Pace Environmental Law Review

Volume 27
Issue 3 *Summer 2010*

Article 12

10-12-2010

Best Brief, Appellees

Thomas Kessler
New York University School of Law

Ranadeb Mukherjee
New York University School of Law

Follow this and additional works at: http://digitalcommons.pace.edu/pelr

Recommended Citation
Thomas Kessler and Ranadeb Mukherjee, *Best Brief, Appellees*, 27 Pace Envtl. L. Rev. 971 (2010)
Available at: http://digitalcommons.pace.edu/pelr/vol27/iss3/12

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

TWENTY-SECOND ANNUAL PACE UNIVERSITY LAW SCHOOL NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

Best Brief, Appellees*

NEW YORK UNIVERSITY SCHOOL OF LAW
THOMAS KESSLER AND RANADEB MUKHERJEE

C.A. No. 09-1001
IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

FRIENDS OF RESPONSIBLE TRADE,
and two of its members, ACE VENTURA and JUAN VALDEZ
Appellants,
v.
GREEN RECYCLING GROUP, INC.,
and
NEWTOWN PARENT TEACHERS ASSOCIATION, INC.,
Appellees,
v.
LISA JACKSON, ADMINISTRATOR,
United States Environmental Protection Agency,
Intervenor-Appellee.

On Appeal from The United States District Court
For The District of New Union

Brief for Green Recyling Group, Inc. and Newtown Parent Teachers Association, Inc.

* This brief has been reprinted in its original format. Please note that the Table of Authorities and Table of Contents for this brief have been omitted.

JURISDICTIONAL STATEMENT

The district court correctly held that it lacks subject matter jurisdiction over Valdez's claims under the Alien Tort Claims Act, 28 U.S.C. § 1350 (the "ATCA") because Valdez failed to state a violation of a treaty of the United States or the law of nations as required by that statute. *See infra* Part I. The district court also correctly held that it lacks subject matter jurisdiction over the claims brought by Friends of Responsible Trade ("FRT"") under the citizen suit provision of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a) ("RCRA"), because FRT's factual allegations failed to state a current and ongoing violation of that statute. *See infra* PartII(D). The district court had jurisdiction over EPA's enforcement action pursuant to 42 U.S.C. § 6973, which empowers EPA to bring RCRA enforcement actions in the appropriate district court.

The district court entered summary judgment in favor of Appellants, Green Recycling Group (GRG) and Newtown Parent Teachers Association, Inc. (Newtown PTA), on all claims on August 31, 2009. The district court's order granting summary judgment as to all claims and all parties constitutes a final order over which this Court has jurisdiction under 28 U.S.C.A. § 1291. *Orin v. Barclay*, 272 F.3d 1207, 1214 (9thCir, 2001).Accordingly, jurisdiction is properly laid before this court.

STATEMENT OF THE ISSUES

I. Whether Appellant, Juan Valdez, has sufficiently alleged a violation of a treaty of the United States or the law of nations to establish jurisdiction under the Alien Tort Claims Act, 28 U.S.C. § 1350;

II. Whether Appellant, Friends of Responsible Trade, has alleged sufficient facts to establish constitutional or statutory standing under the citizen suit provision of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a);

III. Whether the Environmental Protection Agency can continue in an intervention after the underlying case has been dismissed for lack of standing;

IV. Whether collecting used electronic devices for shipment constitutes "disposal" of those devices as that term is

used to define "solid waste" under Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*; and

V. If those devices are solid waste, whether they are properly classified as hazardous.

STATEMENT OF THE CASE

FRT, an organization to which both Ventura and Valdez belong (R. at 4), initiated this present action, alleging that GRG and Newtown PTA violated RCRA, 42U.S.C. §§6901 *et seq.* (R. at 3). Specifically, FRT alleges that GRG and Newtown PTA collected and sent UEDs abroad for salvage and recycling without complying with RCRA's requirements pertaining to the disposal of hazardous waste. (R. at 3.) FRT and its two members seek civil penalties for the violations, an injunction against further violations of RCRA, and compensatory damages for injuries suffered by the two members as a result of the violations. (R. at 3.) Valdez bases jurisdiction for his personal injury claim on the ATCA and alleged that GRG and Newtown PTA violated customary international law by shipping UEDs to Sud-Americano without that nation's consent. (R.at 3.)

EPA filed a motion to intervene pursuant to 42 U.S.C. § 6972(d), which the district court granted. (R. at 3.) After full discovery, FRT, joined by EPA, filed a motion for partial summary judgment against GRG and Newtown PTA, asking the district court to find that they violated RCRA. (R. at 3.) GRG and Newtown PTA filed a countermotion for summary judgment against FRT and EPA asking for a ruling either (1)that the district court had no jurisdiction to entertain the action by FRT and its members (and that EPA would then be prevented from carrying on this litigation without the original parties); or (2) that GRG and Newtown PTA had not violated RCRA. (R.at4.)

The district court granted GRG and Newtown PTA's motion for summary judgment with regard to all of FRT's claims, finding that FRT had failed to establish both subject matter jurisdiction and standing. (R. at 4.) The district court found that EPA had a proper basis for continuing the litigation without FRT—namely, EPA's independent ability to enforce RCRA against GRG and Newtown PTA. (R. at 10.) Upon examination of the facts, however, the district court granted GRG and Newtown PTA's

motion for summary judgment against EPA's claim. (R. at 4.) The district court determined that the UEDs collected by Newtown PTA and shipped by GRG were "household waste" and thus specifically exempt from hazardous classification under RCRA. (R. at 1.) FRT and its two members timely appealed the district court's grant of GRG and Newtown PTA's motion for summary judgment. GRG and Newtown PTA also appeal the district court's ruling below that EPA had a proper basis for continuing this litigation without FRT.

STATEMENT OF THE FACTS

Over the past six years, Geraldo Garcia has operated a salvaging business in the city of Pacifica, Sud-Americano. (R at. 6.) Sud-Americano is a developing country with no regulatory scheme governing the recycling of used electronic devices ("UEDs") or the pollution potentially resulting from such activities. (R. at 5.) Garcia imports shipments of UEDs from abroad and sorts their components. (R. at 5.) Those UEDs that are still useful are sold in the Sud-American market or donated to local schools. (R. at 5.) Garcia hires Pacifican residents to reclaim valuable materials from the remaining unusable UEDs. (R. at 5.)

Because Garcia failed to supply his workers with protective devices including gloves and masks, or equipment designed for safe removal of material from UEDs, his workers were directly exposed to mercury, lead, cadmium, chromium and other toxic materials, endangering their health. (R. at 5-6.) Juan Valdez was one such worker. (R.at6.) Valdez has worked in Garcia's operations since their inception, six years ago. (R.at6.) Expert medical testimony has established that Valdez suffers from memory and neurological losses of the type caused by mercury and lead poisoning. (R. at 6.) In addition, because Garcia failed properly to collect, contain, and manage waste from the operations, mercury, lead, and other heavy metals entered into the water and land of Pacifica's local environment, further endangering local inhabitants and potentially anyone encountering the local environment. (R. at 6.)

GRG is in the business of collecting UEDs for sale to foreign salvagers and recyclers such as Garcia. (R. at 4.) In the summer of 2008, GRG entered into a partnership with Newtown PTA for

the collection of UEDs. (R. at 4.) Newtown PTA solicited members of households from within its community to donate their UEDs for recycling. (R. at 5.) A significant number of the UEDs collected by Newtown PTA were MyPhones. (R. at 5.) The MyPhone uses a mercury-lithium battery and small quantities of lead. (R. at 5.)

GRG requires anyone seeking free collection of UEDs to execute a form acknowledging that the particular devices collected were owned by them and used in their households. (R. at 4.) Newtown PTA ensured that each person who donated a UED complied with this requirement. (R. at 5.) Furthermore, Newtown PTA members conducted a visual examination of each UED they collected to ensure that all devices were intact. (R. at 5.) At the end of the collection process, Newtown PTA loaded the UEDs onto a shipping container provided by Garcia (container # VS2078). (R. at 5.) This container was then shipped to Garcia for salvaging and recycling. (R. at 5.)

Ace Ventura is a freelance photojournalist. (R. at 4.) Ventura learned that UEDs were often sent abroad to unregulated recycling facilities whose activities sometimes injured employees, neighbors and the environment. (R. at 4.) Hoping to observe this phenomenon, Ventura traveled to Pacifica where he made a documentary film of the activities of GRG, Newtown PTA, and Garcia, highlighting the exposure of Valdez and other workers and residents to the toxic materials from Garcia's work site, and the injuries possibly caused by those exposures. (R. at 6.) Ventura's film, "Toxic Recycling," has been awarded prizes for the best documentary film at three different film festivals, has aired on public television, and has earned over $100,000 for Ventura, net of expenses. (R. at 6.) Ventura has no present physical manifestations of injury from exposure to toxic material. (R. at 6.) However, he alleges that the dreadful sights in Pacifica brought him to tears. (R. at 7.) Ventura also alleges that he is so emotionally upset by seeing the pollution emanating from Garcia's operations and by seeing workers, such as Valdez, whom he believed to be injured by such pollution, that he is afraid to return to Pacifica. (R. at 7.)

STANDARD OF REVIEW

Federal appellate courts review the grant of summary judgment *de novo*, using the same standards as the trial court. *Bruh v. Bessemer Venture Partners III L.P.*, 464 F.3d 202, 205 (2d Cir. 2006), *cert. denied*, 549 U.S. 1209 (2007). Summary judgment is appropriate where there "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56.

SUMMARY OF THE ARGUMENT

Valdez has failed to establish subject matter jurisdiction for his claims under the Alien Tort Claims Act, 28 U.S.C. § 1350 (the "ATCA"). The ATCA confers subject matter jurisdiction to the United States district courts over any civil action by an alien for torts committed in violation of the law of nations or a treaty of the United States. The act of sending used electronic devices (UEDs) abroad for salvage and recycling without the consent of the recipient nation does not constitute a violation of the law of nations.

Federal courts have consistently determined that allegations of environmental harm do not state a claim under the law of nations. Furthermore, customary international law generally imposes obligations on states—not their individual citizens. International law imposes obligations on private individuals only in relation to conduct of universal concern (such as piracy, slave trading, war crimes, and genocide). Consistent with this principle, the sources of international environmental law cited by Valdez expressly limit their commands to the conduct of States—not their individual citizens. As a result, Valdez has not alleged a violation of the law of nations or a treaty of the United States. Therefore, the district court properly granted GRG and Newtown PTA's motion for summary judgment with regard to Valdez's claims for lack of subject matter jurisdiction under the ATCA.

The district court also correctly held that FRT did not have constitutional or statutory standing with regard to its claims under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a) ("RCRA"). To establish Article III standing, FRT was required to show: (1) that Ventura and Valdez have suffered injuries in fact; (2) that their injuries are fairly traceable to the

actions of GRG and Newtown PTA; and (3) that their injuries will likely be redressed by a favorable decision.

FRT failed to identify any personal injury suffered by Ventura other than the psychological consequence of being brought to tears by the observation of the injuries of others. Viewing conduct with which one disagrees is not a sufficiently concrete and particularized injury for the purposes of Article III standing. Furthermore, because FRT has not alleged that Ventura ever had *any* plans to return to Pacifica, much less concrete plans, his sudden fear of returning to the city is immaterial and does not establish an actual or imminent injury.

FRT has also failed to establish that Ventura's and Valdez's alleged injuries are fairly traceable to the conduct of GRG and Newtown PTA. In this case, Garcia's conduct is the sole proximate cause of Ventura's and Valdez's injuries. FRT has presented no evidence that GRG or Newtown PTA participated in or even knew of Garcia's disregard of the safety of his workers or the environment. GRG and Newtown PTA have only the most tenuous connection to Ventura's and Valdez's complained of injuries. As a result, FRT has failed to establish traceability.

FRT has also failed to establish that Ventura's and Valdez's injuries can be redressed by a favorable decision in the district court. FRT's claims for compensatory damages must fail because this remedy is not expressly provided for in RCRA, and it cannot be assumed that Congress intended to authorize this remedy by implication. A prohibitory injunction will not remedy any of the injuries alleged by FRT because, simply stated, there is nothing to enjoin. Injunctions may issue under RCRA only where there is a reasonable likelihood that a past polluter will continue to pollute in the future. FRT has failed to allege a present or imminent future violation of RCRA by either GRG or Newtown PTA. Consequently, the imposition of civil penalties payable to the United States Treasury is also inappropriate because the purpose of such penalties is to deter future violations. Thus, FRT has failed to satisfy the redressability requirement of standing.

EPA intervened in this case without raising any independent claims or requests for relief. Accordingly, its case ended when the FRT's underlying suit was dismissed for lack of standing.

GRG and Newtown PTA are not liable under RCRA for several reasons. First, the UEDs at issue in this case were not

solid waste. Congress and EPA have together required that items be "disposed of" in order to qualify as solid waste. Consistent with RCRA's purpose, which is to protect national land and water from pollution by such waste, disposal by statutory definition does not occur until the waste at issue is placed in the land or water. In this case, it was a third party—Garcia—who disposed of the UEDs; therefore, the UEDs were not solid waste at any time that they were in the possession of GRG and Newtown PTA.

Second, even if the UEDs were solid waste in Appellee's possession, RCRA would still be inapplicable. FRT and EPA's argument for extraterritorial application of an Act of Congress is only appropriate where Congress has clearly stated its intent that the statute apply abroad. Here, the opposite is true. Not only is there no evidence of intent to apply the statute extraterritorially, but the statute's text, purpose, and legislative history all clearly show that Congress' focus was exclusively domestic.

Finally, even if RCRA did apply extraterritorially and the UEDs were solid waste, they would still not be subject to regulation as hazardous waste. First, FRT and EPA have not adduced sufficient information to demonstrate that the UEDs actually met the standards for hazardous materials. Even if they were in fact hazardous, however, GRG and Newtown PTA took assiduous care to collect only used items from households; thus, the UEDs fall squarely within the "household waste" exception. Furthermore, the testing and reporting requirements that FRT and EPA claim were violated apply only to "generators" of hazardous waste. GRG and Newtown PTA did not "generate" the waste in this case by any rational or pertinent definition of that word.

For the foregoing reasons, GRG and Newtown PTA respectfully request that this Court affirm the district court's grant of summary judgment on all claims.

ARGUMENT

I. THE DISTRICT COURT DOES NOT HAVE JURISDICTION TO HEAR VALDEZ'S CLAIMS UNDER THE ATCA.

Valdez has failed to establish subject matter jurisdiction for his claims under the ATCA. The ATCA confers subject matter jurisdiction to the United States district courts over any civil action by an alien for torts committed in violation of the law of nations or a treaty of the United States. 28 U.S.C. § 1350. Because GRG and Newtown PTA have not violated the law of nations or a treaty of the United States, Valdez cannot meet this threshold jurisdictional requirement. Accordingly, the district court properly granted GRG and Newtown PTA's motion for summary judgment with regard to Valdez's claims for lack of subject matter jurisdiction.

A. Valdez Has Not Alleged a Violation of the Law of Nations.

The act of sending UEDs abroad for salvage and recycling without the consent of the recipient nation does not constitute a violation of the law of nations. In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004), the Supreme Court held that jurisdiction under the ATCA is only available to plaintiffs who allege violations of international law as widely recognized and well defined today as piracy was when the ATCA was enacted in 1789. Under this rubric, Ventura has not alleged a violation of the law of nations. As the district court stated:

> There is surely nothing well defined about regulations dealing with the export of hazardous waste. Even the determination of whether materials are hazardous waste is a mind-numbing journey. . . . There is simply no parallel between the then-well-established crime of piracy and the commercial shipment abroad of used computers and cell phones.

(R. at 10.)

Furthermore, federal courts have consistently determined that allegations of environmental harm do not state a claim under the law of nations. *See, e.g.*, *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 255 (2d Cir. 2003) (holding that the

law of nations was not violated where an American mining company caused environmental pollution and local illness in Peru); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (dismissing plaintiffs' international environmental law claims due to the absence of any universally recognized environmental principles); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 671 (S.D.N.Y. 1991) (holding that the defendant's shipment of allegedly hazardous material to a purchaser in a foreign country did not violate the law of nations). *See also Aguinda v. Texaco, Inc.*, 142 F. Supp.2d 534, 553 (S.D.N.Y. 2001) (dismissing plaintiffs' claim under the doctrine of *forum non conveniens* but also stating that "the specific claim plaintiffs purport to bring under the ATCA—that the defendant's oil extraction activities violated evolving environmental norms of customary international law . . . lacks any meaningful precedential support and appears extremely unlikely to survive a motion to dismiss").

B. Only State Actors Can Violate the Sources of International Law Cited by Ventura.

The district court correctly noted that "[t]orts giving rise to ATCA jurisdiction are few and far between, because treaties and the law of nations normally create obligations for countries, not their citizens." (R. at 9.) Although certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals, this principle is limited to activities of "universal concern" such as "piracy, slave trading, war crimes, and genocide." *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995). "Historically these offenses held a special place in the law of nations: their perpetrators, dubbed *enemies of all mankind*, were susceptible to prosecution by any nation capturing them." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (emphasis added).

Clearly then, "universal concern" is an extremely high standard. Even heinous and despicable acts such as torture and summary execution constitute violations of customary international law *only when* committed by state officials or under color of law. *Flores*, 414 F.3d at 244 (citing *Kadic*, 70 F.3d at 239-

43). It cannot be seriously argued that GRG or Newtown PTA engaged in conduct that is in any way similar to what the Second Circuit described in *Kadic* and *Flores*.

Consistent with this principle, the sources of international law cited by Ventura expressly limit their commands to the conduct of states—not their individual citizens. Ventura claims that GRG and Newtown PTA violated the United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N.T.S. 397 (UNCLOS). (R.at9.) But UNCLOS directs member countries—not their individual citizens—to take action to prevent pollution on the high seas. For example, Article 207 of UNCLOS, which relates to the pollution of marine environments from land based sources, prefaces its directives with "States shall." Nowhere does the UNCLOS say "States *and their citizens* shall. . .." This language stands in stark contrast to that of the Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277, which clearly states that "[p]ersons committing genocide . . . shall be punished, *whether they are constitutionally responsible rulers, public officials or private individuals*." (Emphasis added). *Cf.* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, June 26, 1987, 23 I.L.M. 1027 (defining torture as "inflicted by or at the instigation of or with the consent or acquiescence of *a public official or other person acting in an official capacity*") (emphasis added).

Similarly misguided is Ventura's reliance on *Sarei v. Rio Tinto*, 221 F. Supp.2d 1116, 1160 (C.D. Cal. 2002), *aff'd in part*, *vacated in part*, *rev'd in part*, 456 F.3d 1069 (9th Cir. 2006), *aff'd in part*, *vacated in part*, *rev'd in part*, 487 F.3d 1193 (9th Cir. 2006), *hearing en banc granted*, 499 F.3d 923 (9th Cir. 2007), *aff'd*, 550 F.3d 822 (9th Cir. 2008). The plaintiffs in *Rio Tinto* asserted that the defendant (a non-governmental entity) violated a provision of UNCLOS mandating that "states adopt laws and regulations to prevent, reduce, and control pollution of the marine environment caused by land-based sources." *Id.* at 1161. The court held that UNCLOS reflected customary international law and that the plaintiff had sufficiently established jurisdiction under the ATCA. *Id.* However, were it not for the court's finding that the defendant "operated under the color of state law," *id.*, it would be difficult to comprehend how a non-governmental entity

could possibly violate customary international law by failing to "adopt laws and regulations." In this case, Ventura cannot credibly argue that either GRG or Newtown PTA operated under the color of state law. Accordingly, Ventura's reliance on *Rio Tinto* and UNCLOS is entirely misguided.

The same can be said of Ventura's reliance on the Basel Convention on the Control of Transboundary Movement of Hazardous Waste and Disposal, Mar. 22, 1989, I.L.M 657 (the "Basel Convention") and the Convention on the Organization for Economic Co-operation and Development of December 14, 1960 (the "OECD"). Like UNCLOS, the directives of the Basel Convention and the Decision-Recommendation of the Council on Exports of Hazardous Wastes from the OECD Area, 5 June 1986-C(86)64/Final (the "OECD Hazardous Waste Decision"), are aimed at member states—not their individual citizens. For example, Article 6 of the Basel Convention, which deals with the "transboundary movement of hazardous waste between parties," prefaces its directives with "The State of export shall" or "The State of export shall not." Similarly, the OECD Hazardous Waste Decision states "Member countries shall" and "Member countries should require. . . ."

None of the sources cited by Ventura could be violated by GRG or Newtown PTA. As a result, Ventura has not alleged a violation of the law of nations or a treaty of the United States. Therefore, the district court properly granted GRG and Newtown PTA's motion for summary judgment with regard to Valdez's claims for lack of subject matter jurisdiction under the ATCA.

II. FRT DOES NOT HAVE CONSTITUTIONAL OR STATUTORY STANDING.

The "case or controversy" requirement of Article III is the "irreducible constitutional minimum" of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To establish standing, a plaintiff must demonstrate: (1) that he has suffered injury in fact; (2) that the injury is fairly traceable to the actions of the defendant; and (3)that the injury will likely be redressed by a favorable decision. *Id.* These three elements are an indispensable part of a claimant's case and, as such, must be supported with the manner and degree of evidence required at the successive stages of the litigation. *Id.* at 561. At the

summary judgment stage, claimants cannot rest on "mere allegations" to satisfy their burden for these elements but must set forth specific facts. *Id.*

To establish representational standing on behalf of its members, FRT must demonstrate that Ventura and Valdez would have personal standing to bring this suit in their own right. *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972). Yet FRT has not set forth sufficient facts to establish standing for either Ventura or Valdez. Accordingly, the district court properly granted GRG and Newtown PTA's motion for summary judgment against FRT's claims under RCRA.

A. Ventura's Melancholy Is Not a Judicially Cognizable Injury.

Ventura testified before the district court that he was so emotionally upset by seeing the pollution emanating from Garcia's operations and by seeing workers, like Valdez, who were injured by such pollution that he is afraid to return to Pacifica. (R. at 7.) He also testified that sights in Pacifica brought him to tears. (R.at7.) These are the sum total of the injuries alleged by Ventura. He has not alleged any particular physical injury from GRG and Newtown PTA's activities. (R. at 7.) Nor has he alleged any fear of becoming ill from his exposure to the pollutants in Pacifica. FRT's failure to allege these injuries before the district court is fatal to any claim alleging such injuries on appeal. *See, e.g.*, *Webb v. City of Philadelphia*, 562 F.3d 256, 263 (3dCir. 2009) (stating that the failure to raise an argument before the district court generally results in the waiver of that argument on appeal).

FRT failed to identify any personal injury suffered by Ventura other than the psychological consequence of being brought to tears by the observation of the injuries of others. In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982), the Supreme Court held that viewing conduct with which one disagrees is not a sufficiently concrete and particularized injury for the purposes of Article III standing. Furthermore, the decision to seek review is not to be placed in the hands of "concerned bystanders," like Ventura who will use it simply as a "vehicle for the vindication of value interests." *United States v.*

SCRAP, 412 U.S. 669, 687 (1973). To the contrary, the injury in fact test "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club*, 405 U.S. at 734-35.

The injury in fact requirement protects a fundamental interest of the justice system:

> It [serves] as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were [courts] to . . . authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process.

Id. To recognize standing premised on Ventura's passing and insubstantial "injuries" would open the floodgates to the most frivolous claims. For example, there is little separating Ventura's alleged injuries from those of the several thousand theater-goers and television viewers who were saddened by the images in Ventura's film, "Toxic Recycling." It cannot truly be said that either Ventura or his film audience has a direct stake in the outcome of this case. Ventura may be saddened by what he saw in Pacifica, but his claim is nothing more than an attempt to vindicate his personal value preferences through the judicial process.

B. Ventura's Fear of Returning to Pacifica Is Insufficient to Establish an Injury in Fact.

The Supreme Court has defined "injury in fact," to mean an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Defenders of Wildlife*, 504 U.S. at 560. Ventura's fear of returning to Pacifica does not satisfy either of these requirements. Ventura visited Pacifica on only one occasion. He has not alleged that he ever had *any* plans to return to the city, much less any concrete ones. To the contrary, the facts in the record suggest that Ventura's connection to Pacifica terminated at the moment that his cameras stopped rolling.

In *Defenders of Wildlife*, 504 U.S. 560-61, the Supreme Court held that the plaintiffs' "intent to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough" for constitutional standing. "Such '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 [the Court's] cases require." *Id.* Because FRT has not alleged that Ventura ever had *any* plans to return to Pacifica, his sudden fear of returning to the city is immaterial and does not establish an actual or imminent injury. Furthermore, FRT has not made clear exactly what Ventura experienced during his first visit to Pacifica that he may be deprived of upon his hypothetical next visit. Indeed, Ventura went to Pacifica to witness human suffering and environmental pollution. Measured against this baseline, Ventura cannot claim that he will be deprived of any cognizable interest.

C. Ventura's and Valdez's Injuries Are Not "Fairly Traceable" to the Conduct of GRG or Newtown PTA.

FRT has failed to establish that Ventura's and Valdez's alleged injuries are fairly traceable to the conduct of GRG or Newtown PTA. The "fairly traceable" requirement is in large part designed to ensure that the injury complained of is "not the result of the independent action of some third party not before the court." *Defenders of Wildlife*, 504U.S. at 560.

In this case, Garcia's conduct is the sole proximate cause of Ventura's and Valdez's injuries. It was Garcia who failed to supply his workers with protective devices such as gloves, masks, and equipment designed for safe removal of material from UEDs. (R. at 5-6.) It was Garcia's reckless disregard of his workers' safety that led those workers to be exposed to mercury, lead, cadmium, chromium and other toxic materials. (R. at 6.) And it was Garcia's failure to properly collect, contain, and manage waste from his salvaging operations that caused mercury, lead, and other heavy metals to enter into the water and land of the Pacifican environment, further endangering local inhabitants and those encountering the local environment. (R. at 6.)

FRT has presented no evidence that GRG or Newtown PTA participated in or even knew of Garcia's disregard of the safety of his workers or the environment. (R.at8.) FRT has not even alleged that GRG or Newtown PTA *should have known* about Garcia's reckless and reprehensible conduct. Accordingly, GRG and Newtown PTA have only the most tenuous connection to Ventura's and Valdez's complained of injuries. As the Supreme Court warned in *Warth v. Seldin*, 422 U.S. 490, 505 (1975), the indirectness of an injury "may make it substantially more difficult to meet the minimum requirement of Article III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm."

Ventura's claims of traceability are especially tenuous because the line of causation between GRG and Newtown PTA's conduct and his alleged injuries runs through two independent actors: Garcia and himself. As previously noted, Ventura went to Sud-Americano for the sole purpose of documenting human suffering and environmental pollution. Having knowingly and intentionally exposed himself to these dreadful conditions, Ventura cannot now seek to hold GRG and Newtown PTA liable for his resulting "injuries."

FRT's claims of traceability are entirely opportunistic and a direct result of its inability to bring a claim against Garcia, the person who is truly responsible. Because Sud-Americano is a developing country with no regulatory scheme governing the recycling of UEDs or the potential pollution resulting from such activity (R. at 5), Garcia is likely unassailable in any Sud-American court. Furthermore, United States courts do not have personal jurisdiction over Garcia while he remains in Sud-Americano. Accordingly, this entire litigation boils down to FRT's desperate search for an open courtroom and an open coffer. Unfortunately, FRT's impetuous grab for cash has forced GRG and Newtown PTA to defend themselves in a protracted and costly litigation despite having only the most tenuous connection to the complained of injuries.

D. Ventura's and Valdez's Injuries Cannot Be Redressed by a Favorable Decision in the District Court.

RCRA's comprehensive remedial scheme does not provide for compensatory damages or equitable restitution. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484 (1996); 42 U.S.C. § 6972(a). Consequently, FRT's claims for compensatory damages for injuries suffered by Ventura and Valdez as a result of the alleged RCRA violations must fail. *See Meghrig*, 516 U.S. at 487 (stating that "where Congress has provided elaborate enforcement provisions for remedying the violation of a federal statute, as Congress has done with RCRA . . . it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the statute").

A private citizen suing under RCRA's citizen suit provision, 42 U.S.C. § 6972(a), may seek two different forms of injunction: a mandatory injunction, *i.e.*, one that orders a responsible party to take action by attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, *i.e.*, one that restrains a responsible party from further violating RCRA. *Meghrig*, 516 U.S. at 484 (citing 42 U.S.C. § 6972(a)(2)). FRT has not sought an injunction ordering either GRG or Newtown PTA to take action by attending to the cleanup and proper disposal of the toxic waste in Pacifica. FRT has only sought a prohibitory injunction to restrain GRG and Newtown PTA from further violating RCRA. (R. at 3.)

Nevertheless, a prohibitory injunction will not remedy any of the injuries alleged by FRT because, simply stated, there is nothing to enjoin. The Supreme Court has interpreted the Clean Water Act, 33 U.S.C. § 1365(a), which contains the same "to be in violation" language as RCRA (42 U.S.C. § 6972(a)(1)(A)), to require that "citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter *will continue to pollute in the future*." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, Inc., 484 U.S. 49, 57 (1987) (emphasis added). Like the Clean Water Act, RCRA can only be violated through present or future *conduct*, not an extant environmental *condition*.[1]

1. *Cf.* Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. § 9607 (imposing liability on (1) current owners and operators of facilities where hazardous substances are released or threatened to be released; (2) owners and operators of facilities at the time the substances were disposed; (3) persons who arranged for disposal or treatment of such

FRT has failed to allege a present or imminent future violation of RCRA by either GRG or Newtown PTA. The alleged violation occurred in 2008 and involved one shipment of one container. (R. at 8.) The solitary act of shipping one container can not properly be described as a "continuous" or "intermittent" violation by any plausible definition of those words. Furthermore, FRT has not alleged that Newtown PTA has any future plans to solicit other UEDs for shipment. The district court correctly pointed out that, "[a]s far as Newtown PTA is concerned, this was a one-time, isolated activity." (R.at 8.) GRG has sent other containers of similar materials abroad for salvage and recycling on several previous and subsequent occasions but never to Pacifica or anywhere else in Sud-Americano. (R. at 8.) GRG also has an open-ended contract with Garcia for potential future containers of UEDs to be sent to Pacifica under specified terms, but no such shipments have occurred to date. (R. at 8.) This prompted the district court to remark that the cessation of shipments was "presumably because of the pendency of this litigation." (R. at 8.)

Nevertheless, even if the district court's presumption were correct, it would have no bearing on the current dispute. In *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 109 (1998), the Supreme Court rejected the argument that there is a presumption of future injury when the defendant has voluntarily ceased its illegal activity in response to litigation. Instead, the Court held that the allegations of future injury must be "particular and concrete." *Id.* In this case, FRT has not, and cannot allege particular and concrete future injuries because GRG itself does not have any particular or concrete plans to ship additional containers of UEDs to Pacifica. Nor has FRT alleged that GRG had any such plans prior to their filing of this suit. *See Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 694 (4th Cir. 1989) (interpreting the Supreme Court's holding in *Gwaltney*, 484 U.S. 49 (1987), to stand for the

substances; and (4) persons who accepted such substances for transport for disposal or treatment. These parties are liable for all costs of removal or remedial action).

It is for this reason that FRT's claims are more amenable to establishing standing under CERCLA as opposed to RCRA. Unlike RCRA, which promulgates *ex ante* regulations, CERCLA sets forth *ex post* remedies for extant environmental pollution.

proposition that the correct point from which to assess the likelihood of continuing violations is not the present but the date of filing suit).

Finally, the imposition of civil penalties payable to the United States Treasury under 42 U.S.C.A. § 6928(g) is not an appropriate remedy in this case because the purpose of such penalties is to deter future violations. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 185 (2007). As already stated, FRT has failed to allege that GRG or Newtown PTA has particularized and concrete plans to send other UEDs to Pacifica in the future. Thus, FRT has failed to satisfy the redressability requirement for standing.

For all these reasons, the district court correctly granted GRG and Newtown PTA's motion for summary judgment on the grounds that FRT failed to establish standing.

III. EPA CANNOT CONTINUE AS INTERVENOR IN A SUIT, DISMISSED FOR LACK OF STANDING, IN WHICH EPA NEVER MADE AN INDEPENDENT CLAIM.

Because EPA never made an independent claim in this case, its intervention has always been ancillary to the original suit. When that suit was dismissed for lack of standing, EPA's request to continue as an intervenor became, in essence, a request for an advisory opinion.

EPA's request runs afoul of the fundamental principle that intervention cannot cure a defect in jurisdiction. "It is well-settled that since intervention contemplates an existing suit in a court of competent jurisdiction and because intervention is ancillary to the main cause of action, intervention will not be permitted to breathe life into a 'nonexistent' law suit." *Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir. 1965) (citing *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157 (1914)). As the Supreme Court explained in *McCord*, an "intervention [is] what it purport[s] to be, an appearance in the original suit, already brought, and in our view must abide the fate of that suit." *McCord,* 233 U.S. at 163-64.

While a district court has discretion to treat the pleading of the intervenor as a separate action where the intervenor "has a

separate and independent basis for jurisdiction," the purpose of that device is to "adjudicate the claims raised by the intervenor." *Fuller*, 351 F.2d at 328. *See also GTE Cal. v. FCC*, 39 F.3d 940, 947 (9th Cir. 1994) (declining to transform an intervention into a broad-based challenge). Yet there is nothing in the record to indicate that EPA ever raised a claim independently of FRT or either of its members.

Unsupported by any independent claim, EPA's interest in this case is best understood as the interest of an agency in the judicial interpretation of a statute it administers. Yet even a "strong interest in obtaining a ruling" is irrelevant to the propriety of continuation—"the desirability of an advisory opinion is not a substitute for justiciability." *Ruotolo v. Ruotolo*, 572 F.2d 336, 338 (1st Cir. 1978) (finding the government's continuation in a suit improper where the government had not alleged an independent basis for its suit).

Because EPA had not alleged an independent interest when the primary suit was dismissed, EPA's intervention "must abide the fate of that suit." *McCord,* 233 U.S. at 164. If EPA wishes to assert its own claim, the administrative process provides the proper forum.

IV. GRG AND NEWTOWN PTA HAVE NOT VIOLATED RCRA AND ARE NOT SUBJECT TO LIABILITY UNDER RCRA.

The offenses alleged by FRT and EPA in this case are outside the scope of RCRA. Even were that not so, the undisputed facts show no violation of RCRA and no grounds for liability.

A. The UEDs Are Not Solid Waste under RCRA.

Under the language of RCRA, as well as EPA's regulations interpreting that statute, the UEDs at issue in this case were not solid waste at the time that GRG collected and shipped them. Whether the UEDs were "solid waste" depends on whether they were "disposed of" as that term is defined by the statute. Because they were not disposed of within the statute's meaning, they were not solid waste.

Solid waste is defined by RCRA as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution facility *and other discarded material*, including. . . from industrial, commercial, mining, and agricultural operations. . .." 42 U.S.C. § 6903(27) (emphasis added). EPA has defined "discarded material" as any material which is "abandoned." 40 C.F.R. § 261.2(a)(2)(i). (There are other ways a material may qualify as "discarded," but no party has argued that they apply in this case, and they do not.) "Abandoned," in turn, is material "disposed of," §261.2(b)(1), or "accumulated. . . before or in lieu of being abandoned by being disposed of," § 261.2(b)(3). (Again, the other ways of being abandoned are clearly not implicated by the facts of this case.) While "accumulated" is undefined, RCRA defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that [it may] enter the environment or be emitted into the air or discharged into any waters. . .." 42 U.S.C. § 6903(3).

Simply put, the UEDs in this case were only solid waste if they were either "disposed of" as defined by § 6903(3) or "accumulated" before ultimate disposal. Because these UEDs were neither "disposed of" nor "accumulated," they were not solid waste.

1. The UEDs Had Not Yet Been "Disposed Of" While They Were in the Possession of GRG and Newtown PTA.

Congress provided a clear statutory definition of "disposal" as being placed into or on any land or water so as to make contamination possible. 42 U.S.C. § 6903(3) ("The term 'disposal' means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that [it may] enter the environment or be emitted into the air or discharged into any waters. . .." Leaving aside the circularity of ultimately defining solid waste by a definition which includes the term solid waste, it is nonetheless clear that the definition cannot apply to the UEDs in this case.

GRG and Newtown PTA did not in any way place the UEDs into land or water in such a way that they could have contaminated such land or water, nor is it anywhere alleged in

the record that they did. The UEDs were therefore not "disposed of" as understood by RCRA.

The district court's contrary conclusion rested on a common understanding of the term "disposal"—"[w]hen the citizens of New Union gave their UEDs to GRG and Newtown PTA, they were disposing of those devices, hence the devices became solid waste under this definition." (R. at 11.) But this understanding of the term "disposal" is necessarily perspective-driven: one person's disposal is another's acquisition. When assessed in light of the statutory definition of the term, the UEDs in this case were clearly not disposed of.

Because the UEDs were not disposed of, they could not possibly have been solid waste unless, via the relevant EPA regulations, they were "accumulated. . . before or in lieu of being. . . disposed of." 40 C.F.R. § 261.2(b)(3).

2. The UEDs Were Not "Accumulated."

Although "accumulated" is a term that is left undefined by the pertinent regulations, 40 C.F.R. §261.2(b)(3), any definition consistent with the purpose and intent of RCRA compels the conclusion that the UEDs in this case were not "accumulated. . . before or in lieu of being. . . disposed of." *Id.*

Congress' purpose in enacting RCRA was "to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996) (quoting 42 U.S.C. § 6902(b)). Thus Congress' findings focused on "a rising tide of scrap, discarded, and waste materials," and "the problems of waste disposal [that] necessitate. . . proper and economical waste disposal practices." 42 U.S.C. § 6901(a).

Because Congress was clearly concerned with the potential ill effects of solid wastes on human health and the environment, the relevance of RCRA to the UEDs in this case ultimately depends on their disposal in land or water. The reports that FRT and EPA cited below are in accord: the Timothy investigation found that not all UEDs exceed the threshold for hazardous waste determination, and its report states cautiously that such devices

"could potentially be classified as . . . hazardous waste *when discarded*." Timothy G. Timothy, et al., *RCRA Toxicity Characterization of CPUs and Other Discarded Electrical Devices*, 1-3 (2004), *available at* http://www.ees.ufl.edu/homepp/townsend/Research/ElectronicLeaching/UF%20EWaste%20TC%20Report%20July%2004%20v1.pdf (emphasis added).

The D.C. Circuit rejected a similar attempt at overreaching in *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987). That court noted that the statutory definition of solid waste "contains three specific terms and then sets forth the broader term, 'other discarded material.'" *Id.* at 1189. The court thus invoked *ejusdem generis*, the canon of statutory construction that states that broad or ambiguous terms should be interpreted in the context of the other terms with which they appear. *Id.* "[G]arbage, refuse, and sludge from a waste treatment plant, water supply treatment plant, or air pollution facility" all "clearly fit within the ordinary, everyday sense of 'discarded.'" *Id.* at 1190. Therefore, the court reasoned that "Congress, in adding the concluding phrase 'other discarded material,' meant to grant EPA authority over similar types of waste, but not to open up the federal regulatory reach of an entirely new category of materials, *i.e.*, materials neither disposed of nor abandoned. . .." *Id.*

The same reasoning applies to this case. In the context of the statutory definition of solid waste, Congress meant to grant EPA authority over discarded waste. *Id.* Congress could not have intended to grant EPA authority over any materials, potentially "waste" at some future date, whenever they are "accumulated." Since every consumer product will at some point be disposed of, all such products that are accumulated are technically accumulated "before" being disposed of. Thus EPA's regulation, classifying as "abandoned" any materials "accumulated. . . before or in lieu of being. . . disposed of," § 261.2(b)(3), can only make sense with respect to materials accumulated for the purpose of disposal. Otherwise, a shipment of MyPhones from the manufacturer to a distributer, or from a distributer to a retailer, would be subject to EPA regulations as "solid waste," because they would be accumulations of materials that will ultimately be solid waste when disposed of, and thus "abandoned" by the EPA's definition. Congress could not have intended this absurd result, which does nothing to further the purpose of the statute.

GRG and Newtown PTA did not accumulate the UEDs for the purpose of disposal. Rather, their specific purpose was to sell them to a third party, Geraldo Garcia. (R. at 5.) While Garcia may have bought the UEDs with the purpose of disposing of them, Garcia's motive was not pertinent to GRG and Newtown PTA's decision to accumulate those items. Since it appears that Garcia disposed of these materials, he is the one who accumulated the material in order to dispose of it. *Id.*

By analogy, had GRG and Newtown PTA collected the UEDs and sold them to a waste disposal company in the United States, and had that company dumped the UEDs in a landfill or a river, FRT and EPA could properly proceed against the waste disposal company—not against GRG and Newtown PTA. The same is true in this case.

The UEDs in this case were not "disposed of" as defined by RCRA, and they were not accumulated for that purpose; therefore, they were not "solid waste" at any time during which they were in GRG and Newtown PTA's possession.

B. RCRA Does Not Provide for Extraterritorial Application.[2]

Even if the UEDs were solid waste, the district court correctly reasoned that they ceased to be so for the purposes of the statute when they left the United States, because RCRA does not apply outside the United States. (R. at 11.)

RCRA's limitation to domestic waste disposal accords with the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). The Supreme Court has described this as a clear statement rule: "Congress legislates against the backdrop of the presumption against extraterritoriality [which applies] unless there is 'the affirmative intention of the Congress clearly expressed'" that the statute

2. Although normally this issue would be antecedent to any consideration of whether the UEDs were solid waste, the organization of Part IV of this brief tracks the reasoning of the district court's opinion below.

should apply abroad. *Arabian American Oil*, 499 U.S. at 248 (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

The leading case applying this principle to RCRA has reached the conclusion that Congress did not provide for extraterritorial application. *See Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 672 (S.D.N.Y. 1991). The *Amlon* court reached its conclusion after an extensive analysis of the language and structure of RCRA, as well as the statutes' legislative history. *Id.* at 674-76.

1. The Text of RCRA, its Structure, and its Purpose All Counsel Against Extraterritorial Application.

The *Amlon* court noted that the various provisions of RCRA indicate that "Congress was concerned with hazardous waste problems in the United States, not in foreign countries." *Id.* at 675. For example, the first section of RCRA, explaining "the issues that RCRA was passed to address," *id.*, describes waste disposal as "a matter national in scope and concern." 42. U.S.C. § 6901(a)(4). Congress found that "many of the cities in the United States will be running out of suitable solid disposal sites within five years unless immediate action is taken." 42 U.S.C. § 6901(b)(8).

RCRA also contains no provisions for venue for citizen suits concerning waste located in a foreign country. *Amlon*, 775 F. Supp. at 675. And the statute does not address how the sovereignty of other nations would be affected by its application, although it includes a number of such provisions designed to respect state sovereignty. *Id.* at 676 (citing as an example 42 U.S.C. §6973(a), which requires notice to affected states, and noting the absence of any such provision for affected foreign nations).

Public policy concerns also favor the interpretation of RCRA as having exclusively domestic application. The presumption against extraterritoriality serves in part the purpose of respecting foreign nations' sovereignty. *Arabian American Oil*, 499 U.S. at 248. In the context of RCRA, extraterritorial application could create exactly the sort of foreign relations difficulties that the presumption is intended to prevent. For example, a foreign

citizen whose government had consented to import hazardous waste would be able to sue in the United States to have the waste removed. *Amlon*, 775F.Supp. at 676 n.11 (explaining how extraterritorial application of RCRA would violate public policy).

2. *Amlon*'s Holding, that RCRA Does Not Apply Extraterritorially, is Also Bolstered by Legislative History and Subsequent Commentary.

That the text of the statute itself indicates no extraterritorial application should be dispositive. *See, e.g.*, *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) (explaining that "it is the statute [RCRA], and not [the legislative history], which is the authoritative expression of the law.")

Nevertheless, the *Amlon* court also looked to the legislative history behind RCRA, and found nothing there to justify a finding of extraterritoriality. *Amlon*, 775 F. Supp. at 674. As it was uncontested in that case that "the initial focus of Congress when passing RCRA was *entirely domestic*" *id.* (emphasis added), the court looked for any indication that Congress nonetheless intended extraterritorial application. However, the *Amlon* court only found more evidence that Congress was concerned solely with domestic waste, and found "virtually no evidence in the legislative history to support" a contrary view. *Id.*

In the wake of *Amlon*, commentators have consistently agreed that the court correctly found that RCRA does not apply extraterritorially. *See, e.g.*, Lisa T. Belenky, *Cradle to Border: U.S. Hazardous Waste Export Regulations and International Law*, 17 Berkeley J.Int'l L. 95, 135 (1999) (staing that "federal courts are likely to concur in the analysis of the lack of extraterritoriality of RCRA or CERCLA found in *Amlon Metals*"); Lee I. Raiken, *Extraterritorial Application of RCRA: Is Its Exportability Going to Waste?*, 12Va. Envtl. L.J. 573, 583 (1993) (stating that "it appears that Judge Conner [the author of the *Amlon* opinion] correctly evaluated the legislative history in holding that the RCRA citizen suit provision is unavailable when the injury did not occur in this country"). If the titles of these papers indicate that their authors would prefer RCRA to apply abroad, they nonetheless acknowledge that Congress must make this change, not the courts.

C. Appellants Have Failed to Demonstrate that the UEDs Were Hazardous Waste under RCRA; Even if the UEDs Were Hazardous, GRG and Newtown PTA Are Not Liable for Breach of Testing and Reporting Requirements.

Even if the UEDs in this case were solid waste as defined by RCRA, Appellants have not adduced any direct evidence that they qualified as hazardous waste under the pertinent definitions. And even if they did qualify as hazardous waste, GRG and Newtown PTA had no duty to test the UEDs and report the results, because GRG and Newtown PTA are by no definition "generators" of the alleged hazardous waste.

1. FRT and EPA Failed to Demonstrate that the UEDs Were Hazardous.

RCRA defines hazardous waste as "solid waste [that may] pose a substantial present or potential hazard. . .when improperly. . . disposed of . . . ." 42 U.S.C. §6903(5). EPA has promulgated a complex set of regulations detailing how specific types of waste will be identified as hazardous. *See* 40 C.F.R. § 261.3 and sections cited therein.

Appellants have not demonstrated under either the statute or any part of § 261 that the UEDs at issue in this case were hazardous. UEDs are not listed under any of the explicit lists of hazardous materials that EPA has promulgated. (R. at 12.) FRT and EPA's reliance on the testing provisions embodied in 40 C.F.R. § 261.24 is likewise unavailing.

The UEDs that GRG shipped to Sud-Americano have never been tested, so FRT and EPA relied below on statistical generalities regarding cell phones and CRT monitors in general—to wit, that other UEDs have in the past failed toxicity tests. (R. at 12.) As the district court pointed out, this is only circumstantial evidence that the actual UEDs sent in this case were hazardous.

In fact, it is particularly weak circumstantial evidence: even the study that FRT and EPA cited below did not find toxicity exceeding EPA thresholds in all cell phones, and concluded only that such devices "*could potentially* be classified as a. . .

hazardous waste . . . ." Timothy, *supra* p. 26, at 1-3 (emphasis added). In fact, the study acknowledges that the quantity of various potentially toxic substances (e.g., lead) actually leached into surrounding land or water depends in part upon other substances comprising the material, such as iron and maybe plastic, as well as the particle size of the finally disposed of product. *Id.* at 2-8 to 2-9. Despite the fact-specific nature of the inquiry, FRT and EPA have not presented any evidence relating to MyPhones specifically (other than the fact that they contain lead and mercury (R. at 5), which alone does not demonstrate that those substances would be present in large enough amounts or leach sufficiently to qualify as hazardous by EPA standards).

2. Even if the UEDs Met the Criteria for Hazardousness, They Fall under the Household Waste Exception.

Even if FRT and EPA had adduced any evidence that the UEDs were actually hazardous, they would still be exempt under 40 C.F.R. § 261.4(b)(1), which exempts from the definition of hazardous wastes all "household waste"—that is, "material derived from households." *See also Chicago v. EDF*, 511 U.S. at 334-35.

The undisputed facts show that nearly all of the material at issue in this case came directly from Newtown households, and thus falls squarely within the plain meaning of the exception. (R. at 12.) In fact, the only factually grounded argument Appellants have made against the application of the exception is that three laptops were, at some indeterminate point, property of the EPA itself. (R. at 13.)

EPA's attempt to disqualify an entire shipment of household items from the exception based on the presence of three EPA laptops is more than simply ironic. It is also unseemly that EPA should be able to sidestep its own regulation by alleging that it irresponsibly disposed of its own waste. But even so, the evidence adduced does not show that GRG and Newtown PTA got the waste directly from EPA, rather than from a household. (R. at 13.) Nor do three laptops determine the nature of an entire container of electronic items, the rest of which were clearly from households (whether those households had opened the items or not). (R. at 13.)

3. Even If the UEDs Were Hazardous Waste Outside the Household Waste Exception, GRG and Newtown PTA Did Not Generate the Waste and Had No Duty to Test the Materials or Report the Results of Such Tests.

Even if the UEDs here were properly labeled hazardous waste, GRG and Newtown PTA had no duty to test and report, as FRT and EPA allege. EPA's own regulations establish testing and reporting requirements only for *generators* of hazardous waste. 40 C.F.R. § 262.11 ("A person who generates a solid waste, as defined in [40C.F.R. § 261.2], must determine if that waste is a hazardous waste"). Hazardous waste generation, in turn, is defined by the statute as "the act or process of generating hazardous waste." 42 U.S.C. §6903(6).

Thus, in consonance with the plain language definition of "generation," GRG and Newtown PTA are not generators of the allegedly hazardous waste in this case, even if it is hazardous. In fact, Appellants have not alleged any facts that support the conclusion that GRG and Newtown PTA generated the waste in this case; therefore, the testing and reporting requirements are quite simply inapplicable.

CONCLUSION

For the foregoing reasons, GRG and Newtown PTA respectfully request that this Court affirm the district court's grant of summary judgment on all claims.