ARTICLE III – STANDING – ARTICLE III STANDING IS AVAILABLE TO CITIZEN GROUP SEEKING TO ENFORCE PROVISIONS OF THE CLEAN WATER ACT THROUGH CITIZEN SUIT PROVISION – *FRIENDS OF THE EARTH, INC. V. LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.*, 528 U.S. 167 (2000).

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[B]efore these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard. Perhaps they will not win. Perhaps the bulldozers of "progress" will plow under all the aesthetic wonders of this beautiful land. That is not the present question. The sole question is, who has standing to be heard?[1]

I. INTRODUCTION

Citizen suit provisions provide a powerful tool for citizen groups seeking to protect the public interest. In essence, citizen suit provisions allow organizations to act as "private attorney generals" in enforcing the laws of the United States.[2] Citizen suit provisions in environmental laws such as the Clean Water Act allow citizens to bring civil actions to enforce regulations against both private actors and government agencies.[3] Citizen suit provisions began appearing in federal

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[1] Sierra Club v. Morton, 405 U.S. 727, 750-51 (1972) (Douglas, J., dissenting).

[2] *See* Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793 (1993) (crediting the term "private attorney general" to *Associated Industries of New York State v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943)).

[3] *See* 33 U.S.C. § 1365 (1987). Prior to the appearance of citizen suit provisions, courts had already recognized the ability of environmental citizen groups to obtain standing based on injuries incurred by their members. *See* Scenic Hudson Preservation Conference v. Fed. Power Comm'n., 354 F.2d 608 (2d Cir. 1965). *Scenic Hudson* involved a citizen group who opposed the Federal Power Commission ("FPC") granting a license for the construction of a "pumped storage hydroelectric project" along the Hudson River at Storm King Mountain in Cornwall, New York. *Id.* The plaintiff alleged that in approving the proposed hydroelectric project, the FPC did not consider the impact on the recreational and aesthetic value of the area, as required by Section 10(a) of the Federal Power Act, codified at 16 U.S.C. § 803(a). *Id.* at 614. In holding that the citizen group had standing based both on economic and non-economic interests, the Second Circuit noted that the "[r]epresentation of common interests by an organization such as Scenic Hudson serves to limit the number of those who might other-

environmental statutes in the 1970's.[4] Commentators postulate that citizen suit provisions developed in response to a perceived need for greater involvement of the public in the enforcement of the law.[5] While some authorities seriously question the wisdom behind granting private citizens such broad power, citizen suit provisions in general do not appear in danger of legislative repeal.[6]

Despite what power citizen suit provisions may grant, organizations invoking them are still subject to the restraints of Article III standing. The language of Article III, Section 2 of the United States Constitution vests the Supreme Court with judicial power over specific "cases and controversies."[7] The term "stand-

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wise apply for intervention and serves to expedite the administrative process." *Id.* at 617.

[4] *See generally* Eileen Guana, *Federal Environmental Citizen Provisions: Obstacles and Incentives On The Road To Environmental Justice*, 22 ECOLOGY LAW QUARTERLY 1, 39 (1995) (noting that while citizen suit provisions existed in other areas of the law prior to 1970, environmental citizen suit provisions differ in that they grant the ability to sue on behalf of the public, not merely the opportunity to seek vindication for the violation of individual rights).

[5] *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 193 (1992). In exploring the history behind citizen suit provisions in environmental laws, Sunstein reflected that:

> Congress was especially enthusiastic about such suits in the environmental area, addressing the fear that statutory commitments would be threatened by bureaucratic failure. With a number of devices, including the citizen suit, Congress hoped to overcome administrative laxity and unenthusiasm, and also to counteract the relatively weak political influence of beneficiaries.

Id.

[6] *See, e.g., id.* at 164; William H. Lewis, Jr., *Environmentalists' Authority To Sue Industry For Civil Penalties Is Unconstitutional Under The Separation Of Powers Doctrine*, 16 ENVTL. L. REP. 10 (1986).

[7] U.S. CONST. art. III, § 2. Specifically, Article III, section 2 provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

ing" is found nowhere in Article III, or within the rest of the Constitution. Yet over the past few decades, the doctrine built around this concept has developed to provide a significant obstacle for organizations seeking relief in federal court.[8] The recent interest of the Supreme Court in the standing doctrine has been closely tied with the growing use of the judicial system to address public concerns such as environmental protection.[9] In order to satisfy the standing re-

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—to all Cases affecting Ambassadors, other public ministers and Consuls;

—to all Cases of admiralty and maritime Jurisdiction;

—to Controversies to which the United States shall be a Party;

—to Controversies between two or more States;

—between a State and Citizens of another State;

—between Citizens of different States;

—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

There is very little direct evidence available indicating what the framers had intended by the "case or controversy" requirement. Sunstein, *supra* note 5, at 173 (arguing that no evidence indicates that the framers intended injury-in-fact or concrete interest to be required under Article III).

[8] The development of standing as a barrier to federal court has been a fairly recent phenomenon. *See* Sunstein, *supra* note 5, at 169. Sunstein notes that of the 117 times the Supreme Court had considered the issue of standing prior to 1992, 109 of those cases occurred after 1965. *Id.*

[9] *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972) (conservation group does not have standing to challenge development on national forest lands); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (environmental organization has standing to challenge a law that limited liability for nuclear accidents); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990) (citizen group does not have standing to challenge Bureau of Land Management's broad policy concerning mining activity on federal land); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (environmental organization does not have standing to challenge the Secretary of the Interior's interpretation of the Endangered Species Act); Steel Co. v. Citizens For a

quirements of Article III, a plaintiff must show (1) it has suffered an injury-in-fact that is "(a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'"; (2) "the injury is 'fairly traceable' to the challenged action of the defendant"; and (3) "it is 'likely,' as opposed to 'merely speculative,' that the injury will be 'redressed by a favorable decision.'"[10]

While the Court's announcement of the three-prong test eliminated some of the confusion the standing requirement had created for both courts and commentators since the doctrine's rise to prominence in the 1960s and 1970s, the application of the standing and mootness doctrines has not always been consistent.[11] Like many constitutional doctrines, the exact parameters of standing have been difficult to define and have fluctuated over the past few decades.[12] Led by the presence of Justice Antonin Scalia on the Supreme Court, the 1990's have been marked by a drastic narrowing of the availability of standing to citizen groups seeking to protect their environmental interests through the judicial system.[13] In a decision surprising many commentators, the Supreme Court departed from that trend in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*[14]

Better Env't., 523 U.S. 83 (1998) (citizen group lacks standing to seek imposition of civil penalties for wholly past violations of the Emergency Planning and Community Right-to-Know Act).

[10] *Defenders of Wildlife*, 504 U.S. at 560-61. To prove "injury-in-fact," a plaintiff must show that "he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" Los Angeles v. Lyons, 461 U.S. 95,101-102 (1983). The "causation" requirement will only be satisfied by injuries that "fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976). To satisfy the "redressability" requirement, there must be a likelihood that the alleged injury will be redressed by the relief sought. *Id.* at 45-46.

[11] *See* Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 179-80 (2000).

[12] *See infra* Prior History Part III.

[13] *See* Sam Kalen & Jonathan Simon, *No-Standing Zone Deters Citizen Suits*, NAT'L LAW JOURNAL, December 7, 1998, at B5. The validity of citizen group standing has proven difficult to overcome, as a number of commentators have anticipated its demise over the past ten years. *See* Sunstein, *supra* note 5, at 164-65.

[14] 528 U.S. 167 (2000). The appointment to the Court of Justice Ginsburg, author of the majority opinion in *Friends of the Earth*, was predicted by one commentator as being pivotal in leading the Court to return to a more lenient construction of the standing requirement. Eric I. Abraham, Comment, *Justice Ginsburg and the Injury in Fact Element of Standing*, 25 SETON HALL L. REV. 267 (1994).

II. STATEMENT OF THE CASE

In 1986, Laidlaw Environmental Services ("Laidlaw") purchased a hazardous waste incinerator facility located in Roebuck, South Carolina.[15] Included in this facility was a wastewater treatment plant.[16] Laidlaw was granted a National Pollutant Discharge Elimination System permit by the South Carolina Department of Health and Environmental Control ("DHEC") authorizing Laidlaw to discharge wastewater into the North Tyger River.[17] The permit imposed limits on the facility's discharge of several pollutants, including the highly toxic pollutant mercury.[18] Upon the permit becoming effective on January 1, 1987, Laidlaw began discharging various pollutants into the North Tyger River.[19] The facility regularly exceeded the limits set by the permit, including the limit set on mercury discharges.[20] The District Court determined that Laidlaw had violated the permit's mercury limits on 489 occasions between 1987 and 1995.[21]

On April 10, 1992, plaintiff-petitioners Friends of the Earth ("FOE"), an environmental advocacy organization, and the Citizens Local Environmental Action Network sent a letter to Laidlaw notifying the company of their intention to file a citizen suit against Laidlaw under section 505(a) of the Clean Water Act.[22]

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[15] *Friends of the Earth*, 528 U.S. at 175.

[16] *Id.*

[17] *Id.* at 175-76. Section 402 of the Clean Water Act, provides for the issuance of National Pollutant Discharge Elimination System ("NPDES") permits by the Administrator of the Environmental Protection Agency ("EPA") or by authorized states. 33 U.S.C. § 1342 (1987). NPDES permits impose conditions on a facility's ability to discharge pollutants into waterways, in an effort to maintain or improve the quality of the Nation's waters. *Id.* at 176.

[18] *Friends of the Earth*, 528 U.S. at 176. In addition to limiting pollutant discharges, the NPDES permit also regulated the flow, toxicity, temperature, and the pH of the discharges, and imposed reporting and monitoring obligations. *Id.*

[19] *Id.*

[20] Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 890 F. Supp. 470, 477 (D.S.C. 1995).

[21] Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 956 F. Supp. 588, 613-21 (D.S.C. 1995).

[22] *Friends of the Earth*, 890 F. Supp. at 477. Section 505(a) of the Clean Water Act provides:

(a) Authorization; jurisdiction. Except as provided in subsection (b) of this section and

Upon notification of FOE's intention to bring a citizen suit, Laidlaw's lawyers contacted the DHEC, requesting that the DHEC initiate a lawsuit against Laidlaw.[23] DHEC agreed to bring the action.[24] On June 9, 1992, DHEC and Laidlaw reached a settlement in which Laidlaw was required to pay $100,000 in civil penalties and to make every effort to comply with its permit obligations.[25]

On June 12, 1992, FOE filed an action against Laidlaw under section 505 of the Clean Water Act, alleging noncompliance with the terms of the company's NPDES permit.[26] FOE sought declaratory and injunctive relief, in addition to an

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section 309(g)(6), any citizen may commence a civil action on his own behalf— (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act.

33 U.S.C. § 1365(a) (1987).

[23] *Friends of the Earth*, 890 F. Supp. at 477. By requesting that DHEC file a lawsuit against them, Laidlaw aimed to bar FOE's proposed citizen suit. *Id.* at 478. Before a private citizen may bring such an action, they must provide a 60-day notice period to the EPA, to "the state in which the alleged violation occurred," and to the alleged violator. 33 U.S.C. § 1365(b)(1)(A) (1987). The private citizen will be barred from bringing the suit if within the 60-day notice period the EPA or the state environmental agency (in this case, the DHEC) diligently prosecutes a similar action. 33 U.S.C. § 1365(b)(1)(B) (1987).

As noted by the District Court, the circumstances surrounding DHEC's action against Laidlaw were highly suspect. *Friends of the Earth*, 890 F. Supp. at 478. In addition to drafting the state-court complaint and the settlement agreement itself, Laidlaw filed the lawsuit itself and paid the filing fee. *Id.* DHEC officials also testified that while the development of a consent order usually takes thirty to forty-five days, the final settlement agreement in the present case was reached just one day after the initial enforcement conference. *Id.*

[24] *Friends of the Earth*, 890 F. Supp. at 478.

[25] *Id.* at 480.

[26] *Id.* at 474. With the exception of the Federal Insecticide Fungicide Rodenticide Act, every major federal environmental law has a citizen suit provision. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2619 (1998); Clean Water Act of 1976, 33 U.S.C. § 1365

award of civil penalties.[27] Laidlaw moved for summary judgment on several grounds.[28] First, Laidlaw argued that FOE had failed to demonstrate injury-in-fact and thus lacked Article III standing.[29] In response to this motion, FOE submitted testimony from its members in an effort to show that they did indeed suffer an injury-in-fact as a result of Laidlaw's alleged permit violations.[30] The South Carolina district court denied Laidlaw's motion for summary judgment on these submissions, finding that FOE had Article III standing "by the very slimmest of margins."[31]

Laidlaw also moved for summary judgment on the grounds that FOE's citizen suit was barred because of DHEC's prior action against the company.[32] After analyzing the Laidlaw-DHEC settlement and the circumstances surrounding it, the district court held that the settlement was not "diligently prosecuted" by DHEC.[33] The district court therefore again denied Laidlaw's motion for summary judgment and allowed FOE's lawsuit to proceed.[34]

On January 22, 1997, the district court issued a judgment in favor of FOE and

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(1987); Clean Air Act, 42 U.S.C. § 7604 (1995); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9659 (1995).

[27] *Friends of the Earth*, 890 F. Supp. at 474. In citizen suits under section 505(a) of the Clean Water Act, civil penalties are awarded to the state, not to the private plaintiff. 33 U.S.C. § 1365(a) (1987). The Supreme Court left open the question of whether a successful private plaintiff is entitled to attorney fees on remand. Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 195 (2000).

[28] *Friends of the Earth*, 890 F. Supp. at 474.

[29] *Friends of the Earth*, 528 U.S. at 177.

[30] *Id.* As Justice Ginsburg noted, a citizen group has standing to sue on behalf of its members when "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the law suit." *Id.* at 180-81 (citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977)).

[31] *Id.*

[32] *Friends of the Earth*, 890 F. Supp. at 474. FOE was joined in opposing the motion by the United States, appearing in the action as *amicus curiae*. *Id.* The United States participated as *amicus curiae* in support of FOE throughout the subsequent litigation of the case. *Friends of the Earth*, 528 U.S. at 179.

[33] *Friends of the Earth*, 890 F. Supp. at 498.

[34] *Id.*

imposed a civil penalty of $ 405,800 on Laidlaw.[35] The court declined to grant an injunction, finding that injunctive relief was inappropriate due to Laidlaw's subsequent, substantial compliance with the requirements of its NPDES permit.[36]

On appeal to the Court of Appeals for the Fourth Circuit, FOE argued that the district court's civil penalty judgment was inadequate.[37] Laidlaw cross-appealed, arguing both that FOE lacked Article III standing to bring the action and that DHEC's "diligent prosecution" of Laidlaw precluded FOE's action.[38]

The Fourth Circuit issued its judgment on July 16, 1998.[39] Without addressing the issue of whether FOE initially had standing to bring the action, the appellate court held that the case had become moot.[40] The Fourth Circuit stated that an action becomes moot when one of the three elements of Article III standing fails to persist at any stage of judicial review.[41] Basing its analysis on the Su-

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[35] Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 956 F. Supp 588, 610 (D.S.C. 1995). The district court had found that Laidlaw gained a total economic benefit of $1,092,581 as a result of its permit violation, but reduced this amount based on the guiding factors listed in 33 U.S.C. § 1319(d). *Id.* at 603. Section 1319(d) provides that:

> in determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. § 1319(d) (1987).

[36] *Friends of the Earth*, 956 F. Supp. at 603.

[37] Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 179 (2000). FOE did not appeal the district court's denial of declaratory or injunctive relief, a fact Laidlaw unsuccessfully tried to use against FOE in arguing that FOE's injury could not be redressed. *Id.*; *see also infra* note 100.

[38] *Friends of the Earth*, 528 U.S. at 179.

[39] Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 149 F.3d 303 (4th Cir. 1998).

[40] *Id.* at 306-07. For the purpose of analyzing mootness, a court may assume, without deciding, that standing exists. *Id.* at 306 (citing Arizonans for Official English v. Arizona, 520 U.S. 43, 66-67 (1997)).

[41] *Id.* (citing *Arizonans for Official English*, 520 U.S. at 66-67 (1997); Suarez Corp. Indus. v. McGraw, 125 F.3d 222, 228 (4th Cir. 1997)).

preme Court's decision in *Steel Company v. Citizens for a Better Environment*,[42] the appellate court held that the element of redressability was no longer present since civil penalties payable to the government would not redress any injury that FOE had suffered.[43] The Fourth Circuit vacated the district court's order and remanded the case with instructions to dismiss the action.[44]

The United States Supreme Court granted certiorari to resolve inconsistencies between the circuits concerning the issues of standing and mootness.[45] A split existed between the circuits as to the availability of citizen suits where the defendant has come into compliance with its permit obligations after the commencement of litigation.[46] The Court reversed and remanded to the appellate court, holding that FOE's citizen suit for civil penalties was not moot as a result of Laidlaw's later compliance, and that the citizen group had standing to bring the action.[47]

III. PRIOR HISTORY

The first case in which the Supreme Court considered organizational standing for an environmental group was *Sierra Club v. Morton*.[48] In *Sierra Club*, a conservation group sought injunctive and declaratory relief to prevent the development of a private ski resort on national forest land.[49] The Supreme Court recognized that injury-in-fact may be based on non-economic interests, although the Court required that the plaintiff have been among those injured.[50] While the citi-

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[42] 523 U.S. 83 (1998).

[43] *Friends of the Earth*, 149 F.3d. at 306-07.

[44] *Id.* at 307. According to Laidlaw, in the intermission between the Fourth Circuit's decision and the Supreme Court's grant of certiorari, the Roebuck facility was permanently closed, dismantled, and sold, with all discharges from the facility into the Tyger River permanently ceasing. Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 179 (2000).

[45] *Friends of the Earth*, 528 U.S. at 179-80.

[46] *Id.*

[47] *Id.* at 173-74

[48] 405 U.S. 727 (1972). Unlike the plaintiffs in *Friends of the Earth*, the Sierra Club did not have the benefit of a citizen suit provision such as section 505 of the Clean Water Act. *Id.*

[49] *Id.* at 728.

[50] *Id.*

zen group was held to lack standing in *Sierra Club*, the case is recognized as opening the door to federal courts for future, similarly situated groups.[51] The majority indicated that Sierra Club's only deficiency was not making reference to the impact of the project on specific members of its organization.[52]

The Supreme Court further refined the requirements for an organization to sue on behalf of its members in *Warth v. Seldin*.[53] In *Warth*, a number of organizations and individuals brought an action against a town and its zoning board members alleging that zoning regulations effectively excluded low-income families from living in the town and violated plaintiffs' constitutional rights.[54] The Court held that the plaintiffs did not have standing, stating that when an organization does not legitimately have standing on its own, it cannot gain standing through asserting the legal rights of a third party.[55] The Court went on to further define the circumstances under which an organization would have standing, declaring that an organization could seek to protect the general public interest so long as the plaintiff can show a "palpable injury" to themselves.[56]

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[51] *Id.* While on its face the decision was a loss for the Sierra Club, Justice Stewart's language indicated a victory for citizen groups in a broader sense:

> We do not question that this type of harm may amount to an "injury in fact" sufficient to lay the basis for standing under § 10 of the [Administrative Procedure Act]. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.

Id. at 734-35.

[52] *Id.* at 736.

[53] 422 U.S. 490 (1975).

[54] *Id.* at 493.

[55] *Id.* at 499. The plaintiffs in *Warth* did not allege that they were among the individuals that the zoning regulations prevented from living in the town. *Id.*

[56] *Id.* at 511. The standard for organizational standing which the Court set out in *Warth* states:

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. The possibility of such representational standing, how-

The Supreme Court revisited the issue of organizational standing the next year in *Hunt v. Washington Apple Advertising Commission*,[57] where a commission representing Washington State apple growers sought injunctive relief against a North Carolina statute alleging that it posed an unconstitutional restraint on interstate commerce.[58] By prohibiting any apple container shipped into the state from bearing a "grade other than the applicable U.S. grade or standard," the statute effectively prevented Washington apples from being sold in North Carolina since the apples would bear notice of compliance with Washington's own quality standards.[59] The Court held that the commission had standing to seek injunctive relief, while at the same time adding to the organizational standing test the requirement that the group seek to protect interests "germane" to its purpose.[60] The Court found that the commission clearly satisfied this additional requirement.[61]

Since *Hunt*, the Court's analysis of standing in citizen suits has focused on

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ever, does not eliminate or attenuate the constitutional requirement of a case or controversy. The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Id. (internal citations omitted).

[57] 432 U.S. 333 (1977).

[58] *Id.* at 335.

[59] *Id.*

[60] *Id.* at 343-44. Summarizing the organizational standing test in light of this new facet, the Court stated that:

an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 343.

[61] *Id.*

the particular Article III standing requirements for the organization's individual members, rather than the organizational standing requirements set out in *Hunt*.[62] The Court's ability to limit the availability of standing for citizen groups based on the general Article III standing requirements was demonstrated in *Lujan v. National Wildlife Federation*.[63] *National Wildlife Federation* involved an environmental group who alleged that a Bureau of Land Management program, concerning millions of acres, illegally opened up public lands to mining.[64] In an opinion written by Justice Scalia, the Court found that the plaintiff did not adequately allege injury-in-fact.[65] The Court held that averments that the organization's members used unspecified portions of the immense tract of land were insufficient to establish an injury-in-fact as required for Article III standing.[66]

Two years later, in an opinion again written by Justice Scalia, the Court took an even greater step in limiting the availability of Article III standing to citizen groups in *Lujan v. Defenders of Wildlife*.[67] At issue in *Defenders of Wildlife* was the Secretary of the Interior's promulgation of a new interpretation of the Endangered Species Act ("ESA") that required federal agencies to consult with the Secretary only for actions occurring in the United States or at sea.[68] The plaintiff, along with other wildlife conservation organizations, sought declaratory judgment and injunctive relief to restore the prior interpretation.[69] The relevant regulation had previously extended to federal actions taking place in foreign countries, as well as in the United States or on the high seas.[70] In support of

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[62] *See, e.g.*, Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 180-81 (2000) (while Justice Ginsburg recites the organization standing requirements of *Hunt*, both Laidlaw's attack on FOE's standing and the Court's analysis are clearly focused on the standing of the individual members).

[63] 497 U.S. 871 (1990).

[64] *Id.* at 875. The citizen group argued that the programs violated numerous federal land and environmental statutes by reclassifying the status of approximately 180 million acres of public land. *Id.* at 879. The organization also challenged the programs as being arbitrary and capricous under the Administrative Procedure Act. *Id.*

[65] *Id.* at 889.

[66] *Id.*

[67] 504 U.S. 555 (1992).

[68] *Id.* at 559.

[69] *Id.*

[70] *Id.* at 558.

their position, the plaintiff citizen group provided testimony of its members who alleged that the Secretary's new interpretation of the ESA would allow for increasing rates of extinction among endangered species and adversely affect the plaintiffs' ability to observe the species.[71] The Court held that the plaintiff failed to establish the injury-in-fact and redressability requirements of Article III standing.[72] Most important was the Court's treatment of the redressability requirement, stating that even if plaintiffs were successful in invalidating the new promulgation, it likely would not prevent harm to their theoretical interest in the endangered species.[73] Justice Scalia also asserted the theory that citizen suit standing should be limited to where the plaintiff constitutes "the object of the regulation."[74]

The direct predecessor of *Friends of the Earth v. Laidlaw* in the Court's line

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[71] Id. at 562-63. The plaintiffs made specific reference to past visitations to places that could be adversely affected by the new interpretation, such as Sri Lanka. Id. at 563-64.

[72] *Id.* at 562. In a line of reasoning the Justice would revisit in his dissent in *Friends of the Earth v. Laidlaw Environmental Services*, Justice Scalia posited that:

> [v]indicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."

Lujan, 504 U.S.at 576-77 (quoting U.S. CONST. art. II, § 3).

Justice Scalia noted that the plaintiffs lacked any concrete plan to visit the areas affected by the new regulation. *Id.* at 564. The Court concluded that plaintiffs' "some day" intentions of visiting these areas did not support a finding of actual or imminent injury as required by Article III. *Id.*

[73] *Defenders of Wildlife*, 504 U.S. at 568 (arguing that the new interpretation would not bind the agencies who actually funded the foreign projects in question).

[74] *Id.* at 561.

of standing cases is *Steel Co. v. Citizens For a Better Environment.*[75] In *Steel Co.*, a conservation group brought a citizen enforcement suit against a manufacturing company under the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11001.[76] Among other forms of relief, the plaintiffs sought the imposition of civil penalties for past violations of the Act.[77] In an opinion authored by Justice Scalia, the Court held that the citizen group did not have standing to bring a suit for purely past violations.[78] *Steel Co.* presented a burdensome obstacle to citizen suits by precluding actions under the Act for violations corrected before a suit was filed.[79]

In light of the Court's recent decision in *Steel Company*, the possibility of further limitations on citizen group standing seemed likely in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.* Citizen suit provisions gained new life, however, as Justice Ginsburg was able to command a 7 to 2 majority in holding that the conservation group had standing to seek civil penalties for Clean Water Act violations ceasing after the suit was filed.[80]

IV. OPINION: FRIENDS OF THE EARTH V. LAIDLAW

A. THE MAJORITY OPINION

Justice Ginsburg, writing for the Court, began by recognizing that two separate inquiries were necessary to address the standing and mootness issues.[81] The

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[75] Steel Co. v. Citizens For a Better Env't., 523 U.S. 83 (1998).

[76] *Id.* at 86. The Emergency Planning and Community Right-to-Know Act requires manufacturers to file reports with the government concerning the manufacturer's storage and emission of toxic and hazardous chemicals. 42 U.S.C. §§ 11022, 11023 (1995). The citizen group alleged that the defendant had failed to file these reports in a timely manner in the past. *Steel Co.*, 523 U.S. at 87-88.

[77] *Steel Co.*, 523 U.S. at 87.

[78] *Id.* at 109 ("Because respondent alleges only past infractions of [the Act], and not a continuing violation or the likelihood of a future violation, injunctive relief will not redress its injury.").

[79] *See id.*

[80] Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000).

[81] *Id.* at 173-74. Joining in the majority were Chief Justice Rehnquist, and Justices Stevens, O'Connor, Souter, Breyer, and Kennedy.

majority first discussed the question of whether FOE had Article III standing at the outset of the litigation.[82] In analyzing the issue of standing, the Court set out the Article III standing requirements announced in *Lujan v. Defenders of Wildlife*.[83] The majority next addressed Laidlaw's contention that FOE lacked standing because it had failed to show that any of its members had sustained or faced an imminent threat of "injury-in-fact" as a result of Laidlaw's alleged permit violations.[84] Justice Ginsburg noted how Laidlaw's contention rested primarily on the district court's finding that there had been "no demonstrated proof of harm to the environment" as a result of Laidlaw's mercury discharge violations.[85] The Justice explained, though, that for the purposes of Article III standing the relevant showing is injury to the plaintiff, not injury to the environment.[86] The majority stated that to require a showing of injury to the environment for purposes of standing would be to set a higher standard than is even necessary for success on the merits.[87]

Justice Ginsburg agreed with the district court's finding that FOE had presented adequate evidence of injury-in-fact.[88] In particular, the Justice identified

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[82] *Id.* at 174.

[83] *Id.* at 180-81 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)), *see supra* text accompanying note 10. The three basic requirements for Article III standing are: injury-in-fact, causation, and redressibility. *Friends of the Earth*, 528 U.S. at 180-81.

[84] *Friends of the Earth*, 528 U.S. at 181; *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 253 (1988). Fletcher argues that:

> When Congress passes a statute conferring a legal right on a plaintiff to enforce a statutorily created duty, the Court should not require that the plaintiff show "injury in fact" over and above the violation of the statutorily conferred right. The Court has often stated that the power of Congress to grant standing is limited by the Article III requirement that a plaintiff suffer "injury in fact." But when the Court has decided actual cases involving statutory rights, it has never required any showing of injury beyond that set out in the statute itself.

Id.

[85] *Friends of the Earth*, 528 U.S. at 181 (citing Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 956 F. Supp. 588, 602 (D.S.C. 1997)).

[86] *Id.* at 181.

[87] *Id.*

[88] *Id.*

testimony by members of FOE which the Court found sufficient to establish injury in fact.[89] Justice Ginsburg noted how it is well-established law that plaintiffs in an environmental action must aver sufficient injury-in-fact when they allege that they use the affected area and that its aesthetic and recreational value for them would be lessened by the challenged activity.[90]

The Court next explained how its current rationale was in full accordance with the principles announced a decade earlier in *Lujan v. National Wildlife Federation*.[91] Justice Ginsburg recognized that while the injuries alleged in the earlier case may have qualified as mere general averments, the injuries alleged by FOE members were much more substantial.[92] The Justice found that the concern members expressed over the effects of Laidlaw's discharges clearly had a direct impact on the individuals' recreational, aesthetic, and economic interests and were dissimilar from the conclusory allegations the Court rejected in *National Wildlife Federation*.[93]

Justice Ginsburg quickly dismissed the relevance of *Los Angeles v. Lyons*,[94] a case relied on by Justice Scalia in his dissent.[95] Justice Ginsburg recognized, as

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[89] *Id.* at 181-82. One member of FOE who lived a half-mile from the Roebuck facility stated that he was discouraged from fishing, camping, swimming, and picnicking in and near the river due to concerns over Laidlaw's discharges. *Id.* A number of additional FOE members expressed similar fears. *See id.* Other members expressed concerns about purchasing homes near the river and about the effect of the pollution on property values. *Id.* at 182.

[90] *Id.* at 183 (citing Sierra Club v. Morton, 405 U.S. 727, 735 (1972)).

[91] *Friends of the Earth*, 528 U.S. at 184 (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889 (1990)).

[92] *Id.*

[93] *Id.* (citing *Nat'l Wildlife Fed'n*, 497 U.S. at 888).

[94] 461 U.S. 95 (1983)

[95] *Friends of the Earth*, 528 U.S. at 184. In *Los Angeles v. Lyons*, the plaintiff had in the past been injured by a chokehold administered by a Los Angeles police officer who had stopped the plaintiff for a traffic violation. 461 U.S. at 95. The plaintiff later sought injunctive relief, preventing the city's police officers from using chokeholds on suspects who do not threaten death or bodily injury. *Id.* The Court held that the plaintiff lacked Article III standing to seek injunctive relief, declaring that neither the existence of a past injury nor the speculative threat of future injury was sufficient to establish a case or controversy. *Id.* at 107. The Court explained that:

> As we have said, however, it is no more than conjecture to suggest that in every instance of a traffic stop, arrest, or other encounter between the police and a citizen, the

later focused on by Justice Scalia, that *Lyons* stands for the principle that "subjective apprehension" of a recurrence of unlawful conduct is inadequate to support a finding of standing.[96] The Court found that in contrast to the unrealistic apprehension of harm that was present in *Lyons*, the plaintiffs in the present case were reasonable in their belief that Laidlaw's continuous illegal discharges into the North Tyger River would subject them to recreational, aesthetic, and economic harm.[97] Justice Ginsburg concluded that FOE members' apprehensions were justified, and thus sufficient to establish injury-in-fact.[98]

Satisfied that FOE had suffered an injury-in-fact, Justice Ginsburg next turned to the Article III standing requirement of redressability.[99] The Justice noted that Laidlaw's argument concerning redressability centered on the idea that since civil penalties are paid to the government, they offer no redress to private plaintiffs and that FOE would therefore not have standing to seek them.[100] The Court expressed that while it is necessary for a plaintiff to demonstrate standing separately for each form of relief sought, Laidlaw was misguided in its belief that a citizen plaintiff could never have standing to seek civil penalties.[101]

Justice Ginsburg observed that the Court has previously recognized that "all civil penalties have some deterrent effect."[102] Turning to the legislative history

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police will act unconstitutionally and inflict injury without provocation or legal excuse. And it is surely no more than speculation to assert either that Lyons himself will again be involved in one of those unfortunate instances, or that he will be arrested in the future and provoke the use of a chokehold by resisting arrest, attempting to escape, or threatening deadly force or serious bodily injury.

Id. at 108. Justice Ginsburg, in *Friends of the Earth*, was unconvinced that the "conjecture" surrounding the threat of injury in *Lyons* existed in the present case. *Friends of the Earth*, 528 U.S. at 184.

[96] *Friends of the Earth*, 528 U.S. at 184 (citing *Lyons*, 461 U.S. at 108 n.8).

[97] *Id.*

[98] *Id.* at 184-85.

[99] *Id.* at 185.

[100] *Id.* Much in the same line of reasoning, Laidlaw also maintained that FOE's failure to appeal the denial of injunctive relief by the District Court made their civil penalty claim moot. *Id* at 192. Justice Ginsburg summarily rejected this argument, stating that the "denial of injunctive relief does not necessarily mean that the district court had concluded there is no prospect of future violations for civil penalties to deter." *Id.* at 193.

[101] *Id.*

[102] *Friends of the Earth*, 528 U.S. at 185 (citing Hudson v. United States, 522 U.S. 93,

of the Clean Water Act, the Justice noted that the deterrence of future violations was one of the purposes behind the imposition of civil penalties.[103] Expanding on this concept of deterrence, the Court determined that any sanction which is aimed at preventing the recurrence of an activity that is harmful to a private plaintiff clearly offers that plaintiff a form of redress.[104] Justice Ginsburg acknowledged that there likely existed a point at which the deterrent effect offered by civil penalties would be insufficient to satisfy the redressability requirement of Article III standing.[105] The Justice did not believe, though, that the facts of the present case necessitated delineating an outer boundary to the principle that redressability may be established by the deterrent effect of civil penalties.[106]

Justice Ginsburg next dismissed Laidlaw's contention that the Court's decision in *Steel Co. v. Citizens for a Better Environment* required the conclusion that FOE did not have standing to seek civil penalties.[107] The Justice elucidated that the Court in *Steel Co.* made specific recognition of the fact that the plaintiff did not allege any continuing or imminent violation.[108] In contrast, Justice Ginsburg noted that the specific objective of the penalty assessed to Laidlaw by the district court was to abate current violations and prevent future ones.[109] The Justice determined that the holding of *Steel Co.* should be limited to the concept that private plaintiffs may not sue to assess penalties for wholly past violations, and should not be read to extend to the issue of standing to seek penalties on the basis of violations that are either ongoing at the time of the complaint or that could continue in the future if undeterred.[110] The Court therefore concluded that the holding of *Steel Co.* did not preclude a finding that FOE had standing.[111]

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102 (1997)).

[103] *Id.*

[104] *Id.* at 185-86.

[105] *Id.* at 186.

[106] *Id.* at 187.

[107] *Id.*

[108] Friends of the Earth, 528 U.S. at 187.

[109] *Id.* at 188.

[110] *Id.*

[111] *Id.*

Having determined that FOE had satisfied the Article III standing requirements, the Court turned to the question of mootness.[112] Justice Ginsburg hypothesized that Laidlaw's voluntary cessation of the challenged practices was the only imaginable basis for concluding that FOE's claim was moot.[113] The Justice observed that despite such voluntary cessation, it was still within the power of the courts to review the alleged violations.[114] Justice Ginsburg asserted that in order to protect against the danger that defendants would be able to avoid judicial review and subsequently return to the challenged practices, the standard for mootness through the defendant's voluntary conduct is extremely stringent.[115] The Court relied on the previously announced standard that "a case might become moot if subsequent events make it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur."[116]

Addressing the Fourth Circuit's mootness determination, Justice Ginsburg found that the court of appeals had confused the doctrine of mootness with standing.[117] The Justice explained that the oft-quoted description of mootness as "standing set in a time frame" was not entirely correct and was likely responsible for the confusion between the doctrines of mootness and standing.[118] Recognizing the difficulties in distinguishing the two doctrines, the Court went on to attempt to illustrate the differences between mootness and standing.[119] The Justice

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[112] *Id.* at 189.

[113] *Id.* The relevant "voluntary conduct" in the present case refers to Laidlaw's substantial compliance with its NPDES permit by August 1992 and its eventual shutdown of the Roebuck facility. *Id.*

[114] *Friends of the Earth*, 528 U.S. at 189 (citing City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982)). *City of Mesquite* stands for the principle that by allowing defendants to avoid liability through voluntary cessation of an illegal activity, they will be "free to return to their old ways." 455 U.S. at 289.

[115] *Friends of the Earth*, 528 U.S. at 189.

[116] *Id.* (citing United States v. Concentrated Phosphate Export Ass'n, Inc., 393 U.S. 199, 203 (1968) (emphasis added)). The burden of showing that a case has become moot because of the defendant's voluntary conduct is placed on the party asserting mootness. *Id.*

[117] *Id.*

[118] *Id.* at 189-90 (citing Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997) (quoting United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980) (quoting Henry P. Monoghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973))).

[119] *Id.* at 190.

indicated that one of the major differences between mootness and standing is the assignment of the burden of persuasion.[120] Justice Ginsburg explained that while it will be the burden of the plaintiff to initially show standing, a heavy burden is placed on a defendant who claims a case is mooted by voluntary conduct.[121] The Justice summarized that "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness."[122]

The Court took notice of another distinction between the doctrines of standing and mootness, the "capable of repetition, yet evading review" exception to mootness.[123] Justice Ginsburg articulated that while an exception to mootness exists in situations where an allegedly unlawful activity is "capable of repetition, yet evading review," no such exception exists to the standing requirements.[124] The Justice expressed further doubts on the accuracy of referring to mootness as "standing set in time" based on this distinction between the doctrines of mootness and standing.[125]

A third important distinction the Court made between the two doctrines is their basic function.[126] Justice Ginsburg explained that the main function of the standing requirement is to ensure that scarce judicial resources are reserved for actual disputes in which each party has a concrete stake in the adjudication of the

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[120] *Id.*

[121] *Friends of the Earth*, 528 U.S. at 190. Justice Ginsburg clarified that

> a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur. By contrast, in a lawsuit brought to force compliance, it is the plaintiff's burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the "threatened injury [is] certainly impending."

Id. (quoting Whitmore v. Arkansas, 495 U.S. 149 (1990)) (internal citations omitted).

[122] *Id.*

[123] *Id.*

[124] *Id.* at 191(citing *Steel Co.*, 523 U.S. at 109 (quoting Renne v. Geary, 501 U.S. 312, 320 (1991))).

[125] *Id.*

[126] *Id.*

case.[127] In contrast, the Justice maintained that the issue of mootness only arises when it is clear that the parties lack a continuing interest in the adjudication.[128] Justice Ginsburg noted that dismissal of a case on the grounds of mootness is often more wasteful than efficient since the case has in many instances already been litigated for years.[129]

The Court concluded its discussion on the issue of mootness by acknowledging that FOE's claim could still be mooted by Laidlaw's achievement of substantial compliance with the permit requirements and the eventual closure of the Roebuck facility.[130] Justice Ginsburg emphasized that such a finding would only be appropriate if it was "absolutely clear that Laidlaw's permit violations could not reasonably be expected to recur."[131] The Court thus remanded the case for consideration of the mootness issue on these narrow grounds.[132]

B. THE CONCURRENCES

Justice Stevens wrote a concurring opinion, focusing on the issue of mootness.[133] According to Justice Stevens, it was not necessary to remand the case on Laidlaw's claim of mootness.[134] The Justice expressed the belief that even if it were absolutely clear that no threat of future permit violation was present, the case was not moot.[135] Justice Stevens first argued that the district court's monetary judgment against Laidlaw could not be invalidated by entirely post-

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[127] *Friends of the Earth*, 528 U.S. at 191-92.

[128] *Id.*

[129] *Id.*

[130] *Id.* at 193.

[131] *Id.*

[132] *See id.* at 193-94. The Court found it necessary to remand on the issue of mootness since facts concerning the prospect of future violations in light of the facility's closure and Laidlaw's compliance were not addressed by the lower courts. *Id.* The majority expressed serious reservations as to whether a finding of mootness under the given circumstances would be appropriate. *Id.* at 194 n.6 (citing United States Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994)).

[133] *Friends of the Earth*, 528 U.S. at 195-96 (Stevens, J., concurring).

[134] *Id.*

[135] *Id.* at 196 (Stevens, J., concurring).

judgment activities such as closing the Roebuck facility and ceasing discharges into the Tyger River.[136] The Justice further postulated that a claim for civil penalties would not be moot even if before the district court's judgment it was absolutely clear that violations could not reasonably be expected to recur.[137] Finding support from a number of circuit courts, Justice Stevens articulated that "a polluter's voluntary post-complaint cessation of an alleged violation will not moot a citizen-suit claim for civil penalties even if it is sufficient to moot a related claim for injunctive or declaratory relief."[138] Maintaining that civil penalties are more readily equated with punitive damages than injunctive or declaratory relief, the Justice concluded that civil penalties, like punitive damages, could not be mooted by post-complaint conduct.[139]

Justice Kennedy wrote a separate concurring opinion.[140] While in full accordance with Justice Ginsburg's opinion, Justice Kennedy raised questions as to the constitutionality of the citizen-suit provision of the Clean Water Act itself.[141] The Justice expressed serious concerns over whether a statute giving private litigants the ability to exact public fines was an impermissible delegation of the executive powers enumerated in Article II of the Constitution of the United States.[142] Justice Kennedy concluded, though, that since the issue had not been addressed by the court of appeals or identified in the petition for certiorari, these

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[136] *Id.*

[137] *Id.*

[138] *Id.* (citing Comfort Lake Ass'n v. Dresel Contracting, Inc., 138 F.3d 351, 356 (8th Cir. 1998); Atl. States Legal Found. v. Stroh Die Casting Co., 116 F.3d 814, 820 (7th Cir. 1997); Natural Res. Def. Council v. Texaco Ref. and Mktg., 2 F.3d 493, 502-503 (3d Cir. 1993); Atl. States Legal Found. v. Pan Am. Tanning Corp., 993 F.2d 1017, 1020-1021 (2d Cir. 1993); Atl. States Legal Found. v. Tyson Foods, Inc., 897 F.2d 1128, 1134-1137 (11th Cir. 1990); Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 696-97 (4th Cir. 1989))

[139] *Friends of the Earth*, 528 U.S. at 197 (Stevens, J., concurring).

[140] *Id.* (Kennedy, J., concurring).

[141] *Id.*

[142] *Id.* During the same term that *Friends of the Earth* was decided, the Court had the opportunity to address a different case concerning the validity of citizen suits under Article II, section 3. *See* Vt. Agency of Natural Res. v. United States, *ex rel.* Stevens, 529 U.S. 765 (2000). The question remains open though, as *Vermont Agency of Natural Resources* was decided on other grounds, without necessitating a determination of the constitutional issue. 529 U.S. at 848 n.8.

concerns were best reserved for a future case.[143]

C. JUSTICE SCALIA'S DISSENT

Justice Scalia, joined by Justice Thomas in dissent, argued that nearly every aspect of the majority's opinion was flawed.[144] The dissent first addressed the majority's treatment of the injury-in-fact requirement for Article III standing.[145] The Justice found that FOE was unable to meet the burden of demonstrating injury-in-fact, emphasizing that FOE's complaint merely alleged "beliefs" and "concerns" over the injuries they could suffer as a result of Laidlaw's discharges.[146] The dissent argued that these averments concerning the impact on the recreational value of the Tyger River and the influence on property values allegedly caused by Laidlaw's permit violations were wholly insufficient to establish a "concrete and particularized" injury.[147]

Justice Scalia was particularly troubled by the majority's conclusion that the FOE's members had suffered an injury despite the district court's finding of fact that "there had been no demonstrated proof of harm to the environment."[148] The Justice articulated that while the majority was correct in holding that injury to the plaintiff and not the environment was the relevant inquiry, the dissent urged that a lack of injury to the plaintiff is almost a necessary conclusion when there is a lack of injury to the environment.[149] Justice Scalia found that FOE's "bald

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[143] *Friends of the Earth*, 528 U.S. at 197 (Kennedy, J., concurring).

[144] *Id.* at 198 (Scalia, J., dissenting). Justice Scalia's crusade for a narrow construction of standing, especially in regards to citizen groups, is well established. See Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 SUFFOLK L. REV. 881 (1983) (written while Justice Scalia was a judge on the Court of Appeals for the District of Columbia). Justice Scalia's opinion in Friends of the Earth reflects the Justice's adamant beliefs concerning the construction of Article III standing. *See id.* After a brief review of the majority's "watered-down requirements" for standing, Justice Scalia simply stated, "I dissent from all of this." *Friends of the Earth*, 528 U.S. at 198 (Scalia, J., dissenting).

[145] *Friends of the Earth*, 528 U.S. at 198 (Scalia, J., dissenting) .

[146] *Id.*

[147] *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

[148] *Id.* at 199 (Scalia, J., dissenting) (quoting Friends of the Earth v. Laidlaw Envtl. Services (TOC), Inc., 956 F. Supp. 588, 622 (D.S.C. 1997)).

[149] *Id.* While Justice Scalia left open the possibility that injury to a plaintiff could be established even in the absence of injury to the environment, the Justice made it clear that such a situation was doubtful and that it would be the plaintiff's burden to make such a showing. *Id.*

assertions regarding decreasing recreational usage and declining home values" could not establish an injury-in-fact, especially in consideration of the district court's finding of no injury to the environment.[150]

The Justice was also extremely troubled by the way in which the majority was able to find injury-in-fact in a "most casual fashion" when viewed in light of the limited consideration given to the question of injury-in-fact in the courts below.[151] Justice Scalia explained that while the district court concluded that FOE had standing in 1993 when the suit was initiated, this determination did not take into account the district court's 1997 finding that Laidlaw's discharges did not harm the environment.[152] In addition, the Justice noted that the circuit court did not even reach the question of injury-in-fact since it resolved the case on the issue of mootness.[153] Justice Scalia found the majority's reliance on FOE's allegations entirely unwarranted when coupled with the limited analysis given to the issue of standing below.[154] The dissent concluded that the majority had made "the injury-in-fact requirement a sham."[155]

Justice Scalia next turned to the issue of redressability, where he found the majority's reasoning to be equally as flawed as with the injury-in-fact requirement.[156] The Justice argued that the basis upon which the majority attempted to distinguish the present case from *Steel Co.* was insufficient and in effect would

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[150] *Id.* at 200 (Scalia, J., dissenting). Further, Justice Scalia expressed doubt as to whether the concerns expressed by the members of FOE actually affected their conduct. *Id.* One member who stated in her affidavit that she would have used the Tyger River for recreational purposes if not for Laidlaw's pollution, conceded in her deposition that she had only been to the river twice, once in 1980 and once after filing the suit. *Id.* Another member who claimed Laidlaw's discharges deterred him from using the river for recreational purposes testified that he had not been to the river since he was young and that the pollution was not the reason he stopped visiting the Tyger River. *Id.*

[151] *Friends of the Earth*, 528 U.S. at 201 (Scalia, J., dissenting).

[152] *Id.*

[153] *See id.*

[154] *Id.*

[155] *Id.* at 202. Justice Scalia made his vigorous opposition to the majority's injury-in-fact analysis quite clear throughout his dissenting opinion. Later in the opinion, the Justice referred to the majority's threshold showing of injury-in-fact as "a lever that will move the world." *Id.* at 205 (Scalia, J., dissenting).

[156] *Id.*

reverse the prior decision.[157]

The dissent first attacked the Court's analysis of the redressability requirement on the grounds that a plaintiff's ability to benefit from the deterrent effect of a public penalty based on past conduct was speculative as a matter of law.[158] Justice Scalia posited that just as a general grievance affecting citizens as a whole cannot satisfy the injury-in-fact requirement, a generalized remedy that deters all harmful activity against all persons cannot satisfy the redressability requirement.[159] Relying on *Linda R.S. v. Richard D.*,[160] Justice Scalia argued that the remedy FOE sought would not provide relief particularized to their own alleged injury.[161] The Justice did not believe that a logical nexus could be established between an individual's alleged injury and the violation of a permit requirement since the prospect of any benefit to the plaintiff from the relief was too speculative.[162] The dissent concluded that FOE's claim under section 505 of the Clean Water Act failed the redressability requirement as a matter of law, stating that "Congress has done precisely what we have said it cannot do: convert an 'undifferentiated public interest' into an 'individual right' vindicable in the courts."[163]

Accepting for the sake of argument that the redressability of FOE's alleged injury was not speculative as a matter of law, Justice Scalia next argued that it

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[157] *Friends of the Earth*, 528 U.S. at 202 (Scalia, J., dissenting).

[158] *Id.*

[159] *Id.* at 204 (Scalia, J., dissenting) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992)).

[160] 410 U.S. 614 (1973)

[161] *Friends of the Earth*, 528 U.S. at 203. *Linda R.S.* involved a single mother seeking injunctive relief against the discriminatory application of a state law which enforced the obligation to support one's children only on married parents. 410 U.S. at 615. The plaintiff alleged an equal protection violation on the grounds that the deterrent effect of the statute would not apply to the father of the plaintiff's child. *Id.* The Court held that the plaintiff did not have Article III standing on the grounds that no direct relationship could be established between the alleged injury and the potential remedy. *Id.* at 618-19.

[162] *Friends of the Earth*, 528 U.S. at 204 (Scalia, J., dissenting). As noted by Justice Scalia, the Court later abandoned the "logical nexus" analysis applied in *Linda R.S. Id.* at 203 (Scalia, J., dissenting) (citing Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978)).

[163] *Id.* at 204-05 (Scalia, J., dissenting) (citing Lujan v. Defenders of Wildlife, 504 U.S. at 577 (1992); Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 106 (1998)).

was at least speculative as a matter of fact.[164] The Justice found little basis for the majority's conclusion that FOE had satisfied the "likely rather than speculative" standard for redressability based on the deterrent effect of the civil penalties.[165] The dissent first pointed out that the Clean Water Act does not even mention deterrence as one of the elements to be considered by courts in fixing the amount of a penalty.[166]

Justice Scalia also argued that the language of the district court's final opinion did not indicate that the trial court "displayed *any awareness* that deterrence of *future injury to the plaintiffs* was necessary to support standing."[167] The Justice found the majority without basis in concluding that the redressability requirement was satisfied when the deterrent effect of penalties under section 505 was not considered in general by Congress, or in this specific case by the District Court.[168]

While the dissent agreed with the majority that all penalties have some level of deterrent effect, Justice Scalia argued that a distinction needed to be made between deterrence from the availability of civil penalties and the deterrent effect of a single imposition of civil penalties.[169] The Justice maintained that it was the availability of civil penalties alone that created sufficient deterrence for purposes of the redressability requirement.[170] While Justice Scalia acknowledged that

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[164] *Id.* at 205 (Scalia, J., dissenting).

[165] *Id.*

[166] *Id.* at 206 (Scalia, J., dissenting).

[167] *Id.* (emphasis in original).

[168] *Friends of the Earth*, 528 U.S. at 206 (Scalia, J., dissenting).

[169] *Id.* at 207 (Scalia, J., dissenting).

[170] *Id.* Justice Scalia reasoned that:

> [s]trictly speaking, no polluter is deterred by a penalty for past pollution; he is deterred by the *fear* of a penalty for *future* pollution. That fear will be virtually nonexistent if the prospective polluter knows that all emissions violators are given a free pass; it will be substantial under an emissions program such as the federal scheme here, which is regularly and notoriously enforced; it will be even higher when a prospective polluter subject to such a regularly enforced program has, as here, been the object of public charges of pollution and a suit for injunction; and it will surely be near the top of the graph when, as here, the prospective polluter has already been subjected to *state* penalties for the past pollution.

Id. at 207-08 (Scalia, J., dissenting).

Laidlaw's fear of future penalties might be marginally increased by the imposition of penalties for past conduct, the Justice still found it speculative as to whether this deterrent effect would protect FOE members from future harm.[171] Justice Scalia concluded the analysis of the redressability requirement by expressing doubt as to the wisdom behind what he believed to be a vast expansion of Article III standing.[172]

The final issue the dissent addressed was the Court's treatment of the mootness doctrine.[173] While Justice Scalia was not in discord with the majority's conclusion, assuming the plaintiff had standing, the Justice was troubled by the Court's analysis concerning the distinctions between the doctrines of mootness and standing.[174] Based on the applicability of the "voluntary cessation" doctrine to the case, Justice Scalia argued that discussion of the differences between mootness and standing was unnecessary.[175] Despite finding the Court's analysis

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[171] *Id.* at 208 (Scalia, J., dissenting).

[172] *Id.* at 208-09 (Scalia, J., dissenting). Reiterating his vigorous opposition to the majority's treatment of the redressability requirement, Justice Scalia summarized that:

> if this case is, as the Court suggests, within the central core of "deterrence" standing, it is impossible to imagine what the "outer limits" could possibly be. The Court's expressed reluctance to define those "outer limits" serves only to disguise the fact that it has promulgated a revolutionary new doctrine of standing that will permit the entire body of public civil penalties to be handed over to enforcement by private interests.

Id.

Before turning to the issue of mootness, Justice Scalia acknowledged the relevance of the Article II concerns raised by Justice Kennedy in concurrence, agreeing that the issue should not be addressed by the Court since it had not been argued. *Id.* at 209 (Scalia, J., dissenting). Justice Scalia went on to express concern over the extent of power national associations such as FOE would be able to assert as Clean Water Act plaintiffs. *Id.* The Justice characterized plaintiffs under the Clean Water Act as "mini-EPA[s]," able to choose their targets without the benefit of public control. *Id.* The dissent noted how citizen group plaintiffs might use the threat of such suits as bargaining power to achieve settlements under which the defendant must support environmental projects designated by the plaintiff. *Id.* at 209-10 (Scalia, J., dissenting) (citing Michael S. Greve, "*The Private Enforcement of Environmental Law*," 65 TULANE L. REV. 339, 355-59 (1990)). For discussion on the perceived abuse of citizen suit provisions in the context of the Clean Air Act, see Krent & Shenkman, *supra* note 2, at 1814.

[173] *Friends of the Earth*, 528 U.S. at 210 (Scalia, J., dissenting).

[174] *Id.* at 211 (Scalia, J., dissenting).

[175] *Id.* at 210-11 (Scalia, J., dissenting). In resolving *Steel Co. v. Citizens For a Better Environment.* on the issue of Article III standing, Justice Scalia himself was accused of engag-

of the doctrines irrelevant, Justice Scalia identified what the Justice perceived as flaws in the majority's discussion.[176]

The dissent asserted that it was unnecessary for the Court to abandon the characterization of mootness as "standing set in a time frame."[177] While acknowledging that the doctrine of mootness has some elements that standing lacks, Justice Scalia argued that these differences did not diminish the standing requirements during the course of a suit.[178] The dissent further posited that the "voluntary cessation" doctrine, used by the majority to distinguish mootness from standing, was merely an evidentiary presumption that the controversy at the core of a suit continued to exist.[179]

Similarly, the dissent did not find that the "capable of repetition, yet escaping review" principle illustrated that the requirements for mootness were different than those for standing.[180] While recognizing that evidentiary presumptions applicable only to mootness prevented an absolute parallel between the doctrines of mootness and standing, Justice Scalia posited that both doctrines were supported by the same underlying principle, the assurance that the personal interest required at the outset of a suit would continue to its conclusion.[181]

V. CONCLUSION

Friends of the Earth has obviously been accepted with great relief by organizations who rely on citizen suit provisions to protect what they perceive as the

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ing in unnecessary analysis in order to reach a particular conclusion by Justices Stevens, Souter, and Ginsburg, who concurred only in the judgment. 523 U.S. 83, 133 (1998) (Stevens, J., concurring) ("Our settled policy of adopting acceptable constructions of statutory provisions in order to avoid the unnecessary adjudication of constitutional questions – here, the unresolved standing question – strongly supports a construction of the statute that does not authorize suits for wholly past violations.").

[176] *Friends of the Earth*, 528 U.S. at 212 (Scalia, J., dissenting).

[177] *Id.* 214-15 (Scalia, J., dissenting) (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997) (quoting United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980))).

[178] *Id.* at 213 (Scalia, J., dissenting).

[179] *Id.*

[180] *Id.* at 213-14.

[181] *Id.* at 214-15 (Scalia, J., dissenting) (citing *Arizonans for Official English*, 520 U.S. at 68 n.22 (quoting *Geraghty*, 445 U.S. at 397)).

public interest. The Court was presented with the opportunity to once again narrow the scope of citizen group standing under Article III but declined to do so. While it appears that the pendulum may be swinging back towards a broader availability of standing for organizations, this result is far from certain.

The decisive 7 to 2 majority Justice Ginsburg was able to gather is impressive, in light of the close splits that have plagued the Court's prior Article III decisions.[182] This would seem to argue in favor of stability in the latest interpretation of the standing doctrine. If the prior standing cases teach any lesson though, it is that the finest distinctions may make all the difference.[183] While citizen suit provisions may provide a valuable tool in the enforcement of environmental regulations, plaintiffs using them must still fall within the constraints of Article III. In order to save the utility of citizen suit provisions, the Court in *Friends of the Earth v. Laidlaw* appears to have loosened the injury-in-fact and redressability requirements considerably. Considering the Court's willingness to alter its construction of the standing requirement in the past, the Court is likely to again swing towards a more narrow interpretation.

Such a change may not be far off. It is unclear what impact may result from the anticipated changes in the membership of the Court expected to occur over the next few years.[184] In addition, Justice Scalia clearly does not appear ready to concede his stance against a broad interpretation of standing.[185] The Article II concerns expressed in Justice Kennedy's concurrence may very well be the next battleground for citizen group standing.[186] What is clear at the very least today

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[182] Past decisions reflect a deeply divided Court on the issue of standing. *See* Steel Co. v. Citizens For a Better Env't, 523 U.S. 83 (1998) (5-4 decision; three Justices concurring only in judgment); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (7-2 decision; three Justices concurring only in judgment); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990) (5-4 decision); Sierra Club v. Morton, 405 U.S. 727 (1972) (4-3 decision; two Justices not taking part in the decision).

[183] *See supra* text accompanying notes 107-11.

[184] *See generally* David G. Savage, *More Than Just The Oval Office At Stake* (Oct. 2, 2000), *at* http://www.cnn.com/2000/ALLPOLITICS/stories/10/02/latimes.scotus/index.html.

[185] *See supra* note 144.

[186] Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. at167, 197 (2000) (Kennedy, J., concurring). One commentator sees Justices Kennedy and Scalia's interest in the Article II concerns surrounding citizen suit provisions as a "virtual invitation for defendants to challenge environmental citizen suit provisions on Article II-based separation of powers grounds." Robin Kundis Craig, *Will Separation Of Powers Challenges "Take Care" Of Environmental Citizen Suits? Article II, Injury-In-Fact, Private "Enforcers," And Lessons From Qui Tam Litigation*, 72 U. COL. L. REV. 93, 98 (2001).

is that citizen groups bringing actions under citizen suit provisions, such as section 505 of the Clean Water Act, do have the ability to satisfy the standing requirements of Article III.