

The implications for environmental law are far from being the most important aspect of the leaked draft of a Supreme Court opinion overruling *Roe v. Wade*. The aggressiveness of the opinion in the *Dobbs* case signals a kind of activism that is definitely worrisome in other areas. At the end of last week, however, there was a flap over whether the opinion threatens the standing of environmental organizations. That particular fear is based on a misunderstanding.

The misunderstanding derives from a brief mention in Justice Alito's draft opinion about third-party standing. Normally, a plaintiff who is injured by a law cannot base their standing in court on a violation of the rights or interests of someone else. To take one example, a criminal defendant's spouse may be injured if the defendant is convicted of a crime and sentenced to prison. But only the defendant can appeal the conviction, not the spouse. Thus, the basic rule is that only the person whose rights have been violated can sue to defend those rights, even if others are injured as a result of the violation.

The Court has recognized an exception in cases where there is a close relationship between the plaintiff and the person whose rights have been injured, there is no conflict of interest between them, and the person whose rights were violated faces barriers to bringing the suit themselves. This is called "third party standing."

In the draft *Dobbs* opinion, Justice Alito provides a list of issues where he says that the law has been "distorted" by the abortion doctrine, and one of the items on the list is third-party standing. He cites dissents where he and other conservatives have argued that abortion providers should *not* have standing to represent the rights of their patients. This is the basis for the concern about the standing of environmental organizations to sue for injuries to their members.

Before discussing that, it's important to point out that this passage by Alito is quite improper. The passage hints at bad faith on the part of the majorities in the cases he cites. Worse, Alito raises and effectively decides issues that were not before him in violation of the most basic principle of judicial decision making. Most of the items on the list have no relevance to *Dobbs*, the case before the Court. Although the issues in those other cases arose in an abortion-related context such as picketing of clinics, they had nothing to do with the constitutionality of laws limiting abortions. The Court has no business overruling those cases when those issues are not before the Court, let alone doing so in a single sentence or footnote — a kind of drive-by overruling.

Be that as it may, the *Dobbs* opinion has no relevance to cases brought by environmental groups, because those cases have an entirely different legal basis than the lawsuits by abortion providers. It's true that environmental groups are basing their lawsuits on injuries to the environmental interests of their members. So it's understandable that scholars who do not specialize in federal jurisdiction would view this as an example of "third-party" standing. But that is not the way the Supreme Court looks at it. The Court does not consider those environmental cases to involve third-party standing at all.

The difference is that the organizations do not just have a business relationship with their members. Instead, they are formed specifically to *represent* their members. In fact, the Supreme Court has held that the ability to form organizations for bringing lawsuits is a form of freedom of association protected by the Constitution. In other words, as the Supreme Court itself has said on more than one occasion, an association and its members are "in every practical sense identical. The Association . . . is but the medium through which its individual members seek to make more effective the expression of their own views." Thus, the organization isn't considered a third-party, it's just a megaphone used by the members.

It's conceivable that the Supreme Court might reconsider the doctrine of organizational standing. But nothing in the Alito draft even hints at an interest in doing so. Moreover, there is no reason for conservatives to favor doing so, since conservative organizations as well as business organizations often sue over government regulations.

In short, there are many reasons to be upset about the leaked opinion. But a threat to environmental standing is not one of them.