

SCALIA, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 98–822

FRIENDS OF THE EARTH, INCORPORATED, ET AL.,
PETITIONERS v. LAIDLAW ENVIRONMENTAL
SERVICES (TOC), INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[January 12, 2000]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins,
dissenting.

The Court begins its analysis by finding injury in fact on the basis of vague affidavits that are undermined by the District Court’s express finding that Laidlaw’s discharges caused no demonstrable harm to the environment. It then proceeds to marry private wrong with public remedy in a union that violates traditional principles of federal standing— thereby permitting law enforcement to be placed in the hands of private individuals. Finally, the Court suggests that to avoid mootness one needs even less of a stake in the outcome than the Court’s watered-down requirements for initial standing. I dissent from all of this.

I

Plaintiffs, as the parties invoking federal jurisdiction, have the burden of proof and persuasion as to the existence of standing. *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 561 (1992) (hereinafter *Lujan*); *FW/PBS, Inc. v. Dallas*, 493 U. S. 215, 231 (1990). The plaintiffs in this case fell far short of carrying their burden of demonstrating injury in fact. The Court cites affiants’ testimony asserting that their enjoyment of the North Tyger River has been diminished due to “concern” that the water was

polluted, and that they “believed” that Laidlaw’s mercury exceedances had reduced the value of their homes. *Ante*, at 10–11. These averments alone cannot carry the plaintiffs’ burden of demonstrating that they have suffered a “concrete and particularized” injury, *Lujan*, 504 U. S., at 560. General allegations of injury may suffice at the pleading stage, but at summary judgment plaintiffs must set forth “specific facts” to support their claims. *Id.*, at 561. And where, as here, the case has proceeded to judgment, those specific facts must be “‘supported adequately by the evidence adduced at trial,’” *ibid.* (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U. S. 91, 115, n. 31 (1979)). In this case, the affidavits themselves are woefully short on “specific facts,” and the vague allegations of injury they do make are undermined by the evidence adduced at trial.

Typically, an environmental plaintiff claiming injury due to discharges in violation of the Clean Water Act argues that the discharges harm the environment, and that the harm to the environment injures him. This route to injury is barred in the present case, however, since the District Court concluded after considering all the evidence that there had been “no demonstrated proof of harm to the environment,” 956 F. Supp. 588, 602 (SC 1997), that the “permit violations at issue in this citizen suit did not result in any health risk or environmental harm,” *ibid.*, that “[a]ll available data . . . fail to show that Laidlaw’s *actual* discharges have resulted in harm to the North Tyger River,” *id.*, at 602–603, and that “the overall quality of the river exceeds levels necessary to support . . . recreation in and on the water,” *id.*, at 600.

The Court finds these conclusions unproblematic for standing, because “[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff.” *Ante*, at 10. This statement is correct, as far as it goes. We have certainly held that a

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demonstration of harm to the environment is not *enough* to satisfy the injury-in-fact requirement unless the plaintiff can demonstrate how he personally was harmed. *E.g.*, *Lujan, supra*, at 563. In the normal course, however, a lack of demonstrable harm to the environment will translate, as it plainly does here, into a lack of demonstrable harm to citizen plaintiffs. While it is perhaps possible that a plaintiff could be harmed even though the environment was not, such a plaintiff would have the burden of articulating and demonstrating the nature of that injury. Ongoing “concerns” about the environment are not enough, for “[i]t is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff’s subjective apprehensions,” *Los Angeles v. Lyons*, 461 U. S. 95, 107, n. 8 (1983). At the very least, in the present case, one would expect to see evidence supporting the affidavits’ bald assertions regarding decreasing recreational usage and declining home values, as well as evidence for the improbable proposition that Laidlaw’s violations, even though harmless to the environment, are somehow responsible for these effects. *Cf. Gladstone, supra*, at 115 (noting that standing could be established by “convincing evidence” that a decline in real estate values was attributable to the defendant’s conduct). Plaintiffs here have made no attempt at such a showing, but rely entirely upon unsupported and unexplained affidavit allegations of “concern.”

Indeed, every one of the affiants deposed by Laidlaw cast into doubt the (in any event inadequate) proposition that subjective “concerns” actually affected their conduct. Linda Moore, for example, said in her affidavit that she would use the affected waterways for recreation if it were not for her concern about pollution. Record, Doc. No. 71 (Exhs. 45, 46). Yet she testified in her deposition that she had been to the river only twice, once in 1980 (when she visited someone who lived by the river) and once after this

suit was filed. Record, Doc. No. 62 (Moore Deposition 23–24). Similarly, Kenneth Lee Curtis, who claimed he was injured by being deprived of recreational activity at the river, admitted that he had not been to the river since he was “a kid,” (Curtis Deposition, pt. 2, p. 38), and when asked whether the reason he stopped visiting the river was because of pollution, answered “no,” *id.*, at 39. As to Curtis’s claim that the river “looke[d] and smell[ed] polluted,” this condition, if present, was surely not caused by Laidlaw’s discharges, which according to the District Court “did not result in any health risk or environmental harm.” 956 F. Supp., at 602. The other affiants cited by the Court were not deposed, but their affidavits state either that they *would* use the river if it were not polluted or harmful (as the court subsequently found it is not), Record, Doc. No. 21 (Exhs. 7, 8, and 9), or said that the river looks polluted (which is also incompatible with the court’s findings), *ibid.* (Exh. 10). These affiants have established nothing but “subjective apprehensions.”

The Court is correct that the District Court explicitly found standing—albeit “by the very slimmest of margins,” and as “an awfully close call.” App. in No. 97–1246 (CA4), p. 207–208 (Tr. of Hearing 39–40 (June 30, 1993)). That cautious finding, however, was made in 1993, long before the court’s 1997 conclusion that Laidlaw’s discharges did not harm the environment. As we have previously recognized, an initial conclusion that plaintiffs have standing is subject to reexamination, particularly if later evidence proves inconsistent with that conclusion. *Gladstone*, 441 U. S., at 115, and n. 31; *Wyoming v. Oklahoma*, 502 U. S. 437, 446 (1992). Laidlaw challenged the existence of injury in fact on appeal to the Fourth Circuit, but that court did not reach the question. Thus no lower court has reviewed the injury-in-fact issue in light of the extensive studies that led the District Court to conclude that the environment was not harmed by Laidlaw’s discharges.

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Inexplicably, the Court is untroubled by this, but proceeds to find injury in fact in the most casual fashion, as though it is merely confirming a careful analysis made below. Although we have previously refused to find standing based on the “conclusory allegations of an affidavit” *Lujan v. National Wildlife Federation*, 497 U. S. 871, 888 (1990), the Court is content to do just that today. By accepting plaintiffs’ vague, contradictory, and unsubstantiated allegations of “concern” about the environment as adequate to prove injury in fact, and accepting them even in the face of a finding that the environment was not demonstrably harmed, the Court makes the injury-in-fact requirement a sham. If there are permit violations, and a member of a plaintiff environmental organization lives near the offending plant, it would be difficult not to satisfy today’s lenient standard.

II

The Court’s treatment of the redressability requirement— which would have been unnecessary if it resolved the injury-in-fact question correctly— is equally cavalier. As discussed above, petitioners allege ongoing injury consisting of diminished enjoyment of the affected waterways and decreased property values. They allege that these injuries are caused by Laidlaw’s continuing permit violations. But the remedy petitioners seek is neither recompense for their injuries nor an injunction against future violations. Instead, the remedy is a statutorily specified “penalty” for past violations, payable entirely to the United States Treasury. Only last Term, we held that such penalties do not redress any injury a citizen plaintiff has suffered from past violations. *Steel Co. v. Citizens for Better Environment*, 523 U. S. 83, 106–107 (1998). The Court nonetheless finds the redressability requirement satisfied here, distinguishing *Steel Co.* on the ground that in this case the petitioners allege ongoing violations;

payment of the penalties, it says, will remedy petitioners' injury by deterring future violations by Laidlaw. *Ante*, at 14. It holds that a penalty payable to the public "remedies" a threatened private harm, and suffices to sustain a private suit.

That holding has no precedent in our jurisprudence, and takes this Court beyond the "cases and controversies" that Article III of the Constitution has entrusted to its resolution. Even if it were appropriate, moreover, to allow Article III's remediation requirement to be satisfied by the indirect private consequences of a public penalty, those consequences are entirely too speculative in the present case. The new standing law that the Court makes— like all expansions of standing beyond the traditional constitutional limits— has grave implications for democratic governance. I shall discuss these three points in turn.

A

In *Linda R. S. v. Richard D.*, 410 U. S. 614 (1973), the plaintiff, mother of an illegitimate child, sought, on behalf of herself, her child, and all others similarly situated, an injunction against discriminatory application of Art. 602 of the Texas Penal Code. Although that provision made it a misdemeanor for "any parent" to refuse to support his or her minor children under 18 years of age, it was enforced only against married parents. That refusal, the plaintiff contended, deprived her and her child of the equal protection of the law by denying them the deterrent effect of the statute upon the father's failure to fulfill his support obligation. The Court held that there was no Article III standing. There was no "'direct' relationship," it said, "between the alleged injury and the claim sought to be adjudicated," since "[t]he prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative." *Id.*, at 618. "[Our cases] demonstrate that, in American jurisprudence at least, a

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private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.” *Id.*, at 619.

Although the Court in *Linda R. S.* recited the “logical nexus” analysis of *Flast v. Cohen*, 392 U. S. 83 (1968), which has since fallen into desuetude, “it is clear that standing was denied . . . because of the unlikelihood that the relief requested would redress appellant’s claimed injury.” *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 79, n. 24 (1978). There was no “logical nexus” between nonenforcement of the statute and Linda R. S.’s failure to receive support payments because “[t]he prospect that prosecution will . . . result in payment of support” was “speculative,” *Linda R. S., supra*, at 618—that is to say, it was uncertain whether the relief would prevent the injury.¹ Of course precisely the same situation exists here. The principle that “in American jurisprudence . . . a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another” applies no less to prosecution for civil penalties payable to the State than to prosecution for criminal penalties owing to the State.

The Court’s opinion reads as though the only purpose and effect of the redressability requirement is to assure that the plaintiff receive *some* of the benefit of the relief that a court orders. That is not so. If it were, a federal tort plaintiff fearing repetition of the injury could ask for

¹The decision in *Linda R.S.* did not turn, as today’s opinion imaginatively suggests, on the father’s short-term inability to pay support if imprisoned. *Ante*, at 17, n. 4. The Court’s only comment upon the imprisonment was that, unlike imprisonment for civil contempt, it would not condition the father’s release upon payment. The Court then continued: “The prospect that prosecution will, at least in the future,”—*i.e.*, upon completion of the imprisonment—“result in payment of support can, at best, be termed only speculative.” *Linda R. S.*, 410 U. S., at 618.

tort damages to be paid, not only to himself but to other victims as well, on the theory that those damages would have at least some deterrent effect beneficial to him. Such a suit is preposterous because the “remediation” that is the traditional business of Anglo-American courts is relief specifically tailored to the plaintiff’s injury, and not *any* sort of relief that has some incidental benefit to the plaintiff. Just as a “generalized grievance” that affects the entire citizenry cannot satisfy the injury-in-fact requirement even though it aggrieves the plaintiff along with everyone else, see *Lujan*, 504 U. S., at 573–574, so also a generalized remedy that deters all future unlawful activity against all persons cannot satisfy the remediation requirement, even though it deters (among other things) repetition of this particular unlawful activity against these particular plaintiffs.

Thus, relief against prospective harm is traditionally afforded by way of an injunction, the scope of which is limited by the scope of the threatened injury. *Lewis v. Casey*, 518 U. S. 343, 357–360 (1996); *Lyons*, 461 U. S., at 105–107, and n. 7. In seeking to overturn that tradition by giving an individual plaintiff the power to invoke a public remedy, Congress has done precisely what we have said it cannot do: convert an “undifferentiated public interest” into an “individual right” vindicable in the courts. *Lujan, supra*, at 577; *Steel Co.*, 523 U. S., at 106. The sort of scattershot redress approved today makes nonsense of our statement in *Schlesinger v. Reservists Comm. to Stop the War*, 418 U. S. 208, 222 (1974), that the requirement of injury in fact “insures the framing of relief no broader than required by the precise facts.” A claim of particularized future injury has today been made the vehicle for pursuing generalized penalties for past violations, and a threshold showing of injury in fact has become a lever that will move the world.

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B

As I have just discussed, it is my view that a plaintiff's desire to benefit from the deterrent effect of a public penalty for past conduct can never suffice to establish a case or controversy of the sort known to our law. Such deterrent effect is, so to speak, "speculative as a matter of law." Even if that were not so, however, the deterrent effect in the present case would surely be speculative as a matter of fact.

The Court recognizes, of course, that to satisfy Article III, it must be "likely," as opposed to "merely speculative," that a favorable decision will redress plaintiffs' injury, *Lujan, supra*, at 561. See *ante*, at 9. Further, the Court recognizes that not *all* deterrent effects of *all* civil penalties will meet this standard— though it declines to "explore the outer limits" of adequate deterrence, *ante*, at 16. It concludes, however, that in the present case "the civil penalties sought by FOE carried with them a deterrent effect" that satisfied the "likely [rather than] speculative" standard. *Ibid*. There is little in the Court's opinion to explain why it believes this is so.

The Court cites the District Court's conclusion that the penalties imposed, along with anticipated fee awards, provided "adequate deterrence." *Ante*, at 6, 16; 956 F. Supp., at 611. There is absolutely no reason to believe, however, that this meant "deterrence adequate to prevent an injury to these plaintiffs that would otherwise occur." The statute does not even *mention* deterrence in general (much less deterrence of future harm to the particular plaintiff) as one of the elements that the court should consider in fixing the amount of the penalty. (That element can come in, if at all, under the last, residual category of "such other matters as justice may require." 33 U. S. C. §1319(d).) The statute does require the court to consider "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any

history of such violations, any good-faith efforts to comply with the applicable requirements, [and] the economic impact of the penalty on the violator” *Ibid*; see 956 F. Supp., at 601. The District Court meticulously discussed, in subsections (a) through (e) of the portion of its opinion entitled “Civil Penalty,” *each one* of those specified factors, and then— under subsection (f) entitled “Other Matters As Justice May Require,” it discussed “1. Laidlaw’s Failure to Avail Itself of the Reopener Clause,” “2. Recent Compliance History,” and “3. The Ever-Changing Mercury Limit.” There is no mention whatever— in this portion of the opinion or anywhere else— of the degree of deterrence necessary to prevent future harm to these particular plaintiffs. Indeed, neither the District Court’s final opinion (which contains the “adequate deterrence” statement) nor its earlier opinion dealing with the preliminary question whether South Carolina’s previous lawsuit against Laidlaw constituted “diligent prosecution” that would bar citizen suit, see 33 U. S. C. §1365(b)(1)(B), displayed *any awareness* that deterrence of *future injury to the plaintiffs* was necessary to support standing.

The District Court’s earlier opinion did, however, quote with approval the passage from a District Court case which began: “Civil penalties seek to deter pollution by discouraging future violations. To serve this function, the amount of the civil penalty must be high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business.” App. 122, quoting *PIRG v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158, 1166 (NJ 1989). When the District Court concluded the “Civil Penalty” section of its opinion with the statement that “[t]aken together, this court believes the above penalty, potential fee awards, and Laidlaw’s own direct and indirect litigation expenses provide adequate deterrence under the circumstances of this case,” 956 F. Supp., at 611, it was obviously harking back to this general statement of

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what the statutorily prescribed factors (and the “as justice may require” factors, which in this case did not include particularized or even generalized deterrence) were designed to achieve. It meant no more than that the court believed the civil penalty it had prescribed met the statutory standards.

The Court points out that we have previously said “all civil penalties have some deterrent effect,” *ante*, at 14 (quoting *Hudson v. United States*, 522 U. S. 93, 102 (1997)). That is unquestionably true: As a general matter, polluters as a class are deterred from violating discharge limits by the *availability* of civil penalties. However, none of the cases the Court cites focused on the deterrent effect of a single *imposition* of penalties on a particular lawbreaker. Even less did they focus on the question whether that particularized deterrent effect (if any) was enough to redress the injury of a citizen plaintiff in the sense required by Article III. They all involved penalties pursued by the government, not by citizens. See *Hudson, supra*, at 96; *Department of Revenue of Mont. v. Kurth Ranch*, 511 U. S. 767, 773 (1994); *Tull v. United States*, 481 U. S. 412, 414 (1987).

If the Court had undertaken the necessary inquiry into whether significant deterrence of the plaintiffs’ feared injury was “likely,” it would have had to reason something like this: Strictly speaking, no polluter is deterred by a penalty for past pollution; he is deterred by the *fear* of a penalty for *future* pollution. That fear will be virtually nonexistent if the prospective polluter knows that all emissions violators are given a free pass; it will be substantial under an emissions program such as the federal scheme here, which is regularly and notoriously enforced; it will be even higher when a prospective polluter subject to such a regularly enforced program has, as here, been the object of public charges of pollution and a suit for injunction; and it will surely be near the top of the graph

when, as here, the prospective polluter has already been subjected to *state* penalties for the past pollution. The deterrence on which the plaintiffs must rely for standing in the present case is the marginal increase in Laidlaw's fear of future penalties that will be achieved by adding federal penalties for Laidlaw's past conduct.

I cannot say for certain that this marginal increase is zero; but I can say for certain that it is entirely speculative whether it will make the difference between these plaintiffs' suffering injury in the future and these plaintiffs' going unharmed. In fact, the assertion that it will "likely" do so is entirely farfetched. The speculativeness of that result is much greater than the speculativeness we found excessive in *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 43 (1976), where we held that denying §501(c)(3) charitable-deduction tax status to hospitals that refused to treat indigents was not sufficiently likely to assure future treatment of the indigent plaintiffs to support standing. And it is much greater than the speculativeness we found excessive in *Linda R. S. v. Richard D.*, discussed *supra*, at 6–7, where we said that "the prospect that prosecution [for nonsupport] will . . . result in payment of support can, at best, be termed only speculative," 410 U. S., at 618.

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

C

Article II of the Constitution commits it to the President to "take Care that the Laws be faithfully executed," Art. II, §3, and provides specific methods by which all

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persons exercising significant executive power are to be appointed, Art. II, §2. As JUSTICE KENNEDY's concurrence correctly observes, the question of the conformity of this legislation with Article II has not been argued— and I, like the Court, do not address it. But Article III, no less than Article II, has consequences for the structure of our government, see *Schlesinger*, 418 U. S., at 222, and it is worth noting the changes in that structure which today's decision allows.

By permitting citizens to pursue civil penalties payable to the Federal Treasury, the Act does not provide a mechanism for individual relief in any traditional sense, but turns over to private citizens the function of enforcing the law. A Clean Water Act plaintiff pursuing civil penalties acts as a self-appointed mini-EPA. Where, as is often the case, the plaintiff is a national association, it has significant discretion in choosing enforcement targets. Once the association is aware of a reported violation, it need not look long for an injured member, at least under the theory of injury the Court applies today. See *supra*, at 1–5. And once the target is chosen, the suit goes forward without meaningful public control.² The availability of civil penalties vastly disproportionate to the individual injury gives citizen plaintiffs massive bargaining power—which is often used to achieve settlements requiring the defendant to support environmental projects of the plaintiffs' choosing. See Greve, *The Private Enforcement of*

²The Court points out that the government is allowed to intervene in a citizen suit, see *ante*, at 17–18, n. 4; 33 U. S. C. §1365(c)(2), but this power to “bring the Government's views to the attention of the court,” *ante*, at 18, n. 4, is meager substitute for the power to decide whether prosecution will occur. Indeed, according the Chief Executive of the United States the ability to intervene does no more than place him on a par with John Q. Public, who can intervene— whether the government likes it or not— when the United States files suit. §1365(b)(1)(B).

Environmental Law, 65 Tulane L. Rev. 339, 355–359 (1990). Thus is a public fine diverted to a private interest.

To be sure, the EPA may foreclose the citizen suit by itself bringing suit. 33 U. S. C. §1365(b)(1)(B). This allows public authorities to avoid private enforcement only by accepting private direction as to when enforcement should be undertaken— which is no less constitutionally bizarre. Elected officials are entirely deprived of their discretion to decide that a given violation should not be the object of suit at all, or that the enforcement decision should be postponed.³ See §1365(b)(1)(A) (providing that citizen plaintiff need only wait 60 days after giving notice of the violation to the government before proceeding with action). This is the predictable and inevitable consequence of the Court's allowing the use of public remedies for private wrongs.

III

Finally, I offer a few comments regarding the Court's discussion of whether FOE's claims became moot by reason of Laidlaw's substantial compliance with the permit limits. I do not disagree with the conclusion that the Court reaches. Assuming that the plaintiffs had standing to pursue civil penalties in the first instance (which they did not), their claim might well not have been mooted by Laidlaw's voluntary compliance with the permit, and leaving this fact-intensive question open for consideration

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³The Court observes that “the federal Executive Branch does not share the dissent's view that such suits dissipate its authority to enforce the law,” since it has “endorsed this citizen suit from the outset.” *Ante*, at 17, n. 4. Of course, in doubtful cases a long and uninterrupted history of presidential acquiescence and approval can shed light upon the constitutional understanding. What we have here— acquiescence and approval by a single Administration— does not deserve passing mention.

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on remand, as the Court does, *ante*, at 23, seems sensible.⁴ In reaching this disposition, however, the Court engages in a troubling discussion of the purported distinctions between the doctrines of standing and mootness. I am frankly puzzled as to why this discussion appears at all. Laidlaw's claimed compliance is squarely within the bounds of our "voluntary cessation" doctrine, which is the basis for the remand. *Ante*, at 23.⁵ There is no reason to

⁴In addition to the compliance and plant-closure issues, there also remains open on remand the question whether the current suit was foreclosed because the earlier suit by the State was "diligently prosecuted." See 33 U. S. C. §1365(b)(1)(B). Nothing in the Court's opinion disposes of the issue. The opinion notes the District Court's finding that Laidlaw itself played a significant role in facilitating the State's action. *Ante*, at 6, n. 1, 15, n. 2. But there is no incompatibility whatever between a defendant's facilitation of suit and the State's diligent prosecution— as prosecutions of felons who confess their crimes and turn themselves in regularly demonstrate. Laidlaw was entirely within its rights to prefer state suit to this private enforcement action; and if it had such a preference it would have been prudent— given that a State must act within 60 days of receiving notice of a citizen suit, see §1365(b)(1)(A), and given the number of cases State agencies handle— for Laidlaw to make sure its case did not fall through the cracks. South Carolina's interest in the action was not a feigned last minute contrivance. It had worked with Laidlaw in resolving the problem for many years, and had previously undertaken an administrative enforcement action resulting in a consent order. 890 F. Supp. 470, 476 (SC 1995). South Carolina has filed an *amicus* brief arguing that allowing citizen suits to proceed despite ongoing state enforcement efforts "will provide citizens and federal judges the opportunity to relitigate and second-guess the enforcement and permitting actions of South Carolina and other States." Brief for South Carolina as *Amicus Curiae* 6.

⁵Unlike Justice Stevens' concurrence, the opinion for the Court appears to recognize that a claim for civil penalties is moot when it is clear that no future injury to the plaintiff at the hands of the defendant can occur. The concurrence suggests that civil penalties, like traditional damages remedies, cannot be mooted by absence of threatened injury. The analogy is inapt. Traditional money damages are payable to compensate for the harm of past conduct, which subsists whether

engage in an interesting academic excursus upon the differences between mootness and standing in order to invoke this obviously applicable rule.⁶

Because the discussion is not essential—indeed, not even relevant—to the Court's decision, it is of limited significance. Nonetheless, I am troubled by the Court's too-hasty retreat from our characterization of mootness as “the doctrine of standing set in a time frame.” *Arizonans for Official English v. Arizona*, 520 U. S. 43, 68, n. 22 (1997). We have repeatedly recognized that what is required for litigation to continue is essentially identical to what is required for litigation to begin: There must be a justiciable case or controversy as required by Article III. “Simply stated, a case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Powell v. McCormack*, 395 U. S.

 future harm is threatened or not; civil penalties are privately assessable (according to the Court) to deter threatened future harm to the plaintiff. Where there is no threat to the plaintiff, he has no claim to deterrence. The proposition that impossibility of future violation does not moot the case holds true, of course, for civil-penalty suits by the government, which do not rest upon the theory that some particular future harm is being prevented.

⁶The Court attempts to frame its exposition as a corrective to the Fourth Circuit, which it claims “confused mootness with standing.” *Ante*, at 19. The Fourth Circuit’s conclusion of nonjusticiability rested upon the belief (entirely correct, in my view) that the only remedy being pursued on appeal, civil penalties, would not redress FOE’s claimed injury. 149 F. 3d 303, 306 (1998). While this might be characterized as a conclusion that FOE had no standing to pursue civil penalties from the outset, it can also be characterized, as it was by the Fourth Circuit, as a conclusion that, when FOE declined to appeal denial of the declaratory judgment and injunction, and appealed only the inadequacy of the civil penalties (which it had no standing to pursue) the *case as a whole became moot*. Given the Court’s erroneous conclusion that civil penalties can redress private injury, it of course rejects both formulations— but neither of them necessitates the Court’s academic discourse comparing the mootness and standing doctrines.

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486, 496 (1969). A Court may not proceed to hear an action if, subsequent to its initiation, the dispute loses “its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract propositions of law.” *Hall v. Beals*, 396 U. S. 45, 48 (1969) (*per curiam*). See also *Preiser v. Newkirk*, 422 U. S. 395, 401 (1975); *Steffel v. Thompson*, 415 U. S. 452, 459, n. 10 (1974). Because the requirement of a continuing case or controversy derives from the Constitution, *Liner v. Jafco, Inc.*, 375 U. S. 301, 306, n. 3 (1964), it may not be ignored when inconvenient, *United States v. Alaska S. S. Co.*, 253 U. S. 113, 116 (1920) (moot question cannot be decided, “[h]owever convenient it might be”), or, as the Court suggests, to save “sunk costs,” compare *ante*, at 17, with *Lewis v. Continental Bank Corp.*, 494 U. S. 472, 480 (1990) (“[R]easonable caution is needed to be sure that mooted litigation is not pressed forward . . . solely in order to obtain reimbursement of sunk costs”).

It is true that mootness has some added wrinkles that standing lacks. One is the “voluntary cessation” doctrine to which the Court refers. But it is inaccurate to regard this as a reduction of the basic requirement for standing that obtained at the beginning of the suit. A genuine controversy must exist at both stages. And just as the initial suit could be brought (by way of suit for declaratory judgment) before the defendant actually violated the plaintiff’s alleged rights, so also the initial suit can be continued even though the defendant has stopped violating the plaintiff’s alleged rights. The “voluntary cessation” doctrine is nothing more than an evidentiary presumption that the controversy reflected by the violation of alleged rights continues to exist. *Steel Co.*, 523 U. S., at 109. Similarly, the fact that we do not find cases moot when the challenged conduct is “capable of repetition, yet evading review” does not demonstrate that the requirements for mootness and for standing differ. “Where the conduct has

ceased for the time being but there is a demonstrated probability that it will recur, a real-life controversy between parties with a personal stake in the outcome continues to exist.” *Honig v. Doe*, 484 U. S. 305, 341 (1988) (SCALIA, J., dissenting) (emphasis omitted).

Part of the confusion in the Court’s discussion is engendered by the fact that it compares standing, on the one hand, with mootness *based on voluntary cessation*, on the other hand. *Ante*, at 19. The required showing that it is “absolutely clear” that the conduct “could not reasonably be expected to recur” is *not* the threshold showing required for mootness, but the heightened showing required in a particular category of cases where we have sensibly concluded that there is reason to be skeptical that cessation of violation means cessation of live controversy. For claims of mootness based on changes in circumstances other than voluntary cessation, the showing we have required is less taxing, and the inquiry is indeed properly characterized as one of “standing set in a time frame.” See *Arizonans, supra*, at 67, 68, n. 22 (case mooted where plaintiff’s change in jobs deprived case of “still vital claim for prospective relief”); *Spencer v. Kemna*, 523 U. S. 1, 7 (1998) (case mooted by petitioner’s completion of his sentence, since “throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision”) (internal quotation marks omitted); *Lewis, supra*, at 478–480 (case against state mooted by change in federal law that eliminated parties’ “personal stake” in the outcome).

In sum, while the Court may be correct that the parallel between standing and mootness is imperfect due to realistic evidentiary presumptions that are by their nature applicable only in the mootness context, this does not change the underlying principle that “[t]he requisite personal interest that must exist at the commencement of

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the litigation . . . must continue throughout its existence’” *Arizonans, supra*, at 68, n. 22 (quoting *United States Parole Comm’n v. Geraghty*, 445 U. S. 388, 397 (1980)).

* * *

By uncritically accepting vague claims of injury, the Court has turned the Article III requirement of injury in fact into a “mere pleading requirement,” *Lujan*, 504 U. S., at 561; and by approving the novel theory that public penalties can redress anticipated private wrongs, it has come close to “mak[ing] the redressability requirement vanish,” *Steel Co., supra*, at 107. The undesirable and unconstitutional consequence of today’s decision is to place the immense power of suing to enforce the public laws in private hands. I respectfully dissent.