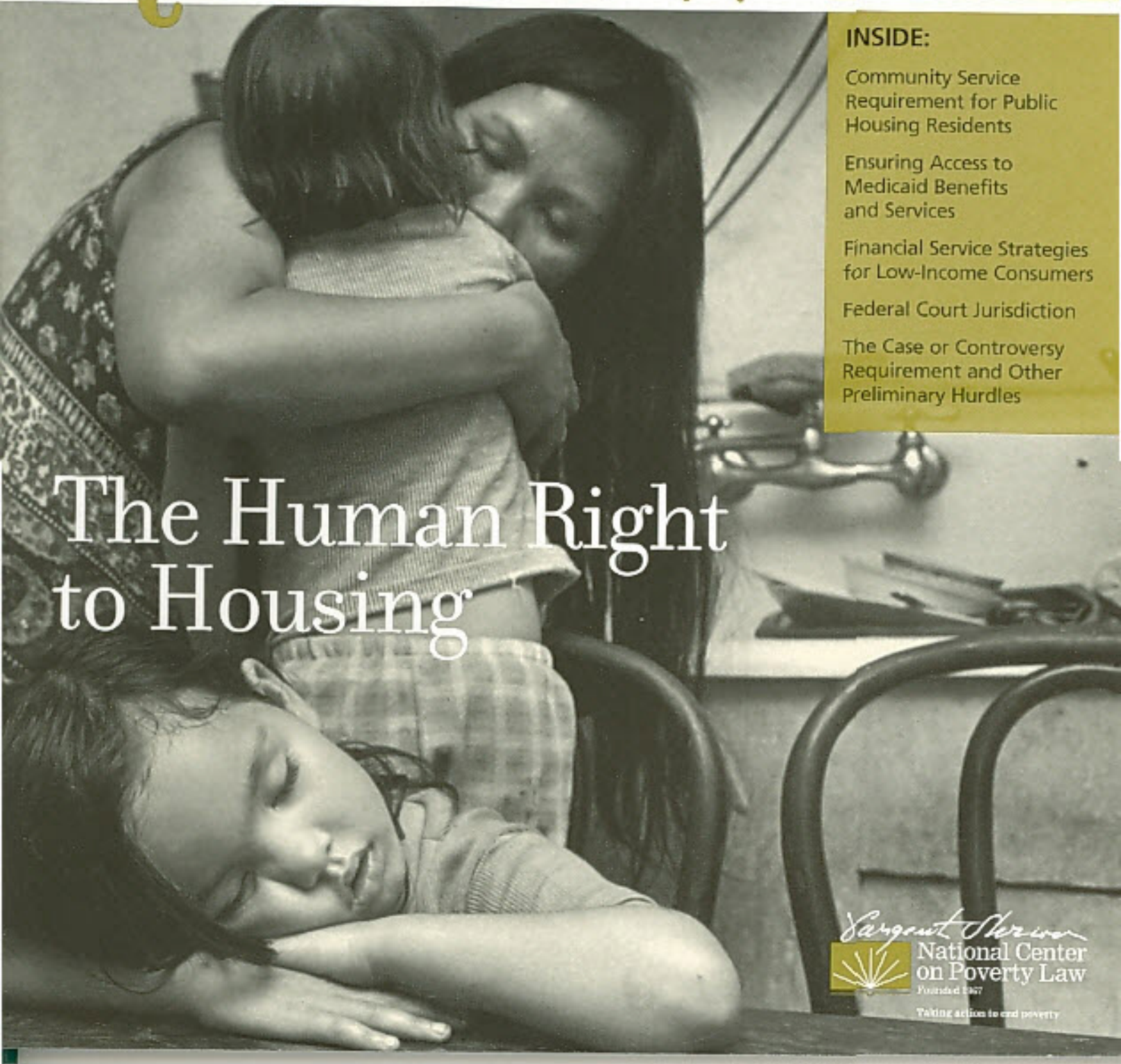
July–August 2004
Volume 38, Numbers 3–4

# Clearinghouse REVIEW

## Journal of Poverty Law and Policy



INSIDE:



# The Human Right to Housing

Sargent Shriver National Center on Poverty Law
Founded 1967
Taking action to end poverty

# The Case or Controversy Requirement and Other Preliminary Hurdles

By Jeffrey S. Gutman and Peyton Whiteley

[**Editor's note:** This article is adapted from Chapter 3 of the FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS, published in June 2004 by the Sargent Shriver National Center on Poverty Law. See the online version at www.povertylaw.org.]

In this article we discuss several constitutionally or prudentially imposed limitations on the pursuit of federal litigation. First, we survey the doctrine of standing—a topic of great importance to legal aid attorneys—and discuss constitutional and prudential doctrine and organizational and third-party standing. Second, we cover mootness, including mootness in the context of class action litigation. Questions of mootness may arise at any time in litigation; the doctrine of mootness has emerged as an important issue in the recovery of attorney fees. And, third, we examine other potentially significant barriers to the pursuit of federal litigation—the exhaustion of administrative remedies and the preclusive effects of such exhaustion if pursued.

**Jeffrey S. Gutman**
*Professor of Law and Associate Dean for Academic Affairs*

George Washington University Law School
2000 G. St. NW
Washington, DC 20052
202.994.5797
jgutman@law.gwu.edu.

**Peyton Whiteley**
*Advocacy Coordinator*

Legal Services of Northern Virginia
4080 Chain Bridge Rd.
Fairfax, VA 22030
703.246.4576
pwhiteley@lsnv.org.

## I. Standing

Legal aid attorneys need to understand the law of standing in order to minimize the chances of litigating the issue. Avoiding a standing defense requires a careful selection of plaintiffs, thoughtful choice of claims, and specific allegation of facts. Skillful pleading therefore should focus not only on the merits of the claims but also on the standing of the plaintiffs to advance them. Failure to do so may result in the dismissal of the case at worst and delay at best.

## A. Overview

The law of standing has its roots in Article III's case and controversy requirement, and the U.S. Supreme Court has established a three-part test for standing. The "irreducible constitutional minimum of standing" requires the plaintiff to establish

> First . . . an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent," not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[1]

While the standing test is easily stated, it is difficult to apply; the Supreme Court observed that '[g]eneralizations about standing to sue are largely worthless as such."[2]

The Supreme Court imposes "prudential" limitations on standing. These include limitations on the right of a litigant to raise another person's legal rights, a rule barring adjudication of generalized grievances more appropriately addressed legislatively, and the requirement that a plaintiff's complaint must fall within the zone of interests protected by the statute at issue.

The burden of establishing standing, the Supreme Court made it clear, rests on the plaintiff.[3] At each stage of the litigation—from the pleading stage, through summary judgment, and to trial—the plaintiff must carry that burden.[4] Standing is determined as of the date the complaint is filed.[5] However, standing cannot be conferred by agreement and can be challenged at any time in the litigation, including on appeal, by the defendants or, in some circumstances, by the court *sua sponte*.[6]

Here we canvass the important Supreme Court cases on standing and attempt to extract useful generalizations to employ in practice. First, we discuss the constitutional and prudential requirements of standing, with an emphasis on recent Court jurisprudence. Second, we describe the Supreme Court's most recent significant case on standing, *Friends of the Earth v. Laidlaw Environmental Services*, which marks a welcome departure from a series of restrictive standing decisions.[7]

A brief caveat is in order. Standing cases are very fact-specific. While the general discussion here may assist you in understanding the outlines of the standing inquiry, you will need to do specialized research in the area in which your case arises. As important, you must carefully interview your clients and perform other necessary factual investigation to assess precisely how your client has or will be injured by the action taken or policy adopted.

---

[1] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

[2] *Association of Data Processing Service Organization Inc. v. Camp*, 397 U.S. 150, 151 (1970).

[3] *FWIPBS Inc. v. Dallas*, 493 U.S. 215, 231 (1990).

[4] *Defenders of Wildlife*, 504 U.S. at 561.

[5] *Id.* at 570 n.5.

[6] While the Supreme Court reviews standing *sua sponte* "where [it][ has been erroneously assumed below," it does not examine standing "simply to reach an issue for which standing has been *denied* below. . . ." *Adarand Construction Inc. v. Mineta*, 534 U.S. 103, 110 (2001). By contrast, courts of appeal are obliged to examine standing under all circumstances. See, e.g., *Wyoming Outdoor Council v. U.S. Forest Service*, 165 F.3d 43, 47 (D.C. Cir. 1999).

[7] *Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000).

## B. The Constitutional and Prudential Requirements of Standing

Inherent in the constitutional limitation of judicial power on cases and controversies is the requirement of "concrete adverseness" between the parties to a lawsuit. The rise of public law litigation centering around claims of noneconomic loss having forced the Supreme Court to craft an analytical framework for determining whether the requisite adversity is present, the Court requires that plaintiffs establish that the challenged conduct caused or threatens to cause them an injury in fact to judicially cognizable interests. By establishing that they personally suffered injury, plaintiffs demonstrate that they are sufficiently associated with the controversy to be permitted to litigate it.

### 1. Injury in Fact

Economic interests are legally protected interests, the Supreme Court had no difficulty determining.[8] More difficult is determining when such economic injury that has yet to occur is sufficiently imminent and likely to confer standing. The Court has been relatively forgiving in this regard. Economic injury need not have already occurred but can result from policies that, for example, are likely to deprive the plaintiff of a competitive advantage or a bargaining chip.[9] In *Clinton v. New York*, for instance, the Court held that New York had standing to challenge the veto of legislation permitting the state to keep disputed Medicare funds.[10] The veto left the state's ability to retain the funds uncertain, subject to the outcome of a request for a waiver. Yet the Court regarded the "revival of a substantial contingent liability" sufficient to confer standing.[11]

**Noneconomic Interests.** Proving more difficult for the Supreme Court to analyze are noneconomic interests. The Court recognizes that environmental, recreational, and aesthetic injuries are legally cognizable for standing but has had difficulty in defining the circumstances in which such injuries are sufficiently concrete and imminent to confer standing. *Sierra Club v. Morton*, for example, arose from a challenge to a decision by the U.S. Department of the Interior to license the construction of a ski resort.[12] The club claimed that the license agreement was illegal and asserted standing based upon its long-standing interest in and concern for the protection of the environment and its experience in environmental litigation. The club did not plead that it or its members would suffer any adverse consequence by virtue of the license agreement. Acknowledging that loss of recreational opportunities or aesthetic enjoyment may be cognizable injuries, the Court held that the club failed to plead any cognizable injury and that it therefore lacked standing to litigate the legality of the agreement. On remand to the district court, the club amended the complaint to allege that its members would suffer such injuries and ultimately succeeded in blocking the development.[13]

*Sierra Club* is significant both for what it permits and what it prohibits. By recognizing that noneconomic injury suffices for injury in fact, *Sierra Club* loosened the requirement of injury in fact. By holding that a specialized interest in a particular issue may not give rise to injury sufficient to challenge unlawful conduct, *Sierra Club* precluded citizen suits to enforce the law. Later cases expand each rule.

---

[8] *Clinton v. New York*, 524 U.S. 417, 432 (1998).

[9] *Id.* at 432–34 (cooperative has standing to challenge veto of tax benefit enacted to foster ability to purchase processing plants); *Association of Data Processing Service Organization v. Camp*, 397 U.S. 150, 154–56 (1970) (data processing service providers have standing to challenge decision to permit banks to provide such services to other banks).

[10] *Clinton,* 524 U.S. at 432–33.

[11] *Id.* at 431.

[12] *Sierra Club v. Morton*, 405 U.S. 727 (1972).

[13] See *Sierra Club v. Morton*, 348 F. Supp. 219 (C.D. Cal. 1972).

*Sierra Club* offers useful advice to lawyers concerned about potential standing problems. Identify in the complaint as precisely as possible the injury about which you complain. When the injury is not economic, plead every effect of the injury upon the plaintiff. Do not omit a potential theory of injury. When pleading standing, forget modern notions of notice pleading; plead facts and plead them in detail. Doing so may prevent wasted time in briefing a motion to dismiss and a delayed resolution of the case.

*United States v. Students Challenging Regulatory Agency Procedures (Scrap)* represents the high watermark of environmental standing.[14] In *Scrap* the Supreme Court held that a student organization assembled for the purpose of litigation had standing to challenge the Interstate Commerce Commission approval of increased rail freight rates that would increase the cost of recycling scrap metal. The students claimed to suffer aesthetic injury when using parks and to suffer injury when breathing polluted air as a result of less recycling. Even though the injuries would generally be suffered by virtually everyone and the connection between the challenged policy and the claimed injuries was highly attenuated, the Court found standing. The Court, however, made it subsequently clear that *Scrap* lay at the very margin of standing doctrine, if not beyond.[15]

The Supreme Court recognized the role of carefully pleading injury in *Duke Power Co. v. Carolina Environmental Study Group.*[16] Organizations and individuals who lived close to a planned nuclear power plant challenged the constitutionality of federal legislation capping the potential liability of a plant operator for a nuclear disaster. Plaintiffs alleged that, absent the liability cap, the plant could not profitably be built, thereby tying the harm that would result from construction of the plant to the liability cap. Plaintiffs claimed that using the two lakes to produce steam and to cool the reactor would release small amounts of nonnatural radiation and would cause a "sharp increase" in temperature, which in turn would harm their interests in the recreational use of the lakes.[17] Relying upon *Sierra Club* and *Scrap*, the Court held that the injuries were sufficient to confer standing.

Since *Duke Power*, the Court has been less receptive to claims of environmental standing. In *Lujan v. National Wildlife Federation*, for example, plaintiff challenged the Interior Department's efforts to review and classify hundreds of parcels of public lands in a manner that might have resulted in their use for mining.[18] Based on affidavits, plaintiffs claimed injury to their recreational and aesthetic enjoyment of lands in the vicinity of public lands that had been opened to mining and oil and gas leasing. The Court rejected standing. The public lands at issue were massive tracts of land, only a small portion of which were subject to the challenged decisions. The Court held that an interest in lands that simply lay in the vicinity of areas subject to development was inadequate.

The Endangered Species Act requires federal agencies to consult with the Interior Department to make sure that any programs authorized or funded by the agency do not affect endangered species. In *Lujan v. Defenders of Wildlife* plaintiff organizations and individuals challenged an Interior Department regulation that had the effect of limiting the scope of the Act to projects undertaken only within the United States or high seas rather than abroad.[19] Plaintiff alleged

---

[14] *United States v. Students Challenging Regulatory Agency Procedures (Scrap)*, 412 U.S. 669 (1973).

[15] *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990).

[16] *Duke Power Company v. Carolina Environmental Study Group*, 438 U.S. 59 (1978).

[17] *Id.* at 73. The Supreme Court suggested that the threat of a core meltdown and the present consequences in terms of personal anxiety and decreased property values of that threat were too speculative to confer standing.

[18] *National Wildlife Federation*, 497 U.S. at 871.

[19] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

that reducing this consultative arrangement would increase the rate of extinction of endangered species overseas. Again the Supreme Court recognized that a desire to observe animals was a cognizable interest but held that plaintiffs failed to demonstrate that they "would thereby be 'directly' affected apart from their 'special interest' in th[e] subject."[20] Affiants claimed only that they had visited the habitats of endangered species abroad and intended to revisit them. The Court observed that "[s]uch 'some day intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."[21] Again *Defenders of Wildlife* offers lessons to advocates in selecting plaintiffs and pleading facts related to injury.[22]

**Injuries to Statutory Rights.** Where none existed in the absence of a statute, statutory rights can create the cognizable legal interest required for standing. *Defenders of Wildlife*, however, placed limits on this general principle. A majority of the Court found the "citizen suit" provision of the Endangered Species Act unconstitutional.[23] The Act permits "any person" to obtain judicial review of agency action that is alleged to violate the Act. The plurality opinion, authored by Justice Scalia, recognized that the Court had frequently held that "[t]he . . . injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'"[24] However, relying on the line of "generalized grievance" cases, Justice Scalia stated that Congress could recognize cognizable injuries by statute but could not dispense with the concrete-injury requirement. Justices Kennedy and Souter joined this holding, forming a majority, on slightly narrower grounds. They noted that "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."[25] That was something the citizen-suit provision of the Act failed to do.

In so holding, the Supreme Court did not purport to overturn a line of cases arising under the Fair Housing Act of 1968.[26] Congress may create by statute a right, the deprivation of which constitutes the injury in fact necessary for standing, even when the plaintiff would have suffered no judicially cognizable injury without the statute, the Court held in those cases. In *Trafficante v. Metropolitan Life Insurance Co.*, cited with apparent approval in *Defenders of Wildlife*, the Court held that Congress created a right to be free from the effects of racially discriminatory housing practices directed at others.[27] Thus, white residents of an apartment complex had standing to challenge

---

[20] *Id.* at 563 (citations omitted).

[21] *Id.* at 564. The Supreme Court also disposed of alternative standing theories asserting standing by those who use any part of a "contiguous ecosystem," by those interested in seeing endangered animals, and by those with a professional interest in animals. *Id.* at 565–66.

[22] A comparison of *National Wildlife Federation* and *Defenders of Wildlife* with *Friends of the Earth*, discussed *infra*, is instructive in this regard. Unlike plaintiffs in *National Wildlife Federation*, the *Friends of the Earth* plaintiffs alleged direct injury between the pollutants in question and the particular area in which they wished to recreate. *Id.* at 183–84. Unlike plaintiffs in *Defenders of Wildlife*, the plaintiffs alleged that they would use the river without the discharges, not that they might someday do so. *Id.* at 184. *Friends of the Earth* suggests that the Court remains receptive to finding injury in fact in environmental cases where plaintiffs are able to allege a clear wish to avail themselves of recreational or aesthetic opportunities in a particular, proximate area but assert that they had not done so because of reasonable concern of harm.

[23] *Defenders of Wildlife*, 504 U.S. at 576–78.

[24] *Id.* at 578 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

[25] *Id.* at 580.

[26] Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3612.

[27] *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205 (1972).

the exclusion of black rental applicants because they suffered the loss of the benefits of life in an integrated community.[28] *Defenders of Wildlife* would suggest that such antidiscrimination laws can create new cognizable injuries but that such statutes can permit only those particularly and concretely suffering such injuries to enforce these laws.[29]

**Procedural Injury.** The Supreme Court addressed a form of injury—other than economic, recreational, and aesthetic injury—of potential value to legal aid attorneys. In *Defenders of Wildlife* plaintiffs sought standing on the ground that the Act in question created a procedural right in the form of interagency consultation that was allegedly violated. The Court rejected the view that anyone could have standing to assert this abstract "procedural right."[30] The Court did, however, note that "'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interest can assert that right without meeting all the normal standards for redressability and immediacy."[31] Plaintiffs have, in short, standing to challenge the alleged violation of procedures so long as the procedures are designed to protect some concrete substantive interest.[32]

## 2. Distinct and Palpable Injury

One of the goals of public law litigation is to force the government to comply with the Constitution and federal statutes. In the absence of more specific injuries, litigants claim that the Constitution confers upon all citizens the right to a lawful government and upon all federal taxpayers the right not to be taxed to support unlawful government activity. In an unbroken line of cases, the Supreme Court refused to permit the litigation of so-called citizen suits and taxpayer suits.[33] The Court coined the requirement that an Article III injury must be "distinct and palpable." "Distinct" generally means that the challenged act or policy affects the plaintiff differently from citizens at large. "Palpable" means that resulting injury is concrete and not abstract or hypothetical.

The Supreme Court put an end to citizen suits and taxpayer suits that attempted to compel the government to comply with the law in the companion cases of

---

[28] *Id*. at 208. Following *Trafficante*, the Supreme Court later held that cities and homeowners had standing to challenge racial steering practices (*Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109–15 (1979)) and that "testers," individuals posing as prospective buyers or renters, had standing to sue for racially motivated misrepresentations that housing was unavailable. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372–75 (1982).

[29] Cf. *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 773 (2000) (relator has standing under False Claims Act as the Act may be regarded as partially assigning the United States' damage claims to third parties).

[30] *Defenders of Wildlife*, 504 U.S. at 572.

[31] *Id.* at 572 n.7. The example used by the Supreme Court involved one who was living next to a proposed dam and has and had standing to challenge the failure to prepare an environmental impact statement even though there was no guarantee that such a statement would result in the dam not being built.

[32] *Id*. at n.8. Courts of appeal decisions applying "procedural rights" standing include *Wyoming Outdoor Council*, 165 F.3d at 51 (plaintiff may sue for the denial of procedural rights in the Forest Service's grant of authority to drill on federal lands even though there was "no certainty" that the drilling would take place); *Moreau v. Federal Energy Regulatory Commission*, 982 F.2d 556, 564 (D.C. Cir. 1993) (plaintiffs had standing to contest the agency's failure to give them notice of proceedings and to hold an evidentiary hearing regarding the construction of a natural gas pipeline notwithstanding the plaintiffs' failure to show that such predeprivation safeguards would have changed the outcome); see also *Yesler v. Terrace Community Council*, 37 F.3d 442, 446–47 (9th Cir. 1994); *Florida Audubon Society v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996); *Banks v. Secretary of the Independent Family and Social Services Administration*, 997 F.2d 231, 238–39 (7th Cir. 1993) (plaintiffs eligible for Medicaid have standing to challenge Medicaid agency's failure to give notice and hearing before denying reimbursement claims).

[33] An exception to the prohibition against federal taxpayer suits is *Flast v. Cohen*, 392 U.S. 83 (1968). In *Flast* the Supreme Court held that taxpayers could challenge federal legislation authorizing spending that allegedly violated the religion clauses of the first amendment. The Court subsequently rejected the reasoning of *Flast* without overruling taxpayer standing to challenge taxing and spending in violation of the religion clauses. See *Valley Forge Christian College v. Americans United for Separation of Church and State Inc.*, 454 U.S. 464, 471 (1982) (no taxpayer or citizen standing to challenge disposal of surplus federal property in violation of religion clauses).

- *United States v. Richardson*[34] and
- *Schlesinger v. Reservists Committee to Stop the War*.[35]

The Court held that injury resulting from the allegedly unlawful invalid expenditure of tax monies did not confer standing because of the "'comparatively minute, remote, fluctuating and uncertain' impact on the taxpayer."[36] With respect to the interest of citizens in lawful government, the Court repeatedly characterized the injury to plaintiffs as citizens as "remote," "abstract," "generalized," and "undifferentiated," rather than "concrete," holding that "motivation [to enforce the Constitution] is not a substitute for the actual injury" required for standing.[37]

The Court expounded on these principles in *Warth v. Seldin*, where the Court coined the phrase "distinct and palpable injury" to capture the requirement that plaintiff plead more than a generalized or undifferentiated grievance against the government.[38] The Court explained in *Warth* that the prohibition against citizen standing and taxpayer standing did not derive from Article III. Rather, the requirement that plaintiff suffer a distinct and palpable injury are "essentially matters of judicial self-governance."[39] Thus, while the requirement of injury in fact is rooted in Article III, the requirement that the injury be distinct and palpable is a prudential limitation on standing created to effectuate the separation of powers. Because the requirement is prudential, Congress can dispense with it.[40]

*Allen v. Wright* culminated the demise of both citizen standing and taxpayer standing.[41] Several provisions of both the Internal Revenue Code and the Constitution arguably prohibit the Internal Revenue Service (IRS) from granting tax-exempt status to racially discriminatory private schools. Parents of black public school children residing in school districts undergoing desegregation challenged the IRS practice of granting tax-exempt status to discriminatory private schools in their respective districts. The parents alleged that the mere fact of governmental financial assistance to discriminatory schools harmed them and impaired their ability to have the public schools desegregated. Treating the former claim as an allegation that the government stigmatized black citizens by subsidizing race discrimination, the Court held that the claim did not state a distinct and palpable injury.[42] The Court found that stigmatic injury "accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct."[43] Thus none of the plaintiffs had standing to challenge unlawful tax subsidies to discriminatory private schools.

Nonetheless the Court has sometimes found standing based upon claims of injury that can be described only as generalized or abstract. In *Federal Election Commission v. Akins*, for example, voters challenged a decision by the Federal Election Commission that a particular organization was not a "political commit-

---

[34] *United States v. Richardson*, 418 U.S. 166 (1974).

[35] *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

[36] *Richardson*, 418 U.S. at 172.

[37] *Schlesinger*, 418 U.S. at 226.

[38] *Warth v. Seldin*, 422 U.S. 490 (1975).

[39] *Warth*, 422 U.S. at 500.

[40] See, e.g., *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997).

[41] *Allen v. Wright*, 468 U.S. 737 (1984).

[42] *Id.* at 753–59. The Supreme Court found that the latter claim lacked the basis for standing because it was not fairly traceable to the alleged unlawful conduct.

[43] *Id.* at 755.

tee."[44] Political committees must make certain disclosures to the commission; those disclosures, in turn, may be made public. The Court found standing because the voters were not afforded access to information that might assist them in casting their vote even though all voters could have claimed the same thing.[45]

### 3. Injury Fairly Traceable to the Challenged Conduct

In addition to alleging injury in fact, the plaintiff must demonstrate that plaintiff's injury is fairly traceable to the defendant's unlawful conduct and that the relief sought will likely redress the injury. In cases in which the government acts against the plaintiff, causation is simple. When, however, government action or inaction relates to third parties or only indirectly affects the plaintiff, then the question becomes whether the causal connection between action and injury is sufficient to confer standing. The Supreme Court found standing in some cases notwithstanding an attenuated or uncertain chain of causation.[46] At the same time the Court denied standing in cases in which the chain seemed both shorter and more certain.[47] The Court's standing causation jurisprudence has been markedly inconsistent and offers few lessons for general application.

The Court first articulated the requirements of causation and redressability in *Linda R.S. v. Richard D.*[48] Plaintiff, a mother, sued to compel a local prosecutor to enforce against the father of her child the state's criminal nonsupport statute against parents of children born out of wedlock. She posited as her injury the refusal of the child's father to provide support and claimed that the state's refusal to enforce the statute against unmarried fathers violated the equal protection clause. Even though the threat of incarceration ordinarily prompts compliance, the Court held that the mother lacked standing because she "made no showing that her failure to secure support payments results from the nonenforcement, as to her child's father, of [the statute]."[49]

In *Warth* low-income plaintiffs who wished to reside in Penfield, New Jersey, challenged zoning restrictions that effectively precluded the construction of low- and moderate-income housing within the city. The Court held that the individual plaintiffs lacked standing because they failed to "allege facts from which it reasonably could be inferred that, absent the [city's] restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield."[50] Because plaintiffs failed to establish that city zoning practices caused their injury, they were not allowed to challenge those practices.

By contrast, the Court held in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* that a developer of low-income housing and one of its putative tenants had standing to challenge exclusionary zoning practices.[51] The developer had contracted to buy property contingent upon its rezoning for multiple family use and filed a properly documented rezoning application. When the

---

[44] *Federal Election Commission v. Akins*, 524 U.S. 11 (1998).

[45] For similar cases, see *Heckler v. Mathews*, 465 U.S. 728, 739 (1987) (men have standing to challenge constitutionality of social security statute that treated men and women differently even though prevailing could not possibly help them); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982) (tester has standing to challenge discrimination). For an explanation why the Supreme Court finds standing in some cases presenting generalized grievances and not others, see RICHARD PIERCE, ADMINISTRATIVE LAW TREATISE § 16.4 at 1152–53(4th ed. 2002).

[46] *Duke Power*, 438 U.S. 59 (1978); *Scrap*, 412 U.S. 669 (1973). See also *Bryant v. Yellen*, 447 U.S. 352 (1980).

[47] Professor Pierce opines that these cases reflect the Supreme Court's use of causation to preclude review of cases that pose difficult justiciability issues on other grounds. PIERCE, *supra* note 45, § 16.5 at 1165–66.

[48] *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

[49] *Id.* at 618.

[50] *Warth*, 422 U.S. at 504.

[51] *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977).

city denied the rezoning application, the developer sued. Although financing for the project was uncertain, the Court held that the developer had standing to challenge the city's action. The individual plaintiff had alleged that he would seek and qualify for housing in the proposed development in order to move closer to his job. Finding that the city's action frustrated plaintiff's specific plan, the Court concluded that he too had standing.

Plaintiffs in *Arlington Heights* overcame standing problems by paying attention to detail. Rather than mount an abstract challenge to exclusionary zoning practices on behalf of developers who hoped to develop at some future time and tenants who hoped to rent somewhere, they identified a developer and an individual with specific injuries traceable to city action. By recognizing from the outset the importance of establishing that exclusionary zoning caused the inability to develop or to rent, they overcame the *Warth* obstacle. *Arlington Heights* represents the thinking lawyer's response to *Warth*: identify with precision the injury and demonstrate the link between the injury and official action.[52]

*Simon v. Eastern Kentucky Welfare Rights Organization* also demonstrates the hazards of filing a suit without giving due regard to standing.[53] In that case various individuals and organizations challenged an IRS Revenue Ruling that permitted some hospitals to deny admission to nonemergency indigent patients without jeopardizing their tax-exempt status. Plaintiffs each claimed to have been denied hospital treatment because of their indigence and asserted that the revised revenue ruling "encouraged" and "was encouraging" the continued denial of treatment. Plaintiffs pleaded that each of the hospitals was tax-exempt and received substantial private contributions. The Court held that each of the plaintiffs failed to establish that the denial of treatment was fairly traceable to the revised revenue ruling. The Court reasoned that in the absence of evidence "[i]t is purely speculative whether the denials of service . . . fairly can be traced to [IRS] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications."[54] The message of *Eastern Kentucky Welfare Rights Organization* for lawyers today is clear: when preparing a challenge to unlawful governmental activity that indirectly harms your clients, plead in detail the causal link between the illegal conduct and the plaintiffs' injury. *Arlington Heights* and *Duke Power* are models of how to overcome the Court's tightened causation requirement.

### 4. Relief Sought to Redress Injury

A corollary to the Supreme Court's requirement for standing that the injury alleged be fairly traceable to the challenged conduct is the separate requirement that the relief sought must redress the injury. In the great majority of cases the inquiry into causation and redressability are indistinguishable. Thus in *Warth* the Court held that there was no reason to suppose that the elimination of exclusionary zoning would enable the plaintiffs to obtain housing in Penfield, and in *Eastern Kentucky Welfare Rights Organization* the Court held that there was no reason to suppose that revoking the IRS Revenue Ruling at issue would assure that the next ill or injured poor person would be admitted to a hospital. What is peculiar about the Court's concern for redressability is its elevation to constitutional status of the question of remedial efficacy.

While the scope of equitable relief to redress unlawful governmental action

[52]Environmental litigants in *Duke Power Co.*, 438 U.S. 59, also overcame *Warth*'s stringent causation requirement. By introducing the testimony of industry representatives before congressional committees expressing their unwillingness to develop nuclear power without a liability cap, plaintiffs established that, but for the cap, the industry would likely die. When the utility company asserted that it could proceed without the cap, plaintiffs introduced to Congress the company's letter reciting that its suppliers and contractors would not proceed without the cap. Thus plaintiffs demonstrated that the cap caused the aesthetic injuries of which they complained.

[53]*Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976).

[54]*Id.* at 26.

has long been a matter of controversy, not until *City of Los Angeles v. Lyons* was decided did the Court clearly articulate the requirement of remedial efficacy as a constitutional component of standing.[55] The plaintiff in *Lyons* sought damages and injunctive relief after being choked by city police officers. He alleged that the city permitted the police department to use unnecessary choke holds indiscriminately. The Court conceded that Lyons had standing to sue for damages.[56] However, the Court held that he lacked standing to seek injunctive relief. An injunction would not redress his injury since it was unlikely that he would be arrested and choked again.

*Lyons* differs dramatically from *Warth* and *Eastern Kentucky Welfare Rights Organization*. In the earlier cases, the Court's concern for remedial efficacy was a corollary to the requirement that plaintiff establish that plaintiff's injury was fairly traceable to defendant's unlawful conduct. If the causal link between the defendant's conduct and the plaintiff's injury was tenuous, then it followed that injunctive relief against that conduct was unlikely to remedy the injury. Thus the requirement of remedial efficacy grew out of the focus upon causation; whenever causation was in doubt, so too was remedial efficacy.

The notion of uncertainty in redressability arose in a different context in *Defenders of Wildlife*. In that case plaintiffs challenged a regulation that did not require funding agencies to consult with the government before granting funds to projects that might harm endangered species. The Court found that plaintiffs had not demonstrated redressability because the funding agencies were not bound by any consultation requirement and because the funding agencies supplied only a small percentage of the financing for certain projects.[57] Even were those funds withdrawn, plaintiffs did not show that the project would be suspended or cause less harm to the endangered species—a formidable, if not impossible, task.

The ability of prospective injunctive relief to remedy past wrongs dealt with in *Lyons* has echoes in *Steel Company v. Citizens for a Better Environment*.[58] In *Steel Co.* plaintiff sued a manufacturing firm for past violations of a federal statute requiring users of certain toxic and hazardous chemicals to file, with the Environmental Protection Administration (EPA), forms that detail the name, quantity, and disposal methods of various chemicals. The EPA alerted the firm that the firm failed to file the forms for several years. The firm then did so. Suing the firm for violating the statute, plaintiff asserted that the company's failure to file these forms precluded plaintiff from learning about its operations. Plaintiff sought declaratory, injunctive relief and civil penalties.

The Court found that plaintiff failed the redressability prong of the standing test. With respect to injunctive relief, plaintiff sought an order permitting plaintiff to inspect the firm's facilities and records and requiring the firm to submit future forms to the EPA. The Court held that such relief would not redress the injury previously caused when the firm failed to file the forms. Plaintiff did not allege that such a violation was going to happen again, and, without it, there was no basis for prospective injunctive relief.

The clear message of *Lyons* and *Steel Co.* is to choose plaintiffs with care and, whenever possible, to choose plaintiffs who have suffered recurrent application of the practice or policy at issue. In preparing a claim seeking injunctive relief

---

[55] *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

[56] While *Lyons* and its progeny do not bar damage claims, those claims frequently are of only uncertain value. Individual defendants assert the defense of qualified immunity, state agencies assert immunity under the eleventh amendment, and local governmental bodies assert that the challenged action is not attributable to the governmental body. See generally the discussion of immunities and municipal liability in FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS ch. 8 (Jeffrey S. Gutman ed., 2004).

[57] *Defenders of Wildlife*, 504 U.S. at 568–71.

[58] *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

based upon past conduct, the attorney must therefore articulate in the complaint the reasons for which the risk of recurrence is more than speculative.

### 5. The Zone-of-Interest Test

A pertinent Supreme Court decision is the 1970 one in *Association of Data Processing Service Organizations Inc. v. Camp*.[59] The Court has since required that plaintiffs establish that their grievance "must arguably fall with the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit."[60] This prudential limitation on standing is "founded in concern about the proper—and properly limited—role of court in a democratic society."[61] The limitation may be set aside by Congress.[62] The zone-of-interest test originally arose from an interpretation of the standing provision in the Administrative Procedure Act.[63] Therefore the test applied only to suits arising from the Act. The Court, however, expanded it to apply to any provisions of law.[64]

In *Block v. Community Nutrition Institute* the Court suggested a liberal standard for applying the zone-of-interest test.[65] That is, a plaintiff fails the test when a legislative intent precludes review, as opposed to an intent to protect the interests of the plaintiff.[66] The presumption is in favor of judicial review, which may be overcome only by clear and convincing evidence found in the legislative scheme.[67] Subsequently the Court expressly stated that the zone-of-interest test "is not meant to be especially demanding," precluding standing only when "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be assumed that Congress intended to permit the suit."[68]

The Court more recently continued to adhere to a relaxed interpretation of the zone-of-interest test. In *National Credit Union Administration v. First National Bank and Trust Co.*, for example, the Court allowed a competing bank to challenge an order which was issued by the National Credit Union Administration and enlarged the charter of a credit union.[69] The Court reasoned that the underlying act's purpose was to limit the scope of memberships in credit unions—an interest shared by competing banks.

## C. Theory of Standing and *Friends of the Earth*

The Supreme Court's most recent standing decision, *Friends of the Earth v. Laidlaw Environmental Services*, involved standing under the citizen-suit provision of the Clean Water Act; the provision authorizes the federal courts to hear entertain actions for injunctive relief and civil penalties by "a person or persons having an interest which is or may be adversely affected."[70] Laidlaw received a permit to discharge certain pollutants

[59] *Association of Data Processing Service Organizations Inc. v. Camp*, 397 U.S. 150 (1970).

[60] *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

[61] *Warth*, 422 U.S. at 498.

[62] Congress must do so explicitly, such as through enactment of a citizen-suit provision. See, e.g., *Bennett*, 520 U.S. at 164 n.2.

[63] 5 U.S.C. § 702.

[64] *Bennett*, 520 U.S. at 163.

[65] *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984).

[66] The *Block* Court unanimously held that consumers of milk lacked standing to challenge milk marketing orders because there was evidence of congressional intent to deny consumers a right to obtain judicial review of such orders. *Id.* at 347–48.

[67] *Id.* at 351.

[68] *Clarke v. Securities Industry Association*, 479 U.S. 388, 399–400 (1987).

[69] *National Credit Union Administration v. First National Bank and Trust Company*, 522 U.S. 479 (1998).

[70] *Friends of the Earth*, 528 U.S. at 174, quoting Clean Water Act, 33 U.S.C. § 1365(a), (g). Even the dissent declined to conclude that this statute was unconstitutional in the sense that the citizen-suit provision in the Endangered Species Act was in *Defenders of Wildlife*.

into a river but repeatedly exceeded those limits. South Carolina sued Laidlaw and quickly settled for $100,000 in civil penalties and a promise to comply with the permit. Friends of the Earth subsequently filed suit, seeking additional civil penalties and injunctive relief. The issue before the Court was whether plaintiffs had standing to seek civil penalties after Laidlaw had indeed complied with the discharge permit.

In short, the Court's decision in *Friends of the Earth* relaxed each of the standing requirements: injury in fact, causation, and redressability. The Court held that plaintiffs had established injury in fact and causation through affidavits and deposition testimony which detailed their desire to recreate on the nearby river and to enjoy its aesthetic beauty but hesitated to do so given the pollution. The Court did not require the plaintiffs to demonstrate that particular discharges had caused them injury. Rather, the Court found it sufficient that the discharges generally created "reasonable concerns" about their effects and that these concerns directly and reasonably affected plaintiffs' recreational and aesthetic interests.[71]

With regard to redressability, the Court rejected the notion that plaintiffs lacked standing simply because the penalty was paid to the government rather than to them. The Court deferred to Congress' judgment that civil penalties deter unlawful conduct. Because civil penalties discourage violators from continuing their misconduct and deter future violations, plaintiffs achieve redress even though they do not pocket the money.[72]

In Prof. Richard Pierce's view, *Friends of the Earth* can be explained by the case having arisen from a suit filed pursuant to a specific federal statute.[73] Such statutes evidence a legislative judgment that certain classes of plaintiffs suffer injury in fact when the statute is violated, that the violation causes the injury, and that such injury is redressable by the statutory remedies provided. These statutes also explicitly reflect Congress' desire that courts intervene to resolve disputes thereunder. As the Court recently put it, "Congress [can] define new legal rights, which in turn will confer standing to vindicate an injury caused to the claimant."[74] With the exception of *Defenders of Wildlife*, the Court found standing in each case arising from such statutes.

When, however, the action does not arise from such statutes and there is no explicit legislative mandate for intervention, the Court takes a much narrower view of standing. This is particularly true, according to Professor Pierce, in cases involving questions that pose challenges to the judicial function because standards of decision are not readily available or discernible.[75]

## D. Associational Standing

Groups may have standing in a representative capacity, in an individual capacity, or in both. A group has standing in a representative capacity when it represents the rights of its members. It has standing in an individual capacity (or *qua* group) when it asserts its own rights as an organization.

### 1. Representative Capacity

The leading case articulating the standing requirements for groups that sue in a representative capacity is *Hunt v. Washington State Apple Growers Commission*.[76] The Court stated in *Hunt*:

> Thus we have recognized that an association has standing to bring suit on behalf of its members when:

[71] *Friends of the Earth*, 528 U.S. at 184.

[72] *Id.* at 185–86.

[73] Pierce, *supra* note 45, § 16.7. See also *Akins*, *Havens Realty*, and *Trafficante*, discussed *infra*.

[74] *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 773 (2000).

[75] Pierce, *supra* note 45, § 16.7. This may explain cases like *Warth*, *Eastern Kentucky*, *Linda R. S.*, *Allen*, and certain taxpayer standing cases.

[76] *Hunt v. Washington State Apple Growers Commission*, 432 U.S. 333 (1977).

(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.[77]

The first prong of the *Hunt* test establishes a traditional standing inquiry grounded in Article III's case or controversy requirement. The second prong is also constitutionally based and is designed to ensure that the association has both a concrete stake in the outcome of the litigation and will approach it with adversarial vigor. By contrast, the Supreme Court ruled, the third prong is a prudential limitation in the same sense as is third-party standing (see *infra*).[78]

With respect to the first element, when an organization asserts standing in a representative capacity, *Hunt* does not require the organization to allege that it has suffered any injury. Rather, the organization must establish that those whom it represents have suffered an injury sufficient to confer standing.[79] The organization need not establish that a substantial number of its members have suffered injury. Injury to a single member will do.[80]

An issue commonly litigated relating to the first prong is whether the plaintiff is the sort of association entitled to avail itself of associational standing. Voluntary membership organizations, such as trade organizations, plainly qualify.[81] Organizations whose members are compelled to join, such as some trade unions and bar associations, may qualify as well.[82] Matters become more difficult when the association is not a traditional membership organization. The association may have standing if the association is "the functional equivalent of a traditional membership organization."[83] That is, if the individuals in the organization select its leaders, guide its activities, and finance its efforts, the association may have standing.[84] If not, the association lacks standing.[85]

Second, *Hunt* also requires some community of interest between the group and the injured member. By requiring that the interests that the suit seeks to protect be germane to the organization's purpose, *Hunt* limits the capacity of groups to define their purpose in terms sufficiently broad to permit the group to represent whoever's interests happen to suit it at a given moment.

---

[77] *Id.* at 343.

[78] *United Food and Commercial Workers v. Brown*, 517 U.S. 544, 556–57 (1996) (holding that the prong "may guard against the hazard of litigating a case to the damages stage only to find plaintiff lacking detailed records or the evidence necessary to show the harm with sufficient specificity. And it may hedge against any risk that the damages recovered by the association will fail to find their way into the pockets of the members on whose behalf injury is claimed").

[79] See, e.g., *Northeastern Florida Chapter v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (injury-in-fact requirement in equal protection case does not require plaintiff to prove that she would have obtained benefit in absence of challenged barrier).

[80] *United Food and Commercial Workers*, 517 U.S. at 555.

[81] *Hunt*, 432 U.S. at 342.

[82] *Id.* at 345.

[83] *Gettman v. Drug Enforcement Administration*, 290 F.3d 430, 435 (D.C. Cir. 2002).

[84] In *Hunt* a state agency whose members were voted on by apple growers was found to have standing *Id.* at 344. Even though not a membership entity, the agency served the interests of a definable group of people, possessed "indicia" of membership organizations, and had a financial nexus with its constituents. See also *Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999) (federally authorized protection and advocacy organization would have standing to sue on behalf of disabled constituents as an association, despite not having membership, if one constituent had standing).

[85] *Gettman*, 290 F.3d at 435 (magazine with readership lacks associational standing); *Fund Democracy v. Securities and Exchange Commission*, 278 F.3d 21 (D.C. Cir. 2002) (one-person business which represents an informal consortium of groups lacks standing); *Association for Retarded Citizens of Dallas v. Dallas County Mental Health and Mental Retardation Board of Trustees*, 19 F.3d 241 (5th Cir. 1994) (public interest advocacy group lacks standing based solely on resources directed toward representing disabled persons in response to the actions of another party).

Third, *Hunt* permits representative standing only when neither the claim nor the relief sought requires the participation of an injured individual. This element is typically satisfied when the plaintiff association seeks injunctive or declaratory relief.[86] Neither *Hunt* nor *International Union, United Automobile, Aerospace and Agricultural Workers of America v. Brock* decided whether a representative group was allowed to seek monetary relief for its members.[87] But Congress, the Court held in *United Food and Commercial Workers*, may eliminate the third element of the *Hunt* test by statutorily authorizing suit for damages.[88]

Until Congress does so, and individualized proof of damage is required, the claims require individual participation, and representative standing is inappropriate.[89] However, the need for some association members to participate in fact discovery or at trial was held not to run afoul of the third element.[90] The application of the third prong in cases with a conflict among an association's membership resulted in an interesting split in the circuits.[91]

Because *Hunt* vests trial courts with some discretion in resolving claims of associational standing, the better practice when group standing appears tenuous is to join at least one named individual as plaintiff in litigation brought by a group asserting associational standing. The presence of an individual with standing should discourage the court—and opposing counsel—from delving deeply into the question of the group's associational standing.

### 2. Advantages and Disadvantages of Associational Standing

Given that a group asserting representative standing will fare no better than its individual members in establishing the requisite injury, we can fairly ask why associational standing is worth pursuing. The principal advantage of group standing lies in its use to obtain the benefits of a class action without the bother of class certification. Those benefits include the opportunity to obtain a judgment in favor of everyone adversely affected and to avoid mootness.

Including a representative organization as a plaintiff avoids mootness questions tied to the passing stake in the controversy of individual members. Representative claims thereby effectively shift the case and controversy focus from whether a particular individual has a live claim to whether any group member has a live claim. In this sense, representative standing resembles a class action without the problems posed by the requirement of class certification.

Indeed, the Supreme Court recognized the propriety of representative group standing as an appropriate alternative to class action litigation for injunctive relief in *International Union, United Automobile, Aerospace and Agricultural Workers.*[92] In this case the government argued that the Court should modify *Hunt* to require representative groups to proceed under Rule 23. Rejecting that argument, the Court reaffirmed *Hunt*. Representative groups, the Court held, may be superior to an "ad hoc union of injured plaintiffs" proceeding as a class action.[93] Because associations are often borne of a desire to vindi-

---

[86] *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988); *Hospital Council of Western Pennsylvania v. City of Pittsburgh*, 949 F.2d 83, 89 (3d Cir. 1991).

[87] *International Union, United Automobile, Aerospace and Agricultural Workers of America v. Brock*, 477 U.S. 274 (1986).

[88] *United Food and Commercial Workers*, 517 U.S. at 554–59.

[89] See *Warth v. Seldin*, 422 U.S. 490, 515 (1975).

[90] *Retired Chicago Police Association. v. City of Chicago*, 7 F.3d 584, 603 (7th Cir. 1993); *Hospital Council*, 949 F.2d at 89.

[91] *Retired Chicago Police Association*, 7 F.3d at 603–7 (surveying circuit split); see also *Note, Associational Standing for Organizations with Internal Conflicts of Interest*, 69 University of Chicago Law Review 351 (2002).

[92] *International Union, United Automobile, Aerospace and Agricultural Workers*, 477 U.S. at 274.

[93] *Id.* at 289.

cate common interests, they are likely to be adequate representatives of their members and "can draw upon a preexisting reservoir of expertise and capital."[94] The Court's reaffirmation of associational standing suggests the potential value of such standing as an alternative to the vagaries of class certification.

Representative group standing also may enable an individual member who does not wish to appear as a named plaintiff to avoid direct participation in the lawsuit. For a variety of reasons, some individuals are reluctant to sue in their own name. However, their membership in a group can confer representative standing on the group. On the other hand, associational standing is generally not available in suits for damages.

An organization may see representative group standing as a device to strengthen the organization within a community.[95] By appearing as the lead plaintiff in a major lawsuit, the group acquires visibility; when it wins, it acquires clout. While these considerations may appear irrelevant to the development of a successful lawsuit, they may matter greatly to a fledgling organization.

### 3. Organizational Standing

An organization that suffers injury in its own right—rather than or in addition to an injury to the rights of its members—has individual standing as a group. When the group asserts an injury to its own interests, the group has standing *qua* group, irrespective of any injury to members.[96] Thus a group that suffers or will suffer economic harm or diminution in membership attributable to unlawful conduct has an individual injury sufficient to confer standing.[97] However, the facts relating to this harm are subject to discovery.[98] Prior to litigation, prospective organizational plaintiffs should be advised to keep careful records of membership loss or diversion of resources.

Only in very limited circumstances, absent economic harm or diminution in membership, does the Court uphold the assertion of individual group standing for groups that suffered an injury to their organizational goals. While *Havens Realty* and *Arlington Heights* expand marginally the opportunity for an organization to establish individual standing based upon injury to its noneconomic agenda, they do not undermine *Sierra Club*, *Schlesinger v. Reservists Committee to Stop the War*, and *Allen v. Wright*, all of which prohibit standing based upon a general injury to a group's ideological interests.[99] Thus group standing deriving from injury to the group's noneconomic interests offers only limited possibilities for litigation.

In structuring a claim by a group suing *qua* group, every effort should be made to identify and plead some kind of economic harm or threat to membership flowing from the challenged conduct. Because combining individual group standing

---

[94] *Id.*

[95] Legal Services Corporation (LSC) restrictions permit the representation of groups, corporations, and associations which meet financial eligibility requirements. 45 C.F.R. § 1611.5(c).

[96] Representative and organizational standing must be distinguished. See *Irish Lesbian and Gay Organization v. Giuliani*, 143 F.3d 639, 649 (2d Cir. 1998) (group had standing because of economic harm to the organization, but organization did not have representative standing to seek damages for individual members).

[97] See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459–60 (1958); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 157–59 (1951) (concurring opinions of Frankfurter, J., Douglas, J., and Burton, J.); *M.O.C.H.A. Society v. City of Buffalo*, 199 F. Supp. 2d 40, 46 (W.D.N.Y. 2002) (finding associational standing based on loss of membership); *Wyoming Timber Industry Association v. U.S. Forest Service*, 80 F. Supp. 2d 1245, 1253 (D. Wyo. 2000) (validating organizational standing based on economic harm to a trade association). But see *Minnesota Federation of Teachers v. Randall*, 891 F.2d 1354, 1359 (8th Cir. 1989) (holding that fear of potential loss of union membership is insufficient to confer organizational standing).

[98] Membership rolls, e.g., may be discoverable depending on whether "good cause" exists for a protective order pursuant to Federal Rule of Civil Procedure 26(c). See generally *Courier Journal v. Marshall*, 828 F.2d 361, 364–67 (6th Cir. 1987) (affirming the district court's use of discretion in fashioning a protective order that recognizes the associational rights of nonparty members of the Ku Klux Klan).

[99] See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372–80 (1982); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 262 (1977).

with associational group standing increases the likelihood of success in establishing standing, a group asserting injury to its own interests should, whenever possible, also plead representative standing.

### E. Third-Party Standing

Third-party standing issues arise when a party seeks to remedy the party's injury by asserting the rights of third parties not before the court. Generally parties may seek only to vindicate their legal rights rather than those of others. The presumption against third-party or *jus tertii* standing rests on prudential principles rather than an application of Article III limitations on standing.[100] Those prudential limitations, in turn, are grounded upon concerns that third parties may not wish to have their rights asserted, that parties are less likely to advocate vigorously the rights of others, and that the quality of judicial decision making may suffer when concrete evidence of harm is not presented by those suffering it.[101] The Supreme Court, however, permitted third-party standing in a variety of cases when these prudential considerations were not presented.

The Court developed a three-part test, each prong of which must be satisfied in order to bring third-party claims: "[t]he litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests."[102] As this test has been applied, however, the Court has found standing in cases in which the second or third prong has not been clearly established.

The first prong of the test has been rigorously enforced. The party (typically but not always the plaintiff) must satisfy traditional constitutional standing requirements; the challenged law or conduct must injure the party in order for that party to assert the rights or interests of third parties. These requirements are satisfied when, for example,

- a plaintiff challenges laws that cause plaintiff economic harm,[103] or
- a criminal defendant challenges jury selection procedures.[104]

With respect to the second prong, the Supreme Court has not articulated specific standards for the degree of the closeness of the relationship between the plaintiff and the third party whose rights are asserted, or the nature of the relationship which satisfies this criterion. Nonetheless a number of cases offer significant guidance.

In *Singleton*, a leading case in this area, the Supreme Court held that a physician had standing to assert the rights of patients in challenging a state statute limiting Medicaid-covered abortions. The Court noted the close relationship between doctor and patient and stated that the relationship was directly implicated by the law challenged. Similarly the Court permitted an attorney to challenge a statute limiting the ability to recover attorney fees in black lung benefit cases on the ground that the statute violated his client's due process right to legal representation.[105] In so doing, the Court observed that third-party standing was appropriate in cases in which the limitation or restriction challenged by the plaintiff prevented the third party from establishing a lawful relationship with the plaintiff.[106]

---

[100] See *United Food and Commercial Workers Union v. Brown Group*, 517 U.S. 544, 557 (1996).

[101] See *Singleton v. Wulff*, 428 U.S. 106, 114–15 (1976); Erwin Chemerinsky, Federal Jurisdiction 83–89 (3d ed. 1999).

[102] *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (citations omitted).

[103] See *Singleton*, 428 U.S. at 119 (doctor suffers loss of Medicaid reimbursement income).

[104] See *Powers*, 499 U.S. at 411 (discriminatory use of peremptory challenges harms criminal defendant).

[105] *U.S. Department. of Labor v. Triplett*, 494 U.S. 715, 720–21 (1990).

[106] *Id.* at 720.

This notion explains a number of cases in which the Court holds that suppliers of products may challenge restrictions on sales by asserting the rights of customers to obtain the product. In *Craig v. Boren*, for example, a seller of beer was permitted to challenge on equal protection grounds an Oklahoma law that prohibited sales of 3.2 percent beer to men under 21, while allowing the sale to women 18–21.[107] While the relationship between a tavern and customers seems more tenuous than that between a doctor and patient or attorney and client, the Court justified its holding on the ground that the seller "is entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should her constitutional challenge fail and the statutes remain in force."[108] Similarly the Court has permitted

- booksellers to assert the First Amendment rights of book buyers[109] and
- sellers of contraceptives to assert the privacy rights of customers.[110]

With respect to the third prong of the test, the Supreme Court frequently permits third-party standing when the third party is unlikely to assert its own interests. Most recently the Court permitted third-party standing in jury selection cases. In *Powers v. Ohio* a white criminal defendant appealed his conviction on the ground that the prosecutor's use of peremptory challenges violated the equal protection rights of prospective black jurors.[111] The Court first found that discriminatory use of peremptory challenges caused the defendant injury in fact regardless of race because such use called into question the fairness of the trial.[112] Second, the Court held that the connection between the defendant and excluded jurors was "as close as, if not closer than" those in cases such as *Triplett* because "[v]oir dire permits a party to establish a relation, if not a bond of trust, with the jurors."[113] Somewhat more convincingly, the Court further noted that the defendant was likely to advocate vigorously on behalf of the excluded juror in order to secure a reversal of his conviction.[114] The Court held that excluded jurors were unlikely to challenge their exclusion since the costs were high and potential benefits low but that, even if they did, they would be unable to obtain declaratory or injunctive relief.[115] The *Powers* rationale was extended to

- civil cases[116] and
- challenges to the selection of grand jurors.[117]

The question of barriers to third parties enforcing their own rights was also featured prominently in cases involving unlawful racial covenants and the distribution of contraceptives. In *Barrows v. Jackson*, for example, whites sued for violating racially restrictive covenants in

---

[107] *Craig v. Boren*, 429 U.S. 190 (1976).

[108] *Id.* at 195. *Craig*'s sweep is potentially quite broad. The articulated justification for the decision admits of no logical limit, and how the third prong, discussed *infra*, was satisfied is difficult to see. The Supreme Court observed that the law banned the sale, not the consumption, of 3.2 percent beer, but this hardly seems a substantial barrier blocking young men from challenging the statute.

[109] *Virginia v. American Booksellers Association.*, 484 U.S. 383, 392 (1988).

[110] *Carey v. Population Services International*, 431 U.S. 678, 682–83 (1977); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972). But see *Tileston v. Ullman*, 318 U.S. 44, 45–46 (1943) (denying standing of doctor to challenge laws prohibiting use of contraceptives on behalf of patients).

[111] *Powers*, 499 U.S. at 400.

[112] *Id.* at 411–12.

[113] *Id.* at 413.

[114] *Id.* at 413–14.

[115] *Id.* at 415.

[116] *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 629 (1991).

[117] *Campbell v. Louisiana*, 523 U.S. 392, 397–98 (1998).

their deeds were permitted to assert the equal protection rights of African Americans, who could not sue as they were not parties to the covenant.[118] In *Eisenstadt v. Baird* a doctor prosecuted for distributing contraceptives to unmarried persons was permitted to assert the rights of such persons.[119] Such persons were not subject to prosecution and were thereby "denied a forum in which to assert their own rights."[120]

At the same time we can imagine scenarios in which young males interested in buying 3.2 percent beer, Medicaid beneficiaries, individuals wishing to obtain contraceptives, and African Americans seeking to purchase property encumbered by a racially restrictive covenant could assert their rights in litigation that they would initiate. This suggests a reasonably relaxed approach to the third prong of the test. However, this may be more reflective of the Court's more generally forgiving approach to standing in the 1970s. The more recent cases in the jury selection area did not raise significant third-prong problems.[121]

At least two justices suggested that the Supreme Court revisit and clarify the law of third-party standing. In *Miller v. Albright* a woman born out of wedlock abroad to an American father and a foreign mother and her father challenged a provision in the Immigration and Nationality Act that created different citizenship requirements for those born abroad of an alien father and American mother as opposed to those born abroad to an alien mother and American father.[122] The lawsuit asserted that the father's equal protection rights were violated. Nonetheless the district court dismissed the father's claim for lack of standing. The father did not appeal.

Citing only *Craig*, the plurality opinion written by Justice Stevens and joined by Chief Justice Rehnquist held that third-party standing was appropriate. Addressing the issue in more detail, Justice Breyer, on behalf of Justices Souter and Ginsburg, who dissented on other grounds, agreed. Justice O'Connor, joined by Justice Kennedy, would have denied third-party standing on the ground that the father did not face sufficient barriers to asserting his own rights. Justices Scalia and Thomas expressed agreement with Justice O'Connor but cited *Craig* to suggest that the third prong of the test was not especially demanding. Justice Scalia concluded that "[o]ur law on this subject is in need of what may charitably be called clarification."[123]

The most sensible approach to litigation in the face of uncertainty is to avoid third-party standing problems by joining appropriate additional plaintiffs. Creating a complex and unnecessary obstacle to the assertion of a claim by attempting to have one plaintiff assert the rights of others makes no sense. Simply join representative individuals whose rights are at issue as named plaintiffs.

---

[118] *Barrows v. Jackson*, 346 U.S. 249 (1953).

[119] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[120] *Baird*, 405 U.S. at 446.

[121] These third-party standing issues do arise in a range of contexts. Two recent cases offer examples. In *Tesmer v. Granholm*, 295 F.3d 536 (6th Cir. 2002), two criminal defense attorneys asserted the federal constitutional rights of potential clients in challenging the practice of state judges in Michigan not to appoint appellate counsel to indigent defendants who plead guilty and who may wish to appeal. The Sixth Circuit found third-party standing. Relying on *Singleton*, the Sixth Circuit held that attorneys and these defendants had a close relationship and common interests. Without counsel, the Sixth Circuit observed that these defendants would face difficulty in bringing this challenge. In *Pennsylvania Psychiatric Society v. Green Springhealth Services*, 280 F.2d 278 (3d Cir. 2002), a medical society sued several health management organizations on behalf of member psychiatrists and patients for refusing to authorize necessary treatment. Holding that third-party standing was appropriate, the Third Circuit relied upon the "inherent closeness of the doctor-patient relationship" (*id.* at 288), which ensures that psychiatrists could effectively advance their claims. With respect to the third prong, the Third Circuit held that the "stigma associated with receiving mental health services presents a considerable deterrent to litigation." *Id.* at 290.

[122] *Miller v. Albright*, 523 U.S. 420 (1998) (Clearinghouse No. 51,992).

[123] *Id.* at 451 n.1.

Third-party standing rules are more clearly developed in the context of overbreadth claims. The prototype overbreadth claim arises when regulation of activity protected by the First Amendment is challenged on the ground that the regulation sweeps substantial protected as well as unprotected conduct or expression within its prohibition. When plaintiff is engaging in expression clearly subject to permissible regulation under a properly drawn restraint, the overbreadth challenge raises third-party standing issues.

One overbreadth case was *Secretary of State of Maryland v. Joseph H. Munson Co.*[124] The Court held that a plaintiff invoking third-party standing in an overbreadth case must establish only that he had suffered injury in fact and that he would adequately frame the issues.[125] To demonstrate injury in fact in an overbreadth case, the plaintiff must demonstrate "a genuine threat of enforcement" of the statute against his future activities.[126] Underlying the special third-party standing rule for overbreadth cases is the risk that the absent party whose rights are at issue may refrain from the protected activity rather than sue to vindicate First Amendment rights. Should that happen, society loses the views of those who are silenced.

The public interest implicated by overbreadth challenges yields two corollary rules. The Court held in *Munson* that even when no practical obstacles prevented the party whose rights were at issue from suing, third-party standing was proper. The Court also found no requirement that the plaintiff show that his own conduct could not properly be regulated by a narrowly drawn statute.[127]

## II. Mootness

Both the law of standing and the law of mootness derive from Article III's requirement that the judicial power of the United States extends only to cases and controversies.[128] While the law of standing involves whether the plaintiff had suffered or is threatened with injury in fact at the time of the filing of the complaint, the law of mootness inquires whether events subsequent to the filing of suit have eliminated the controversy between the parties. Generally the burden of showing standing rests with the plaintiff, and the burden of demonstrating mootness lies with the defendant.[129] Like standing, mootness implicates the court's jurisdiction, it can be raised at any time, and any objection cannot be resolved by stipulation.[130] Moreover, counsel for the plaintiff has a duty to bring to the court's attention facts which may raise an issue of mootness.[131] Advocates can expect to encounter mootness issues in light of the Supreme Court's recent decision in *Buckhannon* since government defendants are likely try to moot out cases in order to avoid paying attorney fees.[132]

---

[124] *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

[125] Anyone who has suffered injury is unlikely to be unable to frame the issues adequately. Thus the only real requirement is the irreducible minimum requirement of injury in fact.

[126] *City of Houston v. Hill*, 482 U.S. 451, 459 (1987) (quoting *Steffel v. Thompson*, 415 U.S. 452, 475 (1974)). Thus in *Hill* an individual who had been arrested four times but never convicted under an ordinance prohibiting interference with a police officer had standing to seek to enjoin future enforcement on the ground of overbreadth.

[127] *Munson*, 467 U.S. at 947. See also *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

[128] See *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180 (2000)

[129] *Id.* at 190.

[130] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997) (Clearinghouse No. 52,194).

[131] *Id.*

[132] *Buckhannon Board and Care Home Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001) (Clearinghouse No. 53,373). *Buckhannon* is discussed in Federal Practice Manual for Legal Aid Attorneys, *supra* note 56, ch. 9. See also Gill Deford, *The Prevailing Winds After* Buckhannon, 36 Clearinghouse Review 313 (Sept.–Oct. 2002).

### A. Considering Mootness

As a threshold matter, distinguishing claims for injunctive relief from claims for damages is important. Because damage claims seek compensation for past harm, they cannot become moot.[133] Short of paying plaintiff the damages sought, a defendant can do little to moot a damage claim. The virtual impossibility that damage claims can become moot gives rise to the primary technique for avoiding mootness: plead a claim for damages if the claim has a reasonable basis.[134] Although later events may moot the claim for injunctive relief, the claim for damages is an opportunity to determine the legality of the conduct at issue.[135]

In the absence of a claim for damages, a suggestion of mootness should not trigger a reflexive response in opposition to dismissal.[136] Before investing substantial time and resources in an attempt to resuscitate an apparently moot claim, consider carefully whether any benefit is to be gained. Some cases are truly moot; no present consequences are traceable to the challenged conduct, and, for whatever reason, the conduct is unlikely ever to recur.[137] In such cases, resisting dismissal without prejudice on the ground of mootness makes no sense. The suggestion of mootness should be an occasion to reevaluate both the factual and legal merits of a lawsuit. While the natural reaction during litigation is to resist, there are times when it is better to fight another day with a different plaintiff.

If such a fight is appropriate, it will likely be over whether one of the well-established exceptions to mootness applies or how the exception may apply in the class action context. We therefore focus upon three issues: When does the voluntary cessation of unlawful conduct render a case moot? When does the termination of an injury "capable of repetition yet evad-

---

[133] *Board of Pardons v. Allen*, 482 U.S. 369, 370 n.1 (1987), illustrates the use of a damage claim to avoid mootness. Prisoners who were denied parole without a statement of reasons challenged the denial; they claimed that the state statute mandating release under certain circumstances created a liberty interest in eligibility for parole protected by the Fourteenth Amendment. Plaintiffs sought damages as well as declaratory and injunctive relief. Although plaintiffs were later released, mooting their individual claims for injunctive relief, their damage claims remained alive. Because the immunity of defendants was not settled, the Supreme Court reached the merits, holding that plaintiffs had a cognizable liberty interest in the processing of their parole applications. The Court remanded the case for further proceedings. See also *City of Richmond v. J.A. Croson Co*, 488 U.S. 469, 478 n.1 (1989). An inability to pay a damages judgment at present does not moot a claim. See *United States v. Behrman*, 235 F.3d 1049, 1053 (7th Cir. 2000). However, if the judgment seemingly could never be paid, a claim might be dismissed on prudential grounds. See, e.g., *Federal Deposit Insurance Corp. v. Kooyomjian*, 220 F.3d 10, 14–15 (1st Cir. 2000).

[134] One approach to doing so in due process cases is to request nominal damages. *Carey v. Piphus*, 435 U.S. 247, 254 (1978). See *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. Cir. 1998) ("The violation of certain constitutional rights, characterized by the Supreme Court as 'absolute,' will support a claim for nominal damages without any showing of actual injury."); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2001) ("A live claim for nominal damages will prevent dismissal for mootness."); *Hotel and Restaurant Employees Union Local 25 v. Smith*, 846 F.2d 1499, 1503 (D.C. Cir. 1988); *Beyah v. Coughlin*, 789 F.2d 986, 988–89 (2d Cir. 1986).

[135] The use of damage claims to avoid mootness has limits. States and their agencies are immune under the Eleventh Amendment; those who act in a judicial capacity enjoy absolute immunity, and other officials enjoy qualified immunity. See Federal Practice Manual for Legal Aid Attorneys, *supra* note 56, ch. 8. The assertion of a damage claim against a defendant who clearly enjoys immunity does not save a claim for injunctive relief from mootness. *Trotter v. Klincar*, 748 F.2d 1177 (7th Cir. 1984). Before embarking on a damage claim of questionable validity, the attorney should consider Federal Rule of Civil Procedure 11. See Federal Practice Manual for Legal Aid Attorneys, *supra* note 56, ch. 4. Section II.

[136] A request for a declaratory judgment does not save a case from mootness when claims for injunctive relief are moot. *Green v. Mansour*, 474 U.S. 64, 67–72 (1985).

[137] Litigation challenging discontinued practices or policies that continue to produce collateral harm is not moot. See, e.g., *Reno v. Bossier Parish School Board*, 528 U.S. 320, 327 (2000) (challenge to redistricting plan following election is not moot because prior plan represents a baseline for evaluation of future challenges); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 568–72 (1984) (city's challenge to injunction prohibiting layoffs based on seniority system not mooted by recall of laid-off employees when injunction would require city to ignore seniority rights in future layoffs and would affect its ability to recruit new employees by precluding it from offering the protection of layoffs by seniority); *Jago v. Van Curen*, 454 U.S. 14, 21 n.3 (1981) (challenge to procedures leading to rescission of forthcoming parole not mooted by later release on parole when later release subject to restrictions not contemplated by original grant of parole); *Youakim v. Miller*, 425 U.S. 231, 236 n.2 (1996) (Clearinghouse No. 15,393) (challenge to reduction in benefits for foster children related to foster parents not mooted by increase in benefits when effect is to discourage acceptance of other family members awaiting placement); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974) (challenge to rule denying Aid to Families with Dependent Children (AFDC) benefits to strikers not mooted by settlement of strike when rule affects every labor dispute and collective bargaining agreement)

ing review" render a case moot? How are mootness principles applied in class actions?

## B. Exceptions to Mootness

A defendant may not moot a claim for injunctive relief simply by ceasing the unlawful conduct. A contrary rule would encourage the resumption of unlawful conduct following the dismissal of litigation.

### 1. Voluntary Cessation of Unlawful Conduct

A relevant case is *United States v. W.T. Grant Co.*[138] The Supreme Court held that the voluntary cessation of illegal conduct would moot a case only if the defendant established that "there is no reasonable expectation that the wrong will be repeated."[139] Unless the defendant meets that "heavy" burden, the court has the power to hear the case and the discretion to grant injunctive relief.[140]

Two recent cases illustrate the relative difficulty in persuading a court to dismiss a case on mootness grounds. In *Friends of the Earth* the Court held that a claim for civil penalties intended to deter a polluter from exceeding discharge limits in a permit was not necessarily moot even when the facility at issue had closed because the defendant retained the permit.[141] In *City of Erie v. Pop's A.M.* the Court rejected the suggestion of mootness filed by a prevailing plaintiff in a challenge to city restrictions on adult dancing establishments.[142] Notwithstanding that the club had closed, the Court noted the city's continued stake in wishing to enforce the statute enjoined by the lower courts and the possibility that the plaintiff would reopen a new club.[143]

Mootness then requires a sensitive fact-based prediction of the probability of recurrence and an analysis of the plaintiff's continued need for relief, the defendant's representations, and the public interest in resolution of the dispute. The burden of demonstrating mootness rests on the defendant, and the essential inquiry is the genuineness of the defendant's claim of self-correction.[144] At the same time the plaintiff should be prepared to explain why, as a prudential matter, the court should, despite the defendant's representations, issue declaratory and injunctive relief. When, as in *City of Erie*, the claim implicates public rather than private interests, a reduced risk of recurrence is sufficient to avoid mootness.[145]

With respect to suits against governmental entities, mootness issues arise when the relevant agency or official declares in some way that it will no longer follow the challenged policy or when superseding or amending legislation is enacted. Courts

---

[138] *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953).

[139] *Id.* at 633. See also *Friends of the Earth*, 528 U.S. at 189, 193 (quoting and citing *United States v. Concentrate Phosphate Export Association*, 393 U.S. 199, 203 (1968) ("A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.")).

[140] A different issue arises when a third party voluntarily discontinues conduct that is the focus of the litigation. In *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67 (1983), the secretary of the U.S. Department of Health, Education, and Welfare informed the University of Miami that the university had violated Title IX by permitting a student organization that barred women from membership to conduct its initiation ceremony on campus. The organization sued the secretary to enjoin further enforcement of the interpretation of Title IX. During the litigation, the university informed the organization that, irrespective of the outcome of the litigation, the organization would not be permitted to return to campus until the organization stopped discriminating. Because the university's action effectively superseded the secretary's action, the Supreme Court held the challenge to the secretary's interpretation of Title IX moot, reasoning that the interpretation no longer could affect the organization. The Court did not decide whether the *W.T. Grant* standard applied to the voluntary acts of third parties; the Court reasoned that, even if it did, the public statement of the university president banning the organization from campus established that the controversy between the organization and the Department of Health, Education, and Welfare was unlikely ever to recur.

[141] *Friends of the Earth*, 528 U.S. at 193–94.

[142] *City of Erie v. Pop's A.M.*, 529 U.S. 277, 288 (2000).

[143] Cf. *City News and Novelty Inc. v. City of Waukesha*, 531 U.S. 278 (2001) (unsuccessful challenge to city licensing ordinance is moot when adult-oriented business decides not to renew license).

[144] 13A Charles A. Wright et al., Federal Practice and Procedure § 3533.7 at 353 (2d ed. 1984).

[145] See also *Desiderio v. National Association of Securities Dealers*, 191 F.3d 198, 201–2 (2d Cir. 1999).

generally look favorably on assertions of discontinuance by public officials.[146] However, if the assertion of discontinuance is not complete or permanent, the suggestion of mootness is likely to be denied.[147] Moreover, the defendant who discontinues the challenged conduct while proclaiming its legality is particularly unlikely to succeed in mooting a case.[148]

From an advocacy perspective, establishing early in the litigation the defendant's belief in the legality of the conduct at issue is therefore useful. Probing in discovery facts relevant to the possibility of resumption of the challenged policy is also advisable. Courts frequently reject suggestions of mootness when the defendant fails to offer some assurance that the challenged policy will not be resumed.[149]

Public officials routinely discontinue challenged conduct in response to changes in legislative and administrative provisions governing that conduct. The voluntary cessation of illegal conduct because of the enactment of superseding or repealing legislation ordinarily moots a claim for injunctive relief.[150] There is little risk of recurrence absent further legislation. If, however, the prior statute remains enforceable, challenged implementing regulations remain in effect, or the statutory amendment does not fully resolve the plaintiff's claim, the case is not moot.[151] For example, in *City of Mesquite v. Aladdin's Castle Inc.* the Court held that repeal of a challenged ordinance did not moot the claim for injunctive relief given the city's stated intention to reenact the ordinance should the suit be dismissed.[152]

### 2. Conduct Capable of Repetition Yet Evading Review

Challenges to recurrent conduct of short duration often avoid mootness under the exception for acts "capable of repetition yet evading review." Conduct is capable of repetition but evading review when the duration of the challenged action is too short to be litigated fully before the cessation or expiration of the challenged conduct, and the plaintiff is reasonably expected to be subject to the same action in the future.[153] This branch of the mootness doctrine frequently overlaps with voluntary cessation. The choice between analysis of discontinuation as voluntary cessation of unlawful conduct or as conduct capable of repetition yet evading review is significant because of the differing burdens. The defendant has the heavy burden of showing that voluntary cessation of unlawful conduct moots

---

[146] See, e.g., *Committee in Solidarity with People of El Salvador v. Sessions*, 929 F.2d 742, 744–45 (D.C. Cir. 1991); *Mosley v. Hairston*, 720 F.2d 409, 419 (6th Cir. 1990); see also *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987) (removal of city seal containing the word Christianity from water tanks, vehicles, and uniforms and promise not to display it in the future moot challenge to display).

[147] *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) ("interim relief or events have completely and irrevocably eradicated the effects of the alleged violation"*); Radio-Television News Directors Association. v. Federal Communications Commission*, 229 F.3d 269, 270–72 (D.C. Cir. 2000).

[148] *Sasnett v. Litscher*, 197 F.3d 290, 291–92 (7th Cir. 1999); *United States v. Laerdal Manufacturing Corp.*, 73 F.3d 852, 856 (9th Cir. 1995); *Donovan v. Cunningham*, 716 F.2d 1455, 1461–62 (5th Cir. 1983). See *Walling v. Helmerich*, 323 U.S. 37, 43 (1944).

[149] See *Pederson v. Louisiana State University*, 213 F.3d 858, 874–75 (5th Cir. 2000); *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1274–75 (9th Cir. 1998); *American Iron and Steel Institution. v. Environmental Protection Administration*, 115 F.3d 979, 1006–7 (D.C. Cir. 1997).

[150] See *Citizens Responsible for Government v. Davidson*, 236 F.3d 1174, 1181–84 (10th Cir. 2000) (election law); *Mosley v. Hairston*, 920 F.2d 409, 413–15 (6th Cir. 1990) (AFDC statute); *Fraternal Order of Police Lodge 121 v. City of Hobart*, 864 F.2d 551, 553 (7th Cir. 1988) (wage and hour statute). See also *Green v. Mansour*, 474 U.S. 67–72 (1986) (prospective challenge to AFDC benefit calculation rendered moot by superseding legislation requiring claimed deductions) *Princeton University v. Schmid*, 455 U.S. 100 (1982) (per curiam) (repeal of university regulations moots challenge to their validity); WRIGHT ET AL., *supra* note 144, § 3533.6.

[151] See *Allee v. Medrano*, 416 U.S. 802 (1974) (superseding legislation mooted challenge to prior legislation except to extent that pending criminal prosecutions subject to injunction for bad-faith prosecution remain); *Washington v. Daley*, 173 F.3d 1158 (9th Cir. 1999); *Amoco Production Co. v. Fry*, 118 F.3d 812, 815–16 (D.C. Cir. 1997).

[152] *City of Mesquite v. Aladdin's Castle Inc.*, 455 U.S. 233 (1982).

[153] *Irish Lesbian and Gay Organization v. Giuliani*, 143 F.3d 638, 647–48 (citing *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

a case, while the plaintiff has the burden of showing that conduct is capable of repetition yet evading review.[154]

Determining whether this exception applies requires an assessment of the probability of repetition or recurrence, the risk that repeated harm will be of sufficiently short duration so as to evade review and remedy, and the extent to which repetition may affect the plaintiff.[155] The Supreme Court has been inconsistent in its treatment of the requirement that the conduct be shown to be capable of repetition; the Court wavered between the more stringent requirement of a "demonstrated probability" and the less stringent requirement of a "reasonable expectation."[156] In *City of Los Angeles v. Lyons*, a challenge to a city policy of using choke holds to subdue suspected criminals, the Court held that a generalized showing that conduct might recur was not sufficient to trigger the exception.[157] The Court stated that the "doctrine applies only in exceptional situations, and generally only in those cases in which the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality."[158]

However, in *Honig v. Doe*, the Court limited *Lyons*.[159] The Court stated that *Lyons* revealed only that the Court was "unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury."[160] The Court held that a "reasonable expectation" of recurrence was sufficient to overcome a suggestion of mootness: "in numerous cases . . . we have found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable."[161] Such a reasonable expectation may be found in the history of the plaintiff's relationship with the defendant.[162]

Actions evade review when they are "too short to be fully litigated prior to cessation or expiration."[163] The question is

---

[154]Nonetheless the Supreme Court found claims not to be moot on these grounds on many occasions. See, e.g., *International Organization of Masters v. Brown*, 498 U.S. 466, 472–73 (1991) (challenge to union election rule); *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988) (challenge to state law on electoral initiatives); *Honig v. Doe*, 484 U.S. 305, 317–18 (1988) (claim under Education for the Handicapped Act); *Burlington Northern Railroad v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 436 n.4 (1987) (labor dispute); *United States v. New York Telephone Co.*, 434 U.S. 159, 165 n.6 (1977) (challenge to order requiring pen register surveillance).

[155]The Supreme Court in *Renne v. Geary*, 501 U.S. 312, 320 (1991), also suggested that the capable-of-repetition doctrine "will not revive a dispute which became moot before the action commenced." The decision, criticized in WRIGHT ET AL, *supra* note 144, § 3533.8 at 495 (Supp. 2003), has been repeated in *Friends of the Earth*, 528 U.S. at 191, and *Steel Co.*, 523 U.S. at 109. Taken literally, the holding may threaten to limit this branch of mootness doctrine.

[156]See *Buckley v. Archer-Daniels-Midland Co.*, 111 F.3d 524, 527–28 (7th Cir. 1997) (applying various standards of the possibility of recurrence, such as "reasonable expectation," "demonstrated probability," and not "highly unlikely").

[157]*City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Buckley*, 111 F.3d at 527–28 ("demonstrated possibility" required) (quoting *Board of Education v. Steven L.*, 9 F.3d 464, 468 (7th Cir. 1996)).

[158]*Lyons*, 461 U.S. at 109. See also *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam) (challenge to state constitutional provision denying pretrial release in sexual assault case mooted by conviction; no probability that plaintiff will again be arrested and detained pending trial); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam) (challenge to procedures governing release on parole mooted by unconditional release; no probability that plaintiff will again be affected by procedures).

[159]*Honig v. Doe*, 484 U.S. 305 (1988).

[160]*Id.* at 320.

[161]*Id.* at 319 n.6.

[162]See *Olmstead v. L.C. by Zimring*, 527 U.S. 581, 594 n.6 (1999) (Clearinghouse No. 52,203) (action to require treatment for disabilities not moot even after plaintiffs were placed in requested programs because they had many institutional placements in the past).

[163]*Spencer v. Kemna*, 523 U.S. 1, 17 (1998); see *Brock v. Roadway Express Inc.*, 481 U.S. 252, 258 (1986). The D.C. Circuit held that "orders of less than two years' duration ordinarily evade review." *Burlington Northern Railroad Co. v. Surface Transportation Board*, 75 F.3d 685, 690 (D.C. Cir. 1996); see also *Public Utilities Commission of California v. Federal Energy Regulatory Commission*, 236 F.3d 708, 714 (D.C. Cir. 2001) (holding that orders regarding two-year contracts evaded review for purpose of mootness); *Irish Gay and Lesbian Organization*, 143 F.3d at 648 (a few weeks between denial of march permit and march).

whether the action is inherently of brief duration, not merely of short duration before the court. Therefore, if circumstances suggest that a possible recurrence of challenged conduct could be litigated should it arise, courts decline to invoke the exception. Such circumstances include the possible use of motions for preliminary injunction, emergency stays, and expedited appeals. Should a plaintiff fail to attempt to avail itself of these procedural opportunities, courts are disinclined to regard the matter as evading review.[164] Advocates are therefore advised first to pursue these avenues for relief when appropriate.

The plaintiff must show that not anyone but "*he* will again be subjected to the alleged illegality."[165] Despite this restrictive language, the Court invokes the exception in circumstances in which the probability of recurrence to the plaintiff is not obvious. Litigation involving the regulation of

- abortion,[166]
- elections,[167] and
- press access to trials[168]

has proceeded despite claims of mootness without any apparent basis for a finding of probable recurrence. The public importance of the issue may explain the more relaxed approach in these narrow categories of cases.[169]

## C. Mootness and Class Actions

Class actions raise the question of whether the claims of the class become moot when the individual claims of the class representatives are moot. In litigation involving recurrent conduct of short duration, pleading a claim as a class action before the conduct terminates offers a greater likelihood of avoiding mootness. Once certified, the case can become moot only if there is no risk of recurrence to the class; as long as the challenged conduct threatens a member of the class, the case will not be moot. Thus class actions shift the mootness inquiry from whether there is a reasonable likelihood that the conduct will again affect the plaintiff to whether there is a reasonable likelihood that the conduct will affect the plaintiff class.

As a matter of practice, in certain cases the advocate may wish to consider avoiding the mootness issue by moving to amend the complaint to add claims of "live" representative plaintiffs.[170] Whether this is possible may turn on the nature and duration of the claim at issue. Doing so requires

---

[164]See, e.g., *Minnesota Humane Society. v. Clark*, 184 F.3d 795, 797 (8th Cir. 1999); *Freedom Party v. New York State Board of Elections*, 77 F.3d 660, 662–63 (2d Cir. 1996); *United States v. Taylor*, 8 F.3d 1074, 1076–77 (6th Cir. 1993).

[165]*Lyons*, 461 U.S. at 107–8; *DeFunis v. Odegaard*, 416 U.S. 312, 318–19 (1974). Typical examples are when a student or youth challenges a policy but later graduates or matures to adulthood before resolution of the case. See *Stotts v. Community Unit School District*, 230 F.3d 989 (7th Cir. 2000); *Cole v. Oroville Union High School District*, 228 F.3d 1092, 1098 (9th Cir. 2000). Cases seeking equitable relief involving prison conditions brought by inmates who are transferred or released are commonly moot for the same reason. See *Herman v. Holiday*, 238 F.3d 660, 665 (5th Cir. 2001); *Smith v. Hundley*, 190 F.3d 852 (8th Cir. 1999); *Kerr v. Farrey*, 95 F.3d 472, 475–76 (7th Cir. 1996).

[166]In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court held that the conclusion of a pregnancy did not moot a challenge to a statute prohibiting abortions without any showing that the plaintiff was likely to suffer another unwanted pregnancy.

[167]Litigation brought by candidates challenging ballot access restrictions does not become moot when the election is complete. *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Moore v. Ogilvie*, 394 U.S. 814 (1969). The Supreme Court shows no interest in the question of whether the affected candidate is likely to run for election again. See also *Mandel v. Bradley*, 432 U.S. 173 (1979); *Storer v. Brown*; 415 U.S. 724 (1974); *Brown v. Chote*, 411 U.S. 452 (1973).

[168]E.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 6–7 (1986) (challenge to denial of access to pretrial hearing not mooted by release of transcript because plaintiff could be assumed to be subject again to exclusion from hearings); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602 (1982) (challenge to exclusion from portions of criminal trial involving testimony by minor who claimed to be victim of sexual battery not mooted by completion of trial for same reason); *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980) (challenge to exclusion from criminal trial not mooted by completion of trial for same reason).

[169]See *Alton and Southern Railway Co. v. International Association of Machinists and Aerospace Workers*, 463 F.2d 872, 880 (D.C. Cir. 1972); *accord United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (holding that repetition or review element, "together with a public interest in having the legality of the practices settled, militates against a mootness conclusion").

[170]Advocates in LSC-funded programs may not file or participate in class action litigation. 45 C.F.R. § 1617.

the advocate to be vigilant in continuing to identify such plaintiffs following the commencement of litigation. Choosing not to name identified class representatives in a complaint in order to hold them in "reserve" for this purpose may raise difficult ethical issues and should not be undertaken without exploration of these issues.

In *Sosna v. Iowa*, plaintiff, on behalf of a class, challenged a state requirement that a petitioner for divorce reside in the state for one year prior to filing the petition.[171] By the time the case was argued before the Supreme Court, the year period had ended, the named plaintiff was divorced, and the law would not again affect the plaintiff. The Court nevertheless found the case not to be moot because the certified class had acquired a legal status separate from the plaintiff. *Sosna* suggests that this doctrine extends only to cases in which the named plaintiff's claim was of brief duration and would therefore otherwise evade review.[172]

In *Franks v. Bowman Transportation Co.* the Court appeared to relax the *Sosna* rule further.[173] There the named representative of a subclass challenging racial discrimination in employment selection had been subsequently hired. The Court held that the *Sosna* rule applied prudentially only to constitutional claims in which the individual claims were capable of repetition but evading review. The distinction between constitutional and statutory claims drawn in *Franks* was thereafter eliminated in *Kremens v. Bartley*.[174]

Although the classes in *Kremens* and *Franks* were certified before the question of mootness arose, the timing of certification has since diminished in importance. In *United States Parole Commission v. Geraghty* the plaintiff sued on behalf of a class challenging parole release guidelines.[175] The district court denied certification and entered judgment for the defendants. Although the plaintiff completed his sentence while his appeal was pending, mooting his personal challenge to the guidelines, the Supreme Court held that he could nevertheless pursue an appeal from the final judgment on the ground that class certification was wrongly denied.[176]

*Geraghty* specifically holds that a putative class action does not become moot when the claim of the named plaintiff expires after denial of class certification. Moreover, *Geraghty* recognizes that "[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires"; in such cases, certification can relate back to the filing of the complaint.[177]

*Geraghty* effectively makes the class a party to the suit from the moment of filing. Should the claim of the representative party become moot before the trial court rules on certification, a case and controversy will continue to exist concerning class certification.[178] To establish that a class should nevertheless be certified, the plaintiff must show that the transitory nature of

---

[171] *Sosna v. Iowa*, 419 U.S. 393 (1975).

[172] See also *Gerstein v. Pugh*, 420 U.S. 103 (1975) (class action challenging state practice of holding criminal defendants accused by information without a probable cause hearing was not moot when the named class representatives were convicted).

[173] *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976).

[174] *Kremens v. Bartley*, 431 U.S. 119 (1977) (remanding case for substitution of new class representatives).

[175] *U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980).

[176] Although Geraghty was allowed to challenge the denial of class certification on appeal, he was not allowed to litigate the merits until a class was properly certified. The Supreme Court noted that should an appellate court affirm denial of class certification, it would necessarily also affirm dismissal on the ground of mootness. Because the court of appeals had ruled that the class should have been certified, the Supreme Court remanded *Geraghty* to the district court for consideration of whether Geraghty should represent the class or whether another class representative should be appointed.

[177] *Geraghty*, 445 U.S. at 399; see also *County of Riverside v. McLaughlin*, 500 U.S. 44, 50 (1991).

[178] The defendant may not moot a proposed class action by making a full offer of judgment to the individual plaintiffs. Should the court deny certification and enter judgment for the individual plaintiffs, the plaintiffs may still appeal from that judgment on behalf of the class. *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980).

the claim is such that it will inevitably expire before a class can be certified.[179] The plaintiff also must show reasonable diligence in filing the complaint and seeking class certification.[180] Such diligence may be demonstrated by filing a motion for class certification with the complaint and proceeding with class discovery promptly.[181]

*Geraghty* is not a foolproof defense to mootness. The Court leaves district courts with considerable discretion in matters of class certification. Should a trial court dismiss before ruling on certification, *Geraghty* may assure reversal for consideration of class certification. However, *Geraghty* assures only consideration of class certification. Should the district court deny certification and dismiss again, establishing on appeal that the court abused its discretion in denying class certification will be necessary. When feasible, it makes sense to intervene additional plaintiffs with live claims rather than to rely exclusively upon *Geraghty* to avoid mootness.

## III. Exhaustion and Preclusion

This section discusses the circumstances under which a federal plaintiff is required to exhaust judicial or administrative remedies before filing in federal court and the preclusion implications of pursuing such remedies when not statutorily mandated.

### A. Whether Exhaustion Is Required

To determine whether exhaustion is required, the advocate must first examine the federal statute that provides the right sought to be enforced for explicit or implicit exhaustion requirements. If exhaustion is required, determine whether one of the recognized exceptions to enforcement of exhaustion applies to the circumstances of the case. The advocate must consider whether to pursue such available remedies when exhaustion of remedies is not required, as in Section 1983 actions.[182] This entails an assessment of the needs of the client, the certainty and speed of such relief, and, of particular importance, the possibility that pursuing such remedies will have claim or issue preclusive effect on any subsequent federal action. The prospect of litigating multiple federal claims or federal and state-law claims with different exhaustion requirements adds another layer of complexity to the assessment.

The structure of practice in many legal aid programs effectively gives the initial strategic decisions to paralegals and to attorneys who may not typically handle federal litigation. Decisions made by these staff members may foreclose the federal forum as a viable option because of the preclusion doctrines. Thus, early in the representation of the client, having experienced federal litigators collaborate with staff who represent clients in administrative hearings is important.

### B. Statutory Duty of Exhaustion

Exhaustion of federal or state administrative remedies is required when Congress explicitly requires exhaustion as a prerequisite to bringing an action in federal court.[183] Such an expression must be specific and clear.[184] For example, 42 U.S.C. § 1997e(a), part of the Prison Litigation Reform Act, provides: "No action shall be brought with respect

---

[179]See *County of Riverside*, 500 U.S. at 51–52 (1991) ("That the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction. . . . In such cases, the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial determination."); *Wade v. Kirkland*, 118 F.3d 667 (9th Cir. 1997); *Robidoux v. Celani*, 987 F.2d 931, 938–39 (2d Cir. 1993) (class action challenging delays in processing welfare applications; such delays are inherently transitory); *Basel v. Knebel*, 551 F.2d 395 (D.C. Cir. 1977). For cases in which plaintiffs did not establish this, see *Egan v. Davis*, 118 F.3d 1148, 1149–51 (7th Cir. 1997) (Clearinghouse No. 52,201); *Rocky v. King*, 900 F.2d 864, 767–71 (5th Cir. 1990); *Ahmed v. University of Toledo*, 822 F.2d 26 (6th Cir. 1987).

[180]See *Banks v. National Collegiate Athletic Association*, 977 F.2d 1081, 1085–86 (7th Cir. 1992), *cert. denied*, 508 U.S. 908 (1993).

[181]See *Christiano v. Courts of the Justices of the Peace in and for New Castle County*, 115 F.RD. 240 (D. Del. 1987).

[182]*Patsy v. Board of Regents*, 457 U.S. 496, 501 (1982).

[183]*McCarthy v. Madigan*, 503 U.S. 140, 144 (1991).

[184]*Id.*

to prison conditions . . . until such administrative remedies are exhausted." The Supreme Court held that this language reflected Congress' intent to require exhaustion in all cases and to eliminate any discretion to permit exceptions.[185]

The interpretive question in such cases is the breadth of statutorily required exhaustion provisions.[186] For example, the Individuals with Disabilities Education Act provides that, "before the filing of a civil action . . . seeking relief that is also available under [the Act], the procedures . . . of this section shall be exhausted."[187] The circuits are evenly split on whether this provision requires the exhaustion of administrative remedies that cannot supply the particular relief (money damages) sought in the federal action.[188] An exception may also apply when an agency adopts a policy or pursued a practice of general applicability contrary to law.[189]

Without an explicit statutory requirement for exhaustion, "courts are guided by congressional intent in determining whether application of the doctrine would be consistent with the statutory scheme."[190] Thus implicit exhaustion requirements are often determined by statutory interpretation and legislative history.[191] In these circumstances "courts play an important role in determining the limits of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided."[192]

Statutory exhaustion requirements may vary even within the same statute or program. For example, Title I, but not Title III, of the Americans with Disabilities Act has an exhaustion requirement.[193] Furthermore, combining claims from a federal statute that does not require exhaustion with one that does have an exhaustion requirement can result in enforcement of an exhaustion requirement for both statutory claims.[194]

### C. Common-Law Duty of Exhaustion

When "Congress has not clearly required exhaustion, sound judicial discretion governs."[195] Exercise of this discretion involves balancing the interests of the plaintiff in accessing a federal forum promptly against the institutional interests advanced when exhaustion is required.[196]

---

[185]See *Porter v. Nussle*, 534 U.S. 516 (2002) (Clearinghouse No. 54464); *Booth v. Churner*, 532 U.S. 731 (2001) (Clearinghouse No. 52,943).

[186]In *Equal Employment Opportunity Commission v. Lutheran Social Services*, 186 F.3d 959 (D.C. Cir. 1999), e.g., the D.C. Circuit wrestled with question whether a Civil Rights Act provision providing that a recipient of a subpoena "may petition" the agency to revoke the subpoena required the recipient to do it. In a 2-to-1 decision, the court concluded that it did not. *Id.* at 965.

[187]20 U.S.C. § 1415(l).

[188]*Covington v. Knox County School System*, 205 F.3d 912 (6th Cir. 2000) (Clearinghouse No. 52,942); *Witte v. Clark County School District*, 197 F.3d 1271 (9th Cir. 1999) (Clearinghouse No. 52,812); *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1996) (no exhaustion); *Frazier v. Fairhaven School Committee*, 276 F.3d 52 (1st Cir. 2002) (Clearinghouse No. 54,384); *Charlie F. v. Board of Education*, 98 F.3d 989 (7th Cir. 1996); *N.B. v. Alachua County School Board*, 84 F.3d 1376 (11th Cir. 1996) (requiring exhaustion).

[189]*Hoeft v. Tucson Unified School District*, 967 F.2d 1298, 1305 (9th Cir. 1992).

[190]*Patsy*, 457 U.S. at 502, n. 4.

[191]*Alacare Inc. v. Baggiano*, 785 F.2d 963, 966 (11th Cir. 1986) (quoting *Patsy*, 457 U.S. at 501).

[192]*Id.*

[193]*Moyer v. Showboat Casino Hotel*, 56 F. Supp. 2d 498 (D. N.J. 1999).

[194]See *Hope v. Cortines*, 872 F. Supp. 14 (E.D.N.Y. 1995) (combining an Americans with Disabilities Act Title II claim with an Individuals with Disabilities Education Act claim required exhaustion).

[195]*McCarthy*, 503 U.S. at 144. Such is the case in which there is only a regulatory exhaustion requirement. See also *Cossio v. Hawk*, Civ. No. 97-445, 1998 U.S. Dist. LEXIS 2433 (D.C. Cir. Feb. 25, 1998).

[196]Those interests were summarized in *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975): "Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for review."

The Supreme Court in *McCarthy* identified three circumstances which, if present, would weigh against exhaustion. The first occurs when requiring exhaustion would unduly prejudice a subsequent court action, such as when the administrative process is either delayed or does not otherwise allow the plaintiff to avert irreparable harm.[197] In *Bowen v. City of New York* the Court found that a class of social security disability insurance claimants would suffer irreparable injury if they were required to exhaust their administrative remedies fully with the Social Security Administration.[198] A second set of circumstances warranting waiver of the exhaustion requirement occurs when the administrative remedy is shown to be inadequate.[199] Such might be the case when the agency was unable to grant an effective remedy or unable to consider the issues presented. Moreover, exhaustion was not required when the challenge was to the agency procedures themselves.[200] Third, the Court finds a waiver of exhaustion appropriate when agency bias is shown. Applying these factors, the Court in *McCarthy* held that a federal prisoner did not have to exhaust the Federal Bureau of Investigation's administrative remedy procedure before filing a *Bivens* action in federal court.[201]

## D. Preclusion

Should exhaustion of judicial or administrative remedies not be required, the advocate has to assess whether to seek such remedies voluntarily or to proceed with federal litigation. Because final judgments or administrative decisions may well have preclusive effect in subsequent federal litigation, voluntary exhaustion has potential dangers.

### 1. Claim Preclusion

In 28 U.S.C. § 1738, the full-faith and credit statute, Congress "required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so."[202] Federal courts apply state preclusion law to determine whether a state court judgment precludes a subsequent federal suit.[203] The Supreme Court therefore held that final state court judgments barred

- Title VII actions[204] and
- actions brought under 42 U.S.C. § 1983.[205]

State court judgments affirming administrative decisions similarly have preclusive effect under Section 1738.[206]

The preclusive effect of unreviewed administrative decisions is set forth in Section 83(1) of the Restatement (Second) of Judgments:

> If the administrative adjudication has the essential elements of an adjudication, and preclusion is consistent with the scheme of remedies, then a valid and final administrative deter-

---

[197] *McCarthy*, 503 U.S. 146–47; *Coit Independence Joint Venture v. Federal Savings and Loan Insurance Corp.*, 489 U.S. 561 (1989).

[198] *Bowen v. City of New York*, 476 U.S. 467 (1986). The court noted that a "severe medical setback" might result from the "trauma of having disability benefits cut off" and "the ordeal of having to go through the administrative appeal process." *Id.* at 483.

[199] *McCarthy*, 503 U.S. at 147–48.

[200] *Gibson v. Berryhill*, 411 U.S. 564, 575 (1973).

[201] A common fourth exception is where the litigant raises a colorable constitutional claim that is collateral to her substantive claim of entitlement. See *Clarinda Home Health v. Shalala*, 100 F.3d 526 (8th Cir. 1996); see also *Mathews v. Eldridge*, 424 U.S. 319 (1976).

[202] *Allen v. McCurry*, 449 U.S. 90, 96 (1980).

[203] *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985).

[204] *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1982).

[205] *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984).

[206] *Kremer*, 456 U.S. at 461.

> mination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.[207]

The preclusive effect of administrative determinations raises three basic questions: (1) When does administrative adjudication have the essential elements of adjudication?[208] (2) What claim did the administrative agency resolve (and thus preclude from relitigation)? (3) Did Congress by statute direct the court to apply preclusion?

The first question—the required degree of formality to the administrative hearing—is relevant to both claim and issue preclusion (discussed *infra*). When the agency engages in a trial-type proceeding, the resulting findings are likely to have preclusive effect. Such features of a trial-type proceeding include the following safeguards:

> (1) opportunity for representation by counsel; (2) pretrial discovery; (3) the opportunity to present memoranda of law; (4) examinations and cross-examinations at the hearing; (5) the opportunity to introduce exhibits; (6) the chance to object to evidence at the hearing; and (7) final findings of fact and conclusions of law.[209]

These safeguards go beyond the minimum due process requirements identified in *Goldberg v. Kelly*.[210] There is little consistency as to whether proceedings with fewer safeguards may have preclusive effect.[211] The preclusive effect of findings in social security hearings, for example, commanded no consistent opinion.[212] Analogously arbitration processes, conducted pursuant to collective bargaining agreements, are not, the Court long concluded, adequate to warrant their awards to be given preclusive effect in a subsequent Section 1983 action:

> [A]rbitral factfinding is generally not equivalent to judicial factfinding [in that] "[t]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."[213]

The Court's critique of arbitration may well characterize many state and local government administrative proceedings. The second question concerns when a claim brought in a first action is sufficiently similar to one sought to be brought later in federal court to require preclusion. Section 24 of the Restatement, which has been very

---

[207]The general rule of res judicata is found in Section 24 of the Restatement (Second) of Judgments (1982). Generally a final judgment on the merits precludes the same parties or parties in privity with them from litigating the same claim in a subsequent lawsuit. Claim preclusion bars the relitigation in federal court of both claims subject to a final state court judgment and of claims which were not raised in state court.

[208]See *United States v. Utah Construction and Mining Co.*, 387 U.S. 394, 422 (1966) (putting the question "whether the parties had an adequate opportunity to litigate"). In *Haring v. Prosise*, 462 U.S. 306, 317–18 (1983), the Supreme Court further held that, "as a general matter, even when issues have been raised, argued, and decided in a prior proceeding, and therefore are preclusive under state law, redetermination of [the] issues [may nevertheless be] warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."

[209]*Sokoya v. 4343 Clarendon Condominium Association*, 199 U.S. Dist. LEXIS 17879 (N.D. Ill. 1996), *citing Reed v. Amax Coal Co.*, 971 F.2d. 1295, 1300 (7th Cir. 1992). See also *Kleenwell Biohazard Waste v. Nelson*, 48 F.3d 391, 393 (9th Cir. 1995); *Hall v. Marion School District*, 31 F.3d 183 (4th Cir. 1994).

[210]*Goldberg v. Kelly*, 397 U.S. 254 (1970).

[211]See *Clark v. Alexander*, 85 F.3d 146 (4th Cir. 1996), holding that implementation of the *Goldberg* due process requirements insured an adequate Section 8 certificate termination hearing. However, rather than give the hearing fact-finding issue preclusive effect in a later appeal to federal court, the court of appeals held that deference should be given to the findings: the fact-finding should be reviewed under a substantial-evidence standard and not be given preclusive effect.

[212]See *Drummond v. Commissioner*, 126 F.3d 837 (6th Cir. 1997); *Purter v. Heckler*, 771 F.2d 682 (3d Cir. 1985); *McGowen v. Harris*, 666 F.2d 60 (4th Cir. 1981).

[213]*McDonald v. City of West Branch*, 466 U.S. 284, 290–91 (1984).

influential, defines the "same" claim as one arising out of the same transaction or series of transactions. "Transactions" in turn "are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."[214] Put more practically, whether a second lawsuit is based upon the same claim litigated as in a prior action "turns on the essential similarity of the underlying events giving rise to the various claims."[215] To determine whether causes of action are sufficiently similar to apply preclusion, "[c]ourts consider the similarity of the acts complained, the material factual allegations in each suit and the witnesses and documentation required to prove each claim."[216]

Claim preclusion can be enforced quite rigorously, as when the plaintiff could not have raised the claims asserted in the second suit in the first action if the claims arose from the same transaction or occurrence. In *Wilkes v. Wyoming Department of Employment Division of Labor Standards* the court barred a plaintiff from bringing a Title VII discrimination action in federal court because of the settlement of a prior federal court case, in which the plaintiff had not and could not have asserted the discrimination claim but which arose out of the same employment relationship.[217] Wilkes argued that federal claim preclusion should not apply to subsequent litigation of the Title VII claim because there was no jurisdiction for inclusion of the retaliation claim in the first court action. Nevertheless, the court found that claim preclusion applied because all of the employment claims, including the retaliation charge, resulted from the same employment relationship, and the plaintiff could have made a choice of forum to enable her to include all of her claims in a single court case.

Third, Congress may, by statute, overturn the presumptive application of preclusion of administrative determinations.[218] The leading case is *University of Tennessee v. Elliott*.[219] In *Elliott* the university fired an African American employee. He appealed the decision administratively, claiming that the termination was racially motivated. The administrative law judge disagreed. Elliott then filed a Tile VII and Section 1983 suit in federal court. The university argued that the administrative law judge's finding precluded relitigation of the discrimination issue. With respect to the Title VII claim, the Court held that the language of the statute reflected Congress' intent that unreviewed state administrative proceedings had no preclusive effect on such claims.[220] The Court, however, found no evidence of such intent in Section 1983; moreover, the Court found, giving preclusive effect to administrative fact-finding enforces repose, conserves resources, and promotes federalism.[221]

Even when all the requirements for claim preclusion appear to be satisfied, some courts do not apply it when important federal rights are at stake. For example, in *Gjellum v. City of Birmingham* the Eleventh Circuit decided that the federal common

---

[214]Restatement (Second) of Judgments § 24 (1982).

[215]*Churchill v. Star Enterprises*, 183 F.3d 184, 194 (3d Cir. 1999).

[216]*Lubrizol v. Exxon Corp.*, 929 F.2d 960, 963 (3d Cir. 1991).

[217]*Wilkes v. Wyoming Department of Employment Division of Labor Standards*, 314 F.3d 501 (10th Cir. 2002).

[218]The Supreme Court directed the lower courts to assume that Congress intended the presumption of preclusive effect of administrative findings to apply unless Congress indicated otherwise. *Astoria Federal Savings v. Solimino*, 501 U.S. 104, 108 (1991). That indication, however, need not be clear and precise. *Id.* (language of Age Discrimination in Employment Act implies that Congress intended administrative findings not to have preclusive effect).

[219]*University of Tennessee v. Elliott*, 478 U.S. 788 (1986).

[220]*Id.* at 795–96.

[221]*Id.* at 798.

law of preclusion did not require application of state claim preclusion rules to unreviewed state administrative decisions in subsequent Section 1983 suits:[222]

> We conclude that the importance of the federal rights at issue, the desirability of avoiding the forcing of litigants to file suit initially in federal court rather than seek relief in an unreviewed administrative proceeding, and the limitations of state agencies as adjudicators of federal rights override the lessened federalism concerns implicated outside the contours of the full faith and credit statute. In addition, claim preclusion, unlike issue preclusion, does not create a risk of inconsistent results in this context after *Elliott* because claim preclusion seeks to prevent litigation of issues that were not adjudicated before the state agency.[223]

In *Dionne v. Mayor and City Council of Baltimore* the Fourth Circuit agreed with this reasoning.[224] Relying in large part on the limited nature of the administrative proceeding at issue, the court observed that the plaintiff could not have raised constitutional law theories or sought remedies available under Section 1983.[225] The court noted that the state court system could not have served as an adequate and unitary alternative forum for the assertion of all theories and remedies.[226] The court reasoned that applying claim preclusion to unreviewed state agency determinations would discourage plaintiffs from pursuing the generally cheaper and more efficient route of seeking an administrative remedy in order to preserve their federal rights.[227]

The Seventh Circuit applied a narrow rule for federal common-law claim preclusion and cited the Eleventh Circuit's analysis for the proposition that there were limits to how far a court should go in enforcing preclusion. In *Waid v. Merrill Area Public Schools* the Seventh Circuit reviewed a teacher's suit brought under Section 1983 and Title IX of the Education Amendments Act of 1972 and held that claim preclusion did not prevent bringing the Title IX claim after going through a state administrative proceeding.[228]

The Seventh Circuit concluded, based upon its examination of the state agency's limited jurisdiction (none to hear the federal law claims, and exclusive jurisdiction over a state law claim, not reviewable in state court), that claim preclusion did not apply because "it is clear that she could not have consolidated all of her claims in a single lawsuit."[229] If the state administrative forum were adequate in allowing all claims to be brought, state preclusion law, the opinion suggests, could be applied. However, the Seventh Circuit also cited the Eleventh Circuit's decision in *Gjellum* for the proposition that deference to state administrative process and state preclusion law was limited when that would impair enforcement of federal rights.[230]

On the other hand, other courts expanded preclusion to include conclusions of law. In *Miller v. County of Santa Cruz* the Ninth Circuit held that unreviewed state agency determinations were entitled to be given preclusive effect in subsequent Section 1983 litigation.[231] The Ninth Circuit recognized that, based upon its assessment of the adequacy of the state administrative forum, it was going farther than the Supreme Court

---

[222] *Gjellum v. City of Birmingham*, 829 F.2d 1056 (11th Cir. 1987).

[223] *Id.* at 1064.

[224] *Dionne v. Mayor and City Council of Baltimore*, 40 F.3d 677, 682 (4th Cir. 1994).

[225] *Id.* at 683.

[226] *Id.*

[227] *Dionne*, 40 F.3d at 684. *Edmundson v. Borough of Kennett Square*, 4 F.3d 186 (3d Cir. 1993).

[228] *Waid v. Merrill Area Public Schools*, 91 F.3d 857 (7th Cir. 1996).

[229] *Id.* at 866.

[230] *Id.* at 865.

[231] *Miller v. County of Santa Cruz*, 39 F.3d 1030 (9th Cir. 1994).

required federal courts to go in *Elliott*:

> *Elliott* requires us to give preclusive effect, at a minimum, to the fact finding of state administrative tribunals. We have gone further, however, and held that "the federal common law rules of preclusion described in *Elliott* extend to state administrative adjudications of legal as well as factual issues, even if unreviewed, so long as the state proceeding satisfies the requirements of fairness outlined in [*United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966)]."[232]

The Eighth Circuit followed the Ninth. In *Plough v. West Des Moines Community School District* the Eighth Circuit concluded that both claim and issue preclusion applied to an unreviewed state agency determination.[233] The plaintiff opposed a defense of claim preclusion in his Section 1983 action, contending that *Elliott* required issue preclusion only for fact-finding, and the state agency's determination of a legal question (that his due process rights had not been violated) was not entitled to be given preclusive effect under federal law. The court concluded plaintiff had a full and fair opportunity to litigate his claims in the administrative process, and therefore state law on claim preclusion should be applied.

### 2. Issue Preclusion

The Restatement (Second) of Judgments, Section 27, provides:

> When (1) an issue of fact or law is (2) actually litigated and determined by (3) a valid and final judgment, and (4) the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

The Supreme Court approved the application of the federal common-law principle of issue preclusion to the litigation of federal claims between parties as well as the expansion to nonmutual defensive and offensive use of issue preclusion.[234] However, the Court declined to employ issue preclusion when the party against whom it was asserted did not have a "full and fair opportunity to litigate the issue" in the earlier case.[235]

The application of issue preclusion to federal litigation is probably most relevant to legal services practice when the fact-finding of an administrative agency is proposed to be given preclusive effect in a subsequent Section 1983 action.[236] The Court in *Elliott* held that sound policy considerations warranted the application of issue preclusion to the fact-finding of administrative bodies acting in a judicial capacity to the same extent as the findings would receive in state court.[237] As discussed above, Congress has the authority expressly or implicitly to limit the usual preclusive effect given to agency decision.[238] If Congress does not, the federal court applies state law preclusion doctrine.

Such application is highly fact-dependent and not susceptible to generalization. Nonetheless the typical litigated questions are whether the issues decided administratively are the same as those at stake in the subsequent federal case and whether the applicable administrative process afforded the party potentially subject to preclusion a full and fair opportunity to litigate.[239]

---

[232] *Id.* at 1032.

[233] *Plough v. West Des Moines Community School District*, 70 F.3d 512 (8th Cir. 1995).

[234] See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (offensive); *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) (defensive).

[235] See *Allen*, 449 U.S. at 94–95.

[236] See *University of Tennessee v. Elliott*, 478 U.S. 788 (1986).

[237] *Id.* at 798–99.

[238] See, e.g., *Kosakow v. New Rochelle Radiology Association*, 274 F.3d 706, 728–29 (2d Cir. 2001) (Clearinghouse No. 52,959) (no evidence that Congress intended to limit preclusion under the Family and Medical Leave Act).

[239] *Kosakow* offers a particularly careful and thoughtful examination of these issues with respect to the Family Medical Leave Act and New York preclusion law. *Kosakow* concluded that the federal plaintiff did not have an adequate opportunity in the administrative hearing to litigate whether the decision to terminate her was made for legitimate business reasons. See also *Swineford v. Snyder County*, 15 F.3d 1258 (3d Cir. 1994) (unemployment compensation hearing).