</i>, 543 F.3d 1050 (9th Cir. 2008)</li> </ul> <p>Tenth Circuit</p> <ul style="list-style-type: none"> <li>Representative Case: <i>Finstuen v. Crutcher</i>, 496 F.3d 1139 (10th Cir. 2007)</li> </ul> <p>Eleventh Circuit</p> <ul style="list-style-type: none"> <li>Representative Case: <i>American Iron &amp; Steel Inst. v. OSHA</i>, 182 F.3d 1261 (11th Cir. 1999)</li> </ul> <p>Federal Circuit</p> <ul style="list-style-type: none"> <li>Representative Case: <i>Gilda Indus. v. United States</i>, 446 F.3d 1271 (Fed. Cir. 2006)</li> </ul>

AVX Corp., 962 F.2d. 108, 116 (1st Cir. 1992)). Finally, the First Circuit noted that it could consider prudential ripeness—a related prudential justiciability doctrine—on its own motion, “regardless of the parties’ own wishes.” *Reddy v. Foster*, 845 F.3d 493, 500-01 n.6 (1st Cir. 2017) (citing *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)).

88. *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 972 n.6 (1st Cir. 1993).

89. *See Ass’n of Battery Recyclers, Inc. v. E.P.A.*, 716 F.3d 667, 677 (D.C. Cir. 2013) (Silberman, J., concurring); *see also Mank, supra* note 54, at 263 (“[T]he *Lexmark* decision’s changing of some of the prudential standing rules and classifications answers some questions, but leaves many for another day.”).

In the wake of *GMA* and Judge Kavanaugh's dissent, Judge Silberman responded to the concerns raised therein regarding prudential standing.<sup>90</sup> Writing in a concurring opinion, Judge Silberman noted that the D.C. Circuit "ought to be especially hesitant to overturn past precedent on these issues until the Supreme Court has provided clear guidance."<sup>91</sup> Further, he noted that even if a court was not required to raise the issue of prudential standing *sua sponte*, it had the authority to do so.<sup>92</sup>

A *Harvard Law Review* recent case note advocated for a prudential standing approach based on the separation of powers.<sup>93</sup> This proposal suggested that the executive branch should be able to concede prudential standing questions as to move directly to the determination of the merits.<sup>94</sup> Noting that federal agencies often do not challenge the standing of plaintiffs in regulatory actions,<sup>95</sup> the case note author would empower the executive branch to waive prudential standing concerns to promote the efficient review of the statutory authority delegated to the executive by Congress.<sup>96</sup> Such a proposal would be frustrated by the D.C. Circuit's mandatory jurisdictional review of prudential standing issues, as described in *GMA*.<sup>97</sup> According to the case note, "[i]t is especially important for litigants in the circuit court that hears a large share of challenges to federal regulations to have clarity on when prudential standing will bar plaintiffs from suing the federal government, increasing the urgency of resolving this uncertainty through" further review.<sup>98</sup>

While the lower federal courts await further guidance from the Supreme Court, it is important to note that the Supreme Court has recently cast doubt on the continuing relevance and validity of the prudential standing doctrine. In a unanimous 2014 opinion, *Lexmark International, Inc. v. Static Control Components, Inc.*, the Court noted

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90. *Id.* at 675-78.

91. *Id.* at 678.

92. *Id.* ("[A] court may consider an issue 'antecedent to . . . and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief." (quoting *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993))).

93. Recent Case, *Federal Civil Procedure—Standing—D.C. Circuit Raises Prudential Standing Sua Sponte to Dismiss Regulator Challenge on Jurisdictional Grounds—Grocery Manufacturers Ass'n v. EPA*, 693 F.3d 169 (D.C. Cir. 2012), *reh'g en banc denied*, No. 10-1380 (D.C. Cir. Jan. 15, 2013), 126 HARV. L. REV. 1446, 1450-51 (2013) [hereinafter "HLR Recent Case"].

94. *Id.* at 1452.

95. *Id.* at 1451.

96. *Id.* at 1452.

97. *Id.* at 1450 & n.45.

98. *Id.* at 1453.

the tension between the prudential standing doctrine and that of the principle that “a federal court’s ‘obligation’ to hear and decide cases within its jurisdiction is virtually unflagging.”<sup>99</sup> Moreover, Justice Scalia, writing for the Court, described the term “prudential standing” as “misleading.”<sup>100</sup> Such an “unflagging” obligation harkens back to Supreme Court precedent from as far back as 1821, when Chief Justice John Marshall noted:

We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.<sup>101</sup>

In another unanimous decision from 2014, the Supreme Court acknowledged the “virtually unflagging” obligation but explicitly declined to resolve the continuing vitality of prudential ripeness, a related prudential ground for courts declining to exercise review.<sup>102</sup> In that case, the Court noted that “the doctrines of standing and ripeness ‘originate’ from the same Article III limitation.”<sup>103</sup> Further, the Court noted that the standing and ripeness issues may boil down to the same question, and the Court may sometimes use the term “standing” to describe both ripeness and standing questions.<sup>104</sup>

If *Lexmark* is to be taken seriously, all prudential based rules of justiciability are in question. Under a strict interpretation of *Lexmark*, courts have a “virtually unflagging” obligation to hear cases and must not limit causes of action “merely because ‘prudence’ dictates.”<sup>105</sup> That is, doctrines of abstention, standing, ripeness, and mootness based on judge-made rules would be abrogated under such a strict interpretation. The Eleventh Circuit recently sidestepped such a strict interpretation. Noting that *Lexmark* called into question prudential standing principles, the Circuit labeled at least part of the Court’s discussion with regard to prudential standing as dicta.<sup>106</sup> The Fifth Circuit similarly applied its

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99. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Sprint Commc’ns Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013)).

100. *Id.* at 1386; see also *Ass’n of Battery Recyclers, Inc. v. E.P.A.*, 716 F.3d 667, 675-76 (D.C. Cir. 2013) (Silberman, J., concurring) (calling “prudential standing” a “misnomer”).

101. *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

102. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014).

103. *Id.* at 2341 n.5 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006)).

104. *Susan B. Anthony List*, 134 S. Ct. at 2341 n.5.

105. *Lexmark*, 134 S. Ct. at 1386-87 (quoting *Sprint Commc’ns Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013)).

106. *Duty Free Ams., Inc. v. Estée Lauder, Inc.*, 797 F.3d 1248, 1273 n.6 (11th Cir. 2015) (labeling *Lexmark*’s discussion of antitrust standing, a prudential standing doctrine, as dicta and not

own prudential standing precedent and labeled *Lexmark* as non-controlling.<sup>107</sup> In that case, the Fifth Circuit noted that it was “bound to follow [its] precedent until the Supreme Court squarely holds to the contrary.”<sup>108</sup>

Circuit courts have continued to question prudential aspects of justiciability after the Supreme Court’s decisions. The Fifth Circuit found that the “continued vitality of prudential ‘standing’ is now uncertain in the wake of the Supreme Court’s recent decision in *Lexmark International, Inc. v. Static Control Components, Inc.*”<sup>109</sup> The Sixth Circuit noted that “the Court has placed the continuing vitality of the prudential aspects of standing and ripeness . . . in doubt.”<sup>110</sup> In discussing recent Supreme Court cases, the Sixth Circuit also noted that “the Supreme Court has expressed disfavor for prudential doctrines that abdicate jurisdiction and has emphasized the duty federal courts have to exercise jurisdiction.”<sup>111</sup> Even so, the circuit found that the Supreme Court had not abolished prudential doctrines, such as the prudential source of the mootness doctrine, and such prudential concerns remained the law of the circuit.<sup>112</sup> In another case, the Sixth Circuit acknowledged its “unflagging obligation” to decide cases within its jurisdiction and analyzed ripeness concerns under the constitutional standing framework, relegating prudential ripeness factors to a footnote.<sup>113</sup>

More recently, in *Miller*, the Sixth Circuit wrote, “[g]iven the Supreme Court’s questioning of the continued vitality of the prudential-standing doctrine . . . and the doubt that has been cast upon it by our own decisions . . . we are hesitant to ground our decision in prudential-standing principles.”<sup>114</sup> While the *Miller* majority noted that the prudential standing doctrine is not a dead doctrine, the court declined to

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applying it to the case at bar).

107. *Superior MRI Servs., Inc. v. All. Healthcare Servs., Inc.*, 778 F.3d 502, 506 (5th Cir. 2015).

108. *Id.* (citing *Exelon Wind I, L.L.C. v. Nelson*, 766 F.3d 380, 394 (5th Cir. 2014)).

109. *Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, Nat’l Ass’n*, 758 F.3d 592, 603 n.34 (5th Cir. 2014).

110. *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 596 n.3 (6th Cir. 2014) (first citing *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014); and then citing *Lexmark*, 134 S. Ct. at 1386-88).

111. *In re City of Detroit*, 838 F.3d 792, 800 (6th Cir. 2016).

112. *Id.*

113. *Kiser v. Reitz*, 765 F.3d 601, 606-07, 607 n.2 (6th Cir. 2014).

114. *Miller v. City of Wickliffe*, 852 F.3d 497, 503 n.2 (6th Cir. 2017) (citing *Lexmark*, 134 S. Ct. at 1386; and then citing *Kiser*, 765 F.3d at 606-07).



predict its future.<sup>115</sup> Instead, they chose “to rely on a more solid foundation for deciding the case,” Article III standing.<sup>116</sup>

Professor Brown has noted that it is time to write the epilogue for the story of prudential standing.<sup>117</sup> The place of prudential standing in modern jurisprudence is “perplexing.”<sup>118</sup> In the words of the *Harvard Law Review*, prudential standing jurisprudence is “ripe for clarification.”<sup>119</sup> Given the split justiciability analysis in *Miller*, the Sixth Circuit’s recent case provides jurists further insight into the federal courts’ discretion to decline review.

#### V. *MILLER V. CITY OF WICKLIFFE*: SAME FACTS, DIFFERENT JUSTICIABILITY STANDARD

The Supreme Court has noted that issues of standing and ripeness draw from the same constitutional source and may sometimes boil down to the same question.<sup>120</sup> *Miller* is one such case. On the same facts, the Sixth Circuit panel split with the majority analyzing justiciability using Article III standing and Judge Rogers’ concurrence evaluating the facts under the prudential ripeness rubric.<sup>121</sup> Along the way, the majority suggested that prudential standing grounds were less solid than Article III standing and noted that prudential standards for court to decline review are in doubt.<sup>122</sup>

The facts of the *Miller* case centered on the Mosley Motel in Wickliffe, Ohio, which is located near Cleveland.<sup>123</sup> Julious Mosely owned the motel and was seeking a new tenant for its lounge space.<sup>124</sup> In 2009, he contracted with Dan Miller to open a nightclub in the motel.<sup>125</sup> Miller claimed that the city was initially receptive to the nightclub idea, but abruptly changed its attitude after he told the city of his plans to cater to an “African American and minority clientele.”<sup>126</sup> After Miller and Mosely executed a five-year lease, the city denied them an occupancy

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115. *Miller*, 765 F.3d at 503 n.2.

116. *Id.*

117. Brown, *supra* note 50, at 133.

118. *Id.* at 96.

119. HLR Recent Case, *supra* note 93, at 1450.

120. Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 n.5 (2014) (quoting *Meadow Immune, Inc. v. Greentech, Inc.*, 549 U.S. 118, 128 n.8 (2007)).

121. *Miller v. City of Wickliffe*, 852 F.3d 497, 502-04, 507-08 (6th Cir. 2017).

122. *Id.* at 503 n.2.

123. *Id.* at 499 (describing the facts of the case).

124. *Id.*

125. *Id.* In a related move, Wickliffe also sent Miller a cease-and-desist letter after a billiards hall, in which he had an ownership stake, stating it was allegedly too close to being a “nightclub.” *Id.* at 501.

126. *Id.* at 500.

permit until parking issues were resolved.<sup>127</sup> Also, the state declined to give the nascent nightclub a liquor license after holding a hearing on the matter.<sup>128</sup> The negative decision was supported by a non-binding city resolution and vocal opposition to the permit from local religious organizations.<sup>129</sup>

The city then passed Ordinance 2009-49 (“the Ordinance”), which mandated that nightclubs must have a permit prior to operation.<sup>130</sup> The Ordinance defined nightclubs as follows:

[A] place operated for a profit, which is open to the public and provides the opportunity to engage in social activities such as dancing; the enjoyment of live or prerecorded music; the serving of food and beverages, all of which are provided for a consideration that may be included in a cover charge or included in the price of the food or beverage.<sup>131</sup>

The Ordinance also detailed the proper closing time for nightclubs, required that nightclubs be operated in safe and legal manner, and provided for a specific application process.<sup>132</sup> The plaintiffs never applied for a permit, alleging that such an application would have been futile.<sup>133</sup> Instead, plaintiffs and their related business entities brought suit alleging a variety of claims, including tortious interference with contract, takings, and racial discrimination.<sup>134</sup>

In district court, the plaintiffs’ claims were primarily dismissed based on lack of standing.<sup>135</sup> The *Miller* majority focused on the district court’s denial of review based on Article III standing, specifically its first injury-in-fact prong.<sup>136</sup> The district court had put it simply: “Plaintiffs needed to at least apply for a permit to operate a nightclub

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127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* (citing WICKLIFFE, OHIO, CODIFIED ORDINANCES § 747.03 (2009)).

132. *Id.* at 500-01.

133. *Id.* at 502.

134. *Id.* at 501.

135. *Id.* at 501. In the trial court, Judge James S. Gwin also relied on the state’s decision to deny the liquor permit as grounds for redressability under Article III standing as an independent reason to dismiss the case. *Id.* at 503 n.1. Judge Gwin reasoned that without serving liquor, the nightclub could not effectively operate. *Id.* The Sixth Circuit found that such an assumption was error but that it did not affect the overall outcome. *Id.* Instead, they placed the onus of the standing test on the local ordinance not the alcohol permit. *Id.* at 503. *But cf.* JAMIE FOXX FEAT. T-PAIN, *Blame It (On the Alcohol)*, on INTUITION (J Records 2008) (concluding repeatedly that the blame should lay with the alcohol).

136. *Miller*, 852 F.3d at 502-04.

before suing for being improperly denied the right to operate a nightclub.”<sup>137</sup>

If the *Miller* plaintiffs instead wanted to bring suit to challenge the Ordinance itself, the district court found they could not show more than a “generalized grievance,” which is insufficient to confer standing.<sup>138</sup> The district court opinion cited to the Supreme Court’s 2013 decision in *Hollingsworth v. Perry*,<sup>139</sup> which concerned California’s Proposition 8. The *Hollingsworth* Court was blunt: “We have repeatedly held that such a ‘generalized grievance,’ no matter how sincere, is insufficient to confer standing.”<sup>140</sup>

Interestingly, the *Hollingsworth* Court suggested that the “generalized grievance” jurisprudence was prudential, or judge-made, in nature, yet it framed its discussion within Article III.<sup>141</sup> As noted above, the prohibition against courts deciding “generalized grievances” has traditionally been a core principle of prudential standing.<sup>142</sup> However, the Supreme Court has recently recast it within constitutional terms.<sup>143</sup> Whether that recasting is dictum or not, the reasoning is echoed in *Hollingsworth*, as the Court noted:

Federal courts have authority under the Constitution to answer such questions only if necessary to do so in the course of deciding an actual “case” or “controversy.” As used in the Constitution, those words do not include every sort of dispute, but only those “historically viewed as capable of resolution through the judicial process.” . . . This is an

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137. *Miller v. City of Wickliffe*, No. 1:12-CV-1248, 2015 WL 9304665, at \*4 (N.D. Ohio Dec. 21, 2015) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-67 (1972)), *aff’d sub nom.* 852 F.3d 497 (6th Cir. 2017).

138. *Id.* at \*5 (quoting *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013)). The Sixth Circuit noted that Judge Gwin had invoked prudential standing considerations when referring to “generalized grievances.” *Miller*, 852 F.3d at 503.

139. 133 S. Ct. 2652 (2013).

140. *Id.* at 2662.

141. *See Brown*, *supra* note 50, at 109-10 (“[T]he precise foundation of the generalized grievances principle has been a source of confusion historically.”). *Compare* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014) (noting that the bar against “generalized grievances” arises from constitutional sources, not prudential ones), *with* *Allen v. Wright*, 468 U.S. 737, 751 (1984) (finding that prudential standing includes generalized grievances), *and Miller*, 852 F.3d at 503-04 (noting that “generalized grievances” fall under the prudential standing requirements).

142. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (“[T]he rule barring adjudication of generalized grievances [is] more appropriately addressed in the representative branches . . .” (quoting *Allen*, 468 U.S. at 751)).

143. *See Lexmark*, 134 S. Ct. at 1387 n.3; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74 (1992) (“[R]aising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.”); *see also Brown*, *supra* note 50, at 109-10.

essential limit on our power: It ensures that we act as *judges*, and do not engage in policymaking properly left to elected representatives.<sup>144</sup>

The *Hollingsworth* Court explained that the “generalized grievance” jurisprudence concerned the federal court’s proper role:

The doctrine of standing, we recently explained, “serves to prevent the judicial process from being used to usurp the powers of the political branches” . . . . In light of this “overriding and time-honored concern about keeping the Judiciary’s power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of [an] important dispute and to ‘settle’ it for the sake of convenience and efficiency.”<sup>145</sup>

With the same breath, the *Hollingsworth* Court discussed both Article III standing’s injury-in-fact prong and the prudential concern of “generalized grievances”:

The Article III requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in our system of separated powers. “Refusing to entertain generalized grievances ensures that . . . courts exercise power that is judicial in nature,” . . . and ensures that the Federal Judiciary respects “the proper—and properly limited—role of the courts in a democratic society.”<sup>146</sup>

The courts can, and do, refuse to hear “generalized grievances” but their reasoning for doing so is now generally grounded using the terminology of Article III’s injury-in-fact prong.<sup>147</sup> Yet, traditionally, the refusal to exercise jurisdiction in such cases stems not from the core constitutional standing inquiry, but instead from judge-made, prudential concerns against third-party standing and the proper role of the judiciary in the constitutional system.<sup>148</sup> Even so, the source of the prohibition on hearing “generalized grievances” has vacillated between constitutional and prudential and has been inconsistent over time.<sup>149</sup>

144. *Hollingsworth*, 133 S. Ct. at 2659 (citations omitted).

145. *Id.* at 2661 (citation omitted).

146. *Id.* at 2667 (citations omitted).

147. See, e.g., *id.*; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

148. See *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975).

149. See *Stern*, *supra* note 31, at 1204-14. It is worth noting that Justice Scalia’s view was rather consistent, noting in a law review article from 1983 that courts should be obligated to hear cases without concerns for prudential standing. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983) (“As I would prefer to view the matter, the Court must always hear the case of a litigant who asserts the violation of a legal right.”).

Professor Ernest A. Young has cast the current state of the source of “generalized grievances” prohibition as “a constitutional core within a prudential penumbra.”<sup>150</sup> Perhaps, as another commenter noted, the Court’s inconsistency may enable Justices to shift the source, between prudential and constitutional, when they desire more flexibility in the application of the “generalized grievances” doctrine.<sup>151</sup>

Turning back to *Miller*, the majority cast the home for “generalized grievances” in the prudential standing realm.<sup>152</sup> The majority suspected that the prudential standing doctrine was all but a dead letter and was hesitant to ground its reasoning on this foundation as it was in question.<sup>153</sup> Instead, the *Miller* Court chose the “more solid” foundation of Article III standing principles.<sup>154</sup>

Accordingly, the *Miller* majority avoided any discussion of prudential principles in its review of the plaintiffs’ standing.<sup>155</sup> Instead, the court found that the injury-in-fact was lacking, as any injury was merely hypothetical without final decision on the nightclub permit as the plaintiffs had not even applied for one.<sup>156</sup> Without a final decision, the case was also not ripe for judicial review.<sup>157</sup>

With regard to the facial challenge to the Ordinance’s validity, the court found that the standing and ripeness question boiled down to the same question: Have plaintiffs established a credible threat of enforcement?<sup>158</sup> The answer to the question was no,<sup>159</sup> as the court found that a sufficiently credible threat of enforcement could not be established because the plaintiffs had not applied for a license.<sup>160</sup>

If the *Miller* majority had not doubted the prudential standing doctrine’s future, it may have utilized the “generalized grievance” framework, as the trial court had done. For example, the Sixth Circuit has previously nested the “generalized grievance” issue within its injury-

150. Ernest A. Young, *Prudential Standing After Lexmark International, Inc. v. Static Control Components, Inc.*, 10 DUKE J. CONST. L. & PUB. POL’Y, 2014, at 149, 154.

151. See Stern, *supra* note 31, at 1214-17; see also U.S. v. Windsor, 133 S. Ct. 2675, 2701 (2013) (Scalia, J., dissenting) (“Relegating a jurisdictional requirement to ‘prudential’ status is a wondrous device, enabling courts to ignore the requirement whenever they believe it ‘prudent’—which is to say, a good idea.”).

152. *Miller v. City of Wickliffe*, 852 F.3d 497, 503 (6th Cir. 2017).

153. *Id.* at 503 n.2.

154. *Id.*

155. See *id.* at 503-07.

156. *Id.* at 503.

157. *Id.* at 506.

158. *Id.*

159. *Id.*; see also MEGHAN TRAINOR, *No, on THANK YOU* (Epic Records 2016).

160. *Miller*, 852 F.3d at 506 (“[P]laintiffs needed only to apply for a license to discover whether they could open their businesses. This not only would have solved their facial-standing problem, but would have given them standing for a bevy of as-applied challenges as well.”).

in-fact analysis for Article III standing.<sup>161</sup> The *Miller* Court's doubts about the continuing vitality of prudential standing principles, which may or may not include "generalized grievances," might explain why the court stayed away from such an analysis here.

Writing in concurrence, Judge Rogers agreed that the case was not justiciable.<sup>162</sup> Judge Rogers would have decided the case not on issues of constitutional justiciability, but instead upon the court's equitable powers to decline review.<sup>163</sup> In this case, Judge Rogers found it would be inappropriate to engage in pre-enforcement review of the Ordinance.<sup>164</sup> Judge Rogers noted that the Supreme Court has called into doubt the courts' prudential discretion to decline review, but he emphasized that the Court has never explicitly discarded it.<sup>165</sup> Like Judge Tatel's concurrence in *GMA*, Judge Rogers would have the court apply prudential principles to decline review in the absence of a clear Supreme Court ruling to the contrary.<sup>166</sup>

Instead of seeing prudential discretion as a dead letter, as the *Miller* majority implied, Judge Rogers applied that prudential principles lead to the same result.<sup>167</sup> For him, the case was not ripe to be tried.<sup>168</sup> Applying prudential ripeness principles, he found the issues in the case were not fit for judicial decision and that the parties would suffer minimal hardship if judicial review was denied.<sup>169</sup> He noted that there were separation of powers issues involved in the case: "Ruling on Article III standing grounds unnecessarily limits the power of Congress."<sup>170</sup> He found there was no need to reach Article III standing at all given that the case was not ripe;<sup>171</sup> ripeness issues alone would preclude judicial review.

Instead of grounding his review on Article III grounds, Judge Rogers focused on the courts' equitable power to decline review. As the Supreme Court has noted, the ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction."<sup>172</sup> Both prudential standing and

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161. *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 543 (6th Cir. 2014).

162. *Miller*, 852 F.3d at 507 (Rogers, J., concurring).

163. *Id.*

164. *Id.* at 507-08.

165. *Id.*

166. *Id.* at 508.

167. *Id.* at 507.

168. *Id.* at 508.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Reno v. Catholic Soc. Servs. Inc.*, 509 U.S. 43, 57 n.18 (1993) (citing *Buckley v. Valeo*, 424 U.S. 1, 114 (1976) (per curiam)).

prudential ripeness relate to the proper role of the courts in deciding disputes and arise, at least in part, from judge-made standards.

Given the circuit split regarding prudential standing issues, Judge Rogers may have chosen the prudential ripeness standard as the Court has been considerably clearer as to whether courts may raise that issue *sua sponte*. The Court has unquestionably allowed prudential ripeness issues to be raised in the first instance by the court itself, writing in 1993, “[e]ven when a ripeness question in a particular case is prudential, we may raise it on our own motion, and ‘cannot be bound by the wishes of the parties.’”<sup>173</sup> That principle was more recently upheld in a 2003 case.<sup>174</sup> In the wake of the D.C. Circuit’s *GMA* decision, at least one judge in that Circuit has postulated that prudential standing may be on the same footing as prudential ripeness.<sup>175</sup> Even as that D.C. Circuit judge found “nothing improper about raising [prudential standing] issue[s] ourselves where the parties do not,”<sup>176</sup> Judge Rogers may have been hesitant to do so even as he utilized a related prudential justiciability doctrine to argue that the court should decline review.

## VI. CONCLUSION AND CONFUSION

Justiciability doctrines dictate that parties must have standing to bring suit in federal courts and the issues involved in those suits must be ripe. These standards derive both from Article III as well as judge-made prudential jurisprudence. In the wake of the Supreme Court’s recent rulings,<sup>177</sup> scholars and jurists have been left without ample guidance about the extent of the Court’s stated aversion to prudential justiciability doctrines.<sup>178</sup> Both the *Miller* majority and the concurring opinion referred to the doubt cast by the Court’s recent statements regarding the “virtually unflagging” obligation for federal courts to hear and decide cases within its jurisdiction.<sup>179</sup>

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173. *Reno*, 509 U.S. at 57 n.18 (quoting Reg’l Rail Reorganization Act Cases, 419 U.S. 102, 138 (1974)).

174. *Nat’l Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803, 808 (2003) (“[E]ven in a case raising only prudential concerns, the question of ripeness may be considered on a court’s own motion.” (citing *Reno*, 509 U.S. at 57 n.18)).

175. *Ass’n of Battery Recyclers, Inc. v. E.P.A.*, 716 F.3d 667, 678 n.6 (D.C. Cir. 2013) (Silberman, J., concurring) (“Prudential standing might therefore stand on the same footing as prudential ripeness.”).

176. *Id.* at 678.

177. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386-87 (2014); see also *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014).

178. Young, *supra* note 150, at 161-63.

179. *Miller v. City of Wickliffe*, 852 F.3d 497, 503 n.2 (6th Cir. 2017); *id.* at 507 (Rogers, J., concurring).

In particular, confusion persists in the federal courts regarding prudential standing, from its jurisdictional nature to its continuing vitality. With regard to jurisdiction, a “deep and important” circuit split has developed.<sup>180</sup> Three circuits would allow courts to raise the issue of prudential standing *sua sponte*, and seven circuits would deem these arguments waived if not argued by the parties.<sup>181</sup> Put simply, the Court has yet to adequately articulate whether the mandates of prudential standing are mandatory aspects of federal courts’ exercise of jurisdiction.<sup>182</sup>

The Supreme Court’s stated disfavor of prudential principles may create a chilling effect for jurists. Read broadly, all prudential standards for the courts to decline to exercise judicial review have been called into doubt by strong language from the Supreme Court.<sup>183</sup> As such, lower courts may be wary to utilize prudential principles or analysis, particularly prudential standing, in deciding cases. Given the questions about the continuing vitality of prudential justiciability standards, the *Miller* majority preferred the “more solid” foundation of constitutional analysis.<sup>184</sup>

Prudential justiciability standards—particularly that of prudential standing—persist but have been called into doubt. In *Miller*, Judge Rogers noted that these doctrines are not yet dead and favored a court’s discretion to avoid review due to prudential concerns.<sup>185</sup> Similarly, Judge Tatel’s concurrence in *GMA* noted that he was bound by D.C. Circuit precedent in the absence of clear guidance from the Supreme Court.<sup>186</sup>

Overall, *Miller* demonstrates how jurists may disagree as to which justiciability standard applies to the same factual scenario. Moreover, they disputed the source of those standards: judge-made rules or Article III. Given the confusion and disagreement among federal jurists regarding prudential justiciability standards, the Supreme Court should act expediently to clarify their sources and potential waiver, especially with regard to prudential standing principles.

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180. *Grocery Mfrs. Ass’n v. E.P.A.*, 693 F.3d 169, 183-85 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

181. *See supra* Table 1.

182. Choosing not to decide does represent a choice in itself. *See RUSH, Freewill, on RUSH* (Mercury/Island Records 2011) (“If you choose not to decide, you still have made a choice.”).

183. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (noting that federal courts “cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates”).

184. *See supra* note 114 and accompanying text.

185. *See supra* note 167 and accompanying text.

186. *See supra* note 76 and accompanying text.



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