Pace Environmental Law Review

Volume 27
Issue 3 *Summer 2010*

Article 13

July 2010

Best Brief, Appellants

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Recommended Citation
Caitlyn Byars, Lindsey Chow, and Steven Lord, *Best Brief, Appellants*, 27 Pace Envtl. L. Rev. 937 (2010)
Available at: http://digitalcommons.pace.edu/pelr/vol27/iss3/13

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

Best Brief, Appellants*

LOYOLA UNIVERSITY NEW ORLEANS COLLEGE OF LAW
CAITLIN BYARS, LINDSEY CROW & STEVEN LORD

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 APPELLANTS, FRIENDS OF RESPONSIBLE TRADE,
ACE VENTURA, AND JUAN VALDEZ

* 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

This is an appeal from the final order of the United States District Court for the District of New Union. (Order 3). The district court had subject matter jurisdiction over the claim based on federal question jurisdiction. 28 U.S.C. § 1331 (2006). Specifically, standing under Article III of the United States Constitution, the Resource Conservation and Recovery Act, the Alien Tort Claims Act, and Code of Federal Regulations are all matters of federal question at issue on appeal. 28 U.S.C. § 1331. Friends of Responsible Trade now timely appeals the district court's final order granting Green Recycling Group and Newtown Parent Teachers Association's motion for summary judgment. (Order 4). This court has jurisdiction based on 28 U.S.C. § 1291 (2006), which grants jurisdiction over all final decisions of the lower courts.

STATEMENT OF THE ISSUES

I. Whether FRT has sufficient constitutional or statutory standing to bring this claim against GRG and Newtown PTA for violating RCRA.
II. Whether ATCA provides an alternate basis for FRT's standing in this claim.
III. Whether the lower court's dismissal of FRT's claim bars the EPA, as intervenor, from continuing litigation.
IV. Whether the lower court properly analyzed the nature of container #VS2078 as solid waste, and whether its export subjects GRG and Newtown PTA to liability under RCRA.
V. Whether container #VS2078 is hazardous waste for the purposes of RCRA.

STATEMENT OF THE CASE

This is an appeal from a final order of the United States District Court for the District of New Union. Order Granting Mot. Summ. J. (Aug. 31, 2009). Friends of Responsible Trade (hereinafter "FRT") instituted an action against Green Recycling Group, Inc. (hereinafter "GRG") and Newtown Parent Teachers Association, Inc. (hereinafter "Newtown PTA") for violation of the

Resource Conservation and Recovery Act, 42 U.S.C. § 6901 (2006). (hereinafter "RCRA") seeking civil penalties, injunctive relief, and compensatory damages. (Order 3). Specifically, FRT argued that GRG and Newtown PTA violated RCRA when they exported used electronic devices (hereinafter "UEDs") abroad for salvage and recycling without complying with the specific federal requirements pertaining to the disposal of hazardous waste. (Order 3). FRT asserts representational standing through members, Ace Ventura (hereinafter "Ventura"), Juan Valdez (hereinafter "Valdez"), or both, pursuant to Article III of the United States Constitution and RCRA's citizen suit provision, 42 U.S.C. § 6972(a)(1)(A) (2006). (Order 3). Alternatively, FRT asserts appropriate federal jurisdiction through Valdez pursuant to the Alien Tort Claims Act, 28 U.S.C. § 1350 (hereinafter "ATCA"). (Order 3). The Environmental Protection Agency (hereinafter "EPA") later intervened pursuant to 42 U.S.C. §6972(d). (Order 3). FRT, joined by the EPA, filed a motion for partial summary judgment against GRG and Newtown PTA for their violation of RCRA, leaving the remedial portion of the action, whether the matter shipped was actually hazardous, to be determined at trial. (Order 3). GRG and Newtown PTA filed a countermotion for summary judgment claiming two alternative arguments: (1) the district court lacked jurisdiction to hear the action brought by FRT, thus precluding the EPA's ability to continue its litigation; or (2) that GRG and Newtown PTA did not violate RCRA. (Order 4).

The district court granted GRG and Newtown PTA's motion for summary judgment, finding that FRT lacked constitutional standing. (Order 4). In addition, the court narrowly interpreted RCRA, finding that an ongoing environmental violation is a condition precedent to bringing suit, and GRG and Newtown PTA's actions were only in the past. (Order 4). The district court also dismissed Valdez's ATCA claim, finding that the actions of GRG and Newtown PTA did not violate a recognized law of nations. (Order 4). Although the district court properly recognized the EPA's right to intervene and continue litigation for the purpose of enforcing RCRA, it ultimately dismissed the entire claim, finding the waste collected was household in nature and thus exempt from hazardous classification under RCRA. (Order 4). As a result of these decisions, FRT requests review.

STATEMENT OF THE FACTS

FRT is an international non-profit membership organization that advocates for responsible trade practices on behalf of its members. (Order Attach). Ventura and Valdez are both members of FRT. (Order 4). Ventura is an American citizen and accomplished photojournalist, who recently released, "Toxic Recycling," a documentary about the shipment of UEDs from the United States to unregulated salvage facilities abroad. (Order 4, 6). "Toxic Recycling" has aired on public television and been awarded as the best documentary film at three film festivals. (Order 6). Valdez, a citizen of Sud-Americano, works at the local salvage and reclamation facility featured in Ventura's documentary. (Order 5-6).

GRG accumulates UEDs, such as cell phones, televisions, and computers, for sale and exportation to foreign salvagers. (Order 4). Pursuant to this purpose, GRG enters into partnerships with community organizations to collect UEDs. (Order 4). The town of Newtown, State of New Union, home to the MyPhone corporate headquarters, was chosen as a test site for the "Myphone," a device similar to Apple's iPhone. (Order 5). Unlike the iPhone, the "Myphone's" battery contains mercury, lithium, and other toxic materials, including lead. (Order 5). The "Myphone" could not adequately make phone calls, lost its market share with its competitors, and eventually became obsolete. (Order 5). After the failure of the "Myphone," most citizens of Newtown were burdened with a heavy, useless device. (Order 5).

GRG partnered with Newtown PTA to develop a recycling program to collect the dysfunctional "Myphones" and other UEDs. (Order 4-5). Newtown PTA solicited residents for UEDs, to be used in developing countries either in their original capacity or recycled for parts. (Order 5). GRG required residents to sign a form acknowledging that all collected devices were used within their household and that all contributed items were intact. (Order 5). GRG supplied the container, identified as #VS2078, and Newtown PTA supervised the collection of all the materials on June 19, 2008. (Order 5). Ventura was at Newtown High School on the day of collection and photographed Newtown PTA members packing the donated UEDs into container #VS2078. (Order 5). Thereafter, GRG shipped this container to Geraldo Garcia's (hereinafter "Garcia") salvage and reclamation facility in

Pacifica, Sud-Americano with no paperwork, aside from custom documents. (Order 5). In pursuit of his investigation, Ventura traveled to Garcia's site and filmed his employees. (Order 6).

Garcia sorts UEDs and their components, typically salvaging about half the material for reuse in the Pacifica market. (Order 5). At his facility, Garcia's employees go through the UEDs, including those in container #VS2078, reclaiming metals and other valuable materials. (Order 5). Valdez has worked for Garcia since the inception of Garcia's salvage and recycling business six years ago. (Order 6). As a result of operating in a country with no regulatory recycling scheme, Valdez and other employees at Garcia's facility were exposed to mercury, lead, and other heavy metals. (Order 6). Ventura's documentary following container #VS2078 highlights Valdez and his fellow workers' exposure to these hazardous materials. (Order 6). Additionally, the release of the toxins, including those known to be present in container #VS2078, caused contamination to the water and the local environment, exposing all residents and visitors (including Ventura) to injurious materials. (Order 6).

Specifically, Valdez now suffers from memory and neurological losses. (Order 6). Expert medical testimony established that Valdez's injuries are "of the type caused by lead and mercury poisoning." (Order 6). The extent to which Ventura's exposure physically harmed him is unknown at this premature stage. (Order 6-7). However, because of his exposure to the contaminated water and environment while filming "Toxic Recycling," Ventura is fearful of returning to Pacifica and risking further exposure. (Order 7). Because of its interest in responsible international trade, FRT brings this action in conjunction with its members, Ventura and Valdez, to redress the injuries suffered as a result of GRG and Newtown PTA's unregulated export of UEDs known to contain mercury, lead, and other toxic materials. (Order 3).

SUMMARY OF THE ARGUMENT

FRT satisfies the requirements of Article III standing through its injured members, Ventura and Valdez. Only one member of FRT need establish constitutional standing to bring this action in federal court. Furthermore, GRG and Newtown PTA's illegal exportation of hazardous waste to Pacifica caused

Ventura and Valdez's injuries. These injuries will be deterred, and thus redressed, through civil penalties, injunctive relief, and punitive damages against GRG and Newtown PTA. An injury which satisfies the Article III burden may exist by virtue of federal statutes creating legal rights, the invasion of which creates standing. RCRA creates such a right for FRT and its members. GRG and Newtown PTA violated this right when they illegally shipped hazardous waste to the unregulated country of Sud-Americano without receiving the country's consent, as required by RCRA.

Even if this court determined that FRT did not qualify for standing under RCRA's citizen suit provision, GRG and Newtown PTA's tortious acts also violated international norms which qualify for recognition under the law of nations. As such, the ATCA is an alternate basis for standing for FRT. The shipment of hazardous waste to unregulated, non-OECD countries has been banned by the majority of the world's civilized nations. By ignoring this customary rule, GRG and Newtown PTA injured the Pacifica community, including Valdez.

Should this court find that FRT cannot establish standing, and thus dismiss their claim, as the administrator agency, the EPA has the right to intervene in this action and has sufficient standing to recommence the proceeding independently.

However, FRT can establish appropriate jurisdiction under RCRA because the material in container #VS2078 was both solid and hazardous, two requisite requirements. Specifically, when the UEDs were individually disposed of, accumulated, and recycled through reclamation they were solid waste for the purposes of RCRA. Furthermore, RCRA is not violated until the solid, hazardous material is shipped abroad to unconsenting countries; thus, Congress intended to apply RCRA to violations committed abroad. The EPA properly treats organizations like GRG and Newtown PTA as generators under RCRA, thus making them responsible under the Code of Federal Regulations to determine whether the material they ship is hazardous. (The material in container #VS2078 is characteristically hazardous.) However, GRG and Newtown PTA failed to meet RCRA's requirements. The household exemption, which would alleviate GRG and Newtown PTA from liability is not applicable here because it was not generated on the premises of a residence, was

not the type of waste generated by consumers in their home, and household and nonhousehold items were mixed together. Therefore, GRG and Newtown PTA are liable for the injuries caused by the illegal disposal of hazardous waste.

STANDARD OF REVIEW

An appellate court reviews a lower court's grant of summary judgment *de novo*, a standard of review in which no form of appellate deference is acceptable. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991). During a *de novo* review, the appellate court will use the same legal standard used by the district court; specifically, "summary judgment is appropriate if there is no genuine issue as to any material fact." *Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co.*, 22 F.3d 1527, 1529 (10th Cir. 1994) (*quoting* Fed. R. Civ. P. 56(c)). "While the party moving for summary judgment bears the burden of showing the absence of a genuine issue of material fact, the moving party. . . need only point out. . .that there is an absence of evidence to support the nonmoving party's case." *Id.* (*quoting* Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Moreover, "[w]hen applying this standard, [the appellate courts] examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). "As with all summary judgment determinations, [the court] reviews the matter *de novo* to decide whether the record as a whole establishes that the defendant was entitled to judgment as a matter of law." *City of Chi. v. Envt'l Def. Fund*, 948 F.2d 345, 347 (7th Cir. 1991).

ARGUMENT

I. FRT HAS STANDING IN FEDERAL COURT TO BRING ACTION AGAINST GRG AND NEWTOWN PTA FOR RCRA VIOLATIONS RESULTING FROM THE EXPORTATION OF CONTAINER #VS2078 TO SUD-AMERICANO.

To establish standing as an organization under Article III of the United States Constitution (hereinafter "Article III"), FRT must show that one of its members has standing to bring this

action. *Sierra Club v. U.S. Forest Serv.*, 878 F.Supp 1295 (D.S.D. 1993). Both Valdez and Ventura are members of FRT and base standing on the environmental degradation and pollution resulting from GRG and Newtown PTA's exportation of hazardous waste to Pacifica. (Order 6). An individual achieves standing by demonstrating: (1) injury-in-fact; (2) a causal connection between that injury and the complained of behavior; and (3) the likelihood that the injury will be redressed by the suit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The injury requirement under Article III may exist by virtue of federal statutes creating legal rights, the invasion of which creates standing. *Warth v. Seldin*, 422 U.S. 490, 500 (1975). In this case, the injury occurred when GRG and Newtown PTA invaded a legal right by violating RCRA. Furthermore, the illegal exportation of hazardous waste to Pacifica by GRG and Newtown PTA, via container #VS2078, demonstrates a causal connection to the physical, as well as environmental injury in this case. This type of gross disregard for the law will be deterred in the future by redressing the injuries of Valdez and Ventura through civil penalties and injunctive relief, thus establishing the redressibility element for standing required by jurisprudence.

Finally, both Valdez and Ventura have a valid cause of action based on GRG and Newtown PTA's violation of RCRA. In 1984 Congress amended RCRA to implement international regulations on the exportation of hazardous waste, like UEDs; the amendment is referred to as the Hazardous and Solid Waste Amendment (hereinafter "HSWA"). 42 U.S.C. § 6398 (2006); 40 C.F.R. § 262.53(a)(i)-(vii) (2009). HSWA requires exporters to obtain express consent from recipient countries before sending hazardous materials abroad for recycling. *Id.* The lower court should have adopted the United States Supreme Court's opinion in *Friends of Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, finding that citizen suits can be brought for past acts when they are likely to reoccur in the future. *Friends of Earth,* 528 U.S. 167 (2000). Therefore, FRT has Article III standing, and can also establish a cause of action based under RCRA.

A. FRT satisfies the requisite elements of Article III standing through its members, Ventura and Valdez.

The lower court should have found that FRT has representational standing through either member, Ventura or Valdez. In *U.S. Forest Serv.* the United States Supreme Court held, "if there is no direct injury to an association itself, an association may establish standing as a representative of its members." 878 F. Supp. 1295 at 1302. The "constitutional minimum of standing" consists of three elements. *Defenders of Wildlife,* 504 U.S. at 560. First, the injury-in-fact suffered by the plaintiff must be (a) concrete and particularized and (b) actual or imminent. *Id.* Second, the causal connection between the injury and the injury causing conduct must be fairly traceable to the defendant's action and not severed by the independent action of some third party. *Id.* at 560-61 (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976)). Third, it must be likely, rather than speculative, that the plaintiff's injury will be redressed with a favorable decision. *Defenders of Wildlife*, 504 U.S. at 561. Ventura and Valdez meet all three requisite elements; thus, FRT can properly establish standing in federal court.

1. Ventura and Valdez suffered injury-in-fact.

Ventura and Valdez suffered injuries that satisfy FRT's burden of proving injury-in-fact. In *Defenders of Wildlife*, the Supreme Court determined injury-in-fact to be an invasion of a legally protected interest that is concrete and particularized as well as actual or imminent. *Id.* at 560. Furthermore, the Court held, "by particularized, we mean that the injury must affect the plaintiff in a personal and individual way. . . ." *Id.* at 561 n.1. In *Laidlaw*, the Court found standing based on plaintiff's inability to use public grounds for recreational purposes, such as hiking and fishing. *Laidlaw*, 528 U.S. at 183. Additionally, the Court has also held that plaintiff must show "specific, concrete facts" to prove actual harm. *Warth*, 422 U.S. at 508. In determining the injury-in-fact, the Supreme Court distinguishes imminent injury from actual injury in that an imminent injury is impending. *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990).

Valdez suffers from both actual and imminent particular injuries caused by the hazardous materials found in "MyPhones." Footage obtained by Ventura reveals that container #VS2078 was entirely filled with material collected from Newtown PTA. (Order 5). Most of the material in the container consisted of "MyPhones" (Order 5). "MyPhones" use mercury lithium batteries and other toxic materials including lead. (Order 5). Ventura's footage also ascertained that Garcia employed Valdez and other local laborers to reclaim these heavy metals and other valuable materials from container #VS2078, thus exposing Valdez to mercury, lead, and other toxic substances. (Order 5-6). Valdez currently suffers from actual injuries, including memory and neurological losses of the type caused by lead and mercury poisoning. (Order 6). He also faces imminent harm through his particular connection to the affected area. Valdez will be injured by corruption to the environment where he lives, raises a family, and works. As such, GRG and Newtown PTA's actions present a threat of imminent future injury. Finally, the lower court found that "there is no doubt that Valdez is suffering injuries." (Order 6).

FRT member Ventura also suffered imminent particular injury from GRG and Newtown PTA's illegal exportation of hazardous waste to Pacifica, and this harm is analogous to the kind of harm the Supreme Court has found to establish standing. Specifically, in *Sierra Club v. Morton*, the Supreme Court declared that even harm to "aesthetic value and environmental well-being" may contribute to establishing injury-in-fact. *Morton*, 405 U.S., 727, 734-35 (1972). The lower court should have found that Ventura did not have to allege physical injuries to establish injury-in-fact. However, the waste from the UEDs in container #VS2078 caused mercury, lead, and other heavy metals to enter into the water and land of Pacifica, endangering everyone in the community, including Ventura. (Order 6). Also, Ventura has expressed his severe distress over the harm to the environmental and aesthetic well-being of Pacifica, an area to which he is particularly connected to by his work. (Order 7). Because of the public interest that has arisen since the release of his documentary, Ventura would likely want to return to Pacifica, but is too fearful of further exposure to hazardous material. (Order 6, 7). Similar to the prevention of recreational activities found to establish standing in *Laidlaw*, Ventura also has a

particularized interest in the city of Pacifica. *Laidlaw*, 528 U.S. at 183. Therefore, Ventura's particularized interest in Pacifica is sufficient to establish imminent injury-in-fact.

2. GRG and Newtown PTA's shipment of container #VS2078 caused Ventura and Valdez's injuries.

GRG and Newtown PTA's shipment of container #VS2078 to Pacifica was the only cause of injuries to Valdez, Ventura, and the city of Pacifica. Under Article III, the injury suffered must be "fairly traceable" to the actions at issue, and not the result of an independent action of a third party absent from the proceeding. *Defenders of Wildlife*, 504 U.S. at 560 (*citing* Simon v. E. Ky. Welfare Rights Org., 426 U.S. at 41-42). Moreover, "to show that the alleged injury is f*airly traceable* to the challenged action, the plaintiff(s) must make a reasonable showing that *but for* the defendant's action the alleged injury would not occur." *Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Servs.*, 338 F. Supp. 2d 1135, 1143 (D. Mont. 2004) (emphasis added).

Ventura's documentary traces the illegal shipment directly from Newtown to Garcia's salvage facility in Pacifica. (Order 5). GRG supplied container #VS2078 and Newtown PTA members supervised the collection of the UEDs, a significant number of which were "MyPhones". (Order 5). Ventura photographed many of the UEDs that Newtown PTA's members placed in the container. (Order 5). Subsequently, GRG and Newton PTA exported container #VS2078 to Pacifica where Ventura and Valdez were directly exposed to material reclaimed from the "MyPhones." (Order 5-6). Medical testimony established that Valdez suffers memory and neurological losses linked to lead and mercury poisoning, agents known to be present in the "MyPhone". (Order 5). Therefore, because the chemicals causing the members' injuries are found in the "MyPhones" handled by Valdez, and videoed by Ventura, a causal link is necessarily established. In addition, because the broad scope of environmental claims allows for injuries to the aesthetic value of the environment in which Ventura and Valdez have an interest, and because Pacifica suffered contamination to the water and land from these hazardous materials, GRG and Newtown PTA's exportation of container #VS2078 to Pacifica, is fairly traceable to

Valdez's direct medical injuries, Ventura's imminent injuries, and to the injuries Pacifica suffered as a whole.

The lower court erroneously found if any causal connection exists, it would be a result of Garcia, an absent third party to the suit, because he "failed to properly conduct his recycling operations." (Order 7). However, the negligent acts of Garcia do not sever the causal link between GRG and Newtown PTA's illegal shipment of hazardous materials and Ventura and Valdez's injuries. Congress amended RCRA to protect persons in unregulated countries from the mismanagement of recycling facilities. 42 U.S.C. § 6398 (2006). Garcia's facility is located in Pacifica, where there is no regulated recycling regime. (Order 5). Without being notified of the hazardous nature of the container's materials pursuant to RCRA's requirement, Garcia had no way to protect his employees. Garcia's actions are at best contributory, but in no way superseding to the illegal acts of GRG and Newtown PTA. Therefore, *but for* the violation of RCRA, the injuries to Ventura and Valdez would not have resulted.

3. Ventura and Valdez's injuries would likely be redressed through a favorable verdict for FRT.

Ventura and Valdez's injuries can be redressed through injunctive relief and civil penalties because GRG, and similar companies, will be deterred from committing similar offenses in the future. In addition, Newtown PTA, and similar organizations, would be deterred from making partnerships with recycling groups without ensuring compliance with all federal exportation requirements under RCRA. In *Doyle v. Town of Litchfield*, the plaintiff alleged that the town violated RCRA and other state laws. *Doyle*, 372 F. Supp. 2d 288, 290 (D. Conn. 2005). The *Doyle* plaintiff owned property approximately a quarter mile from the town's municipal landfill, which he claimed contaminated his property. *Id.* However, the Court in *Doyle* granted summary judgment in favor of the defendant, finding the plaintiff was unable to establish standing because he no longer owned the property, and therefore, had no legal interest in the case. *Doyle*, 372 F. Supp. 2d at 302. Accordingly, the Court held that a favorable verdict would not redress the plaintiff's injuries. *Id.*

Unlike *Doyle*, Ventura and Valdez have an interest in their health and Pacifica, where they live and work, respectively. An injunction to stop the pollution, civil penalties to deter further pollution, or both, would deter GRG and companies with whom it forms partnerships (such as Newtown PTA) from committing similar harmful acts. When FRT filed its complaint, GRG possessed, and continues to possess, an open-ended contract with Garcia for future shipments to Pacifica. (Order 8). Therefore, injunctive relief would redress Ventura and Valdez's injuries because the cessation of future shipments of hazardous material to Pacifica would prevent further harm to their health and professions. Hence, unlike the plaintiff in *Doyle*, Ventura and Valdez have injuries which can be redressed by a favorable decision.

B. FRT has standing to bring a "citizen suit," against GRG and Newtown PTA for their violation of RCRA.

Even though RCRA is usually enforced by the federal government, it contains a citizen suit provision that gives individuals the ability to enforce provisions of RCRA. 42 U.S.C. § 6972 (2006). Violations of this statute would typically afford a plaintiff standing; however, in this case the lower court incorrectly found three reasons why FRT lacked standing. First, the court held RCRA requires an ongoing violation and no continuous violation was occurring. (Order 8). Second, because Valdez was not a citizen of the United States he could not allege jurisdiction under RCRA. (Order 7). Finally, the harms suffered by Ventura and Valdez were not caused by a violation of RCRA, but rather by the negligent actions of Garcia. (Order 7).

However, RCRA creates a legal right to be free from harm from hazardous waste exportation. *Warth*, 422 U.S. at 500. Additionally, actionable claims for RCRA violations should not be based on a solely past act standard, but instead, should consider whether the wrongful action is likely to occur again in the future. The lower court should have adopted the Supreme Court's position in *Laidlaw*, which allows a citizen suit to be brought for past acts when those acts were likely to recur. *See Laidlaw*, 528 U.S. 167. Furthermore, FRT asserts standing through the violation of RCRA under Ventura only, and only one member of

an organization is required to establish standing. Finally, the lower court should have found the injuries suffered were a result of GRG violating RCRA, because RCRA specifically requires that exporters notify recipient countries when they are shipping hazardous materials abroad, and it failed to do so.

1. RCRA, as amended by HWSA, creates a legal right for all persons to be free from the harmful effects of hazardous waste exportation.

By passing HSWA in 1984, Congress extended the scope of RCRA to provide international regulations on the exportation of hazardous waste. William Schneider, *The Basel Convention Ban on Hazardous Waste Exports: Paradigm of Efficacy or Exercise in Futility*, 20 Suffolk Transnat'l L. Rev. 247 (1996). As amended, RCRA requires all United States exporters to notify the EPA and obtain consent of the recipient country prior to exporting hazardous materials abroad. 42 U.S.C. § 6938 (2006); 40 C.F.R. § 262.53 (2009). A manifest copy of the recipient country's acceptance must be attached to each shipment. *Id.* The recipient country sets the terms and conditions on which its consent depends, unless such terms are already established by a treaty between the countries. *Id.* HSWA required GRG to ascertain manifest acceptance from the Sud-Americano government and conform to any conditions Pacifica required. GRG did not provide any paperwork, aside from customs documents, when it shipped container #VS2078 to Pacifica. (Order 5). Thus, GRG and Newtown PTA violated RCRA, infringing on the legal rights of Ventura and Valdez – as well as all citizens of Pacifica.

2. The Supreme Court's interpretation of the "purely past act" language of the Clean Water Act also applies to RCRA's citizen suit provision.

The lower court narrowly interpreted RCRA's citizen suit provision, finding the actions of GRG and Newtown were solely in the past. (Order 8). RCRA's citizen suit provision states: "any person may commence a civil action on his own behalf—against any person. . . who is alleged *to be in violation of* any permit, standard, regulation, condition, requirement, prohibition, or

order. . . ." 42 U.S.C. § 6972 (2006) (emphasis added). The lower court found that because the shipment by GRG and Newtown PTA had already occurred, they were no longer in violation of a RCRA provision.

Recently, the Supreme Court interpreted the Clean Water Act's citizen suit provision in *Laidlaw*, specifically in regard to the purely past act language. *See Laidlaw*, 528 U.S. 167. Because RCRA's citizen suit provision contains the same language, the *Laidlaw* holding should be adopted here. The respondent in *Laidlaw* bought a hazardous waste incinerator facility and subsequently discharged treated water in the North Tyger River. *Id.* at 176. The respondent's discharges repeatedly violated the Clean Water Act by exceeding the limits set out in its permit. *Id.* Pursuant to the citizen suit requirement of the Clean Water Act, petitioner notified respondent of its intent to file suit. *Id.* To avoid petitioner's suit, respondent solicited the appropriate regulatory agency to sue them first and reached a settlement one day before the petitioner legally filed suit in district court, and then argued that the petitioner's claim was moot. *Id.* at 176-67. The majority specifically noted:

> The standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: "a case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur." The "heavy burden of persuading" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.

Id. at 189. The Court ultimately concluded that because the respondent continued to possess a permit, it did not meet its heavy burden of establishing the claim moot. The Court refused to dismiss the case based on respondent's voluntary changes in behavior. *Id.* at 193-194.

It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Furthermore, the defendant has the burden to prove mootness by persuading the court that the conduct in question cannot reasonably be

expected to recur. *Laidlaw*, 528 U.S. at 189. GRG's open-ended contract with Garcia is analogous to Laidlaw's retention of a NPDES permit. Subsequent to the exportation of container #VS2078, it is not reasonably clear that GRG will stop exporting hazardous materials abroad. Therefore, GRG has failed to establish that the RCRA violation was a purely past act.

Moreover, the lower court held that Valdez could not establish jurisdiction under RCRA because he was not a citizen of the United States; however, no provision under HSWA or RCRA specifically bars aliens from bringing a citizen suit against violators. Under the analogous citizen suit provision of the Clean Water Act, Congress defines a citizen as, "a person having interest which is, or may be, adversely affected." 33 U.S.C. § 1365(a), (g) (2006). Therefore, because Valdez is adversely affected by GRG's unregulated exportation of hazardous materials to his country, he is eligible to bring suit under the citizen suit provision. However, even if this court chooses not to recognize Valdez's interest in enforcing unregulated exportation of hazardous materials into his home country, Ventura's standing under RCRA is still valid.

FRT can establish representational standing through either of its members, Valdez or Ventura. Both members suffered concrete and particular, as well as, actual and imminent injuries. The lower court recognized Valdez suffered physical harm, but should have recognized Ventura's injuries were directly related to his interests in the city of Pacifica. Furthermore, those injuries are a direct result of GRG and Newtown PTA's shipment of container #VS2078. The container's contents were known to cause the exact injuries of which FRT complains. By granting injunctive relief, civil penalties, or both, this court will deter GRG, Newtown PTA, and any similar partnerships, from continuing to ignore the federal regulations regarding the export of hazardous waste abroad. Finally, FRT has standing to bring a citizen suit based on GRG and Newtown PTA's violation of RCRA. Because GRG and Newtown PTA's behavior is likely to occur again in the future, the lower court should have found that there was jurisdiction for FRT's claim under RCRA. Further, at the very least there is a dispute of fact, which warrants reversal of summary judgment.

II. THE ALIEN TORT CLAIMS ACT (ATCA) PROVIDES FRT WITH AN ALTERNATE BASIS FOR JURISDICTION.

Should this court find that RCRA does not provide jurisdiction, FRT can still bring a claim through Valdez under the ATCA. The ATCA allows aliens to pursue civil actions in federal courts "for tort only," and only if the tort was "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2006). A violation of the law of nations is a violation of those standards by which nations regulate their dealings with one another. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004). International treaties can evidence customary norms under the law of nations. *Id.* at 734; *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 829 (9th Cir. 2008). As times have changed and as new issues arise, courts have recognized the need to extend ATCA beyond its original purpose. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). However, even with these adaptations, the ATCA only creates jurisdiction for a narrow range of torts. *Sosa*, 542 U.S. at 729. As a result, it is appropriate to analogize the exportation of hazardous waste to piracy, which has long been recognized as a law of nations. *Id.* at 725. Accordingly, the lower court improperly found there is nothing well-defined about regulations on the exportation of hazardous waste.

A. GRG and Newtown PTA violated norms established by international treaties.

The district court should have found that the ATCA does provide jurisdiction for Valdez's tort claim. The ATCA grants federal courts jurisdiction to hear civil actions brought by aliens "for tort only, committed in violation of the law of nations or treaty of the United States." 28 U.S.C. § 1350 (2006). For an action to be maintained under the ATCA's "law of nations" provision, the tort must violate a norm of customary international law. *See Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995); *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980). Valdez suffered personal injuries when GRG and Newtown PTA

deliberately disposed of hazardous waste in contravention of customary international law.

The law of nations is created from the general customs and practices of nations, and is not static but ever-evolving with the changing times. Louis Henkin, *International Law: Politics and Values* 29 (M. Nijhoff ed., Dordrecht 1995) (1995). As the lower court held, torts giving rise to the ATCA jurisdiction are few and far between. (Order 9). However, this should not prevent the judiciary from recognizing the development of international norms, which are created to resolve global problems. Fearing adverse effects on foreign policy, the Supreme Court has continually looked to Congress for guidance as to what modern torts should be recognized as actionable under the law of nations. H.R.Rep. No. 102-367, pt.1, (1991). Since the ATCA's creation in the 18th century, courts have adapted the law of nations to include torture and other acts in violation of human rights. *Filartiga,* 630 F.2d 876; *Tel-O*rren *v. Libyan,* 726 F.2d 774, 813 (2d Cir 1984).

Prior to1989, there existed global concern for the overall increase in the generation and exportation of hazardous waste to countries, where significant health and environmental problems were rising as a result. William Schneider, *The Basel Convention Ban on Hazardous Waste Exports: Paradigm of Efficiancy or Exercise in Futility*, 20 Suffolk Transnat'l L. Rev. 247, 251 (1996). The Basel Convention represents the efforts of 121 countries, OECD nations and non-OECD nations, government organizations and non-government organizations, coming together to address the risks of transboundary movement of hazardous waste. *Id.* at 252. Health and environmental risks to the recipient countries were determined to be far more significant than the profits recycling companies were making by shipping abroad, and thus a ban was created prohibiting the unregulated exportation of hazardous waste. *Id.* at 278. Therefore, because the Basel Convention has been embraced by over 60% of the civilized world, its ban on the exportation of unregulated hazardous waste should be recognized as a law of nations.

Although the Basel Convention covered the exact "activities at issue here," the lower court was hesitant to rely on the Basel Convention as a resource of an international norm because the United States never ratified it. (Order 9). However, in 2008, the Ninth Circuit applied concepts expressed in the United Nations

Convention on the Law of Sea (UNCLOS) as a source of establishing new components of the law of nations. *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 829 (9th Cir. 2008). Like the Basel Convention, the United States has yet to ratify UNCLOS, evidencing that federal courts may turn to unratified treaties to establish modern day international norms. Thus, the Basel Convention's ban prohibiting the exportation of hazardous waste should similarly be adopted here because it establishes an international norm recognized under the law of nations.

In addition, the lower court failed to note that regional treaties have recently adopted the Basel Convention's ban of the exportation of unregulated hazardous material. Lome Convention, Dec. 15, 2009, 29 I.L.M. 809 (1990); Bamako Convention on the Ban of the Import into Africa of Transboundary Movements and Management of Hazardous Waste in Africa, Jan. 30, 1991, 30 I.L.M. 773 (1991). Because the exportation of hazardous waste is such a significant problem and such a large amount of the world supports its regulation, the illegal exportation of hazardous waste should be actionable as a violation of the law of nations. Therefore, this court should find that the ATCA provides jurisdiction for Valdez's personal injury claim arising from GRG and Newtown PTA's tortious conduct.

In *Amlon Metals, Inc. v. FMC Corp.*, the court held exportation of dangerous pollutants would not constitute the requisite violation of international law. It is important to note, however, that this case did not take into consideration the Basel Convention's amendment which officially banned the exportation of hazardous waste to non-OECD countries. *Amlon*, 775 F.Supp. 668, 671 (S.D.N.Y. 1991). Exporting hazardous waste to unregulated countries should be recognized as a violation of law of nations because of its expressed provision in the Basel Convention and the OECD decision on hazardous waste.

B. The exportation of hazardous waste to non-OECD countries without their consent is comparable to piracy, and thus violates the law of nations.

The treaties created as a result of the Basel Convention and the OECD Convention represent the law of nations regarding the export of hazardous waste. *See* Bamko Convention, Jan 30, 1991,

30 I.L.M.773 (1991); Lome Convention, Dec. 15 1989, 29 I.L.M. 809 (1990). The ATCA only creates jurisdiction for a narrow range of torts, only those which violate international law "as widely defined" today as piracy was in 1789. (Order 9). When created in 1789, few tortious actions were recognized as a law of nations, including infringements of the rights of ambassadors and violation of safe conducts, but most notably, piracy. *Sosa,* 542 U.S. 692 at 725. Since then, courts have recognized the need to adapt to changes in time and expand the types of actionable torts under the ATCA. 28 U.S.C. § 1350 (2006); Restatement (Third), Foreign Relations § 702 (1987). Added to the list over the past two centuries have been torture, slavery, and extrajudicial killing. *Id.* The Court in *Sosa* recognized that the ATCA should extend beyond piracy; however, held that a strict standard of the statute's limitations should be maintained. *Sosa*, 542 U.S. 692, 729. The lower court improperly found that there is nothing well-defined about regulations dealing with the exportation of hazardous waste, and thus this court should reverse.

The qualifying factor of all legitimate ATCA causes of action is *hostis humanani generic*, "an enemy of all mankind." *Malek Adhel*, 43 U.S. (1 How.) 210, 239 (1844). In 1844, Justice Story proclaimed why piracy is proscribed by the law of nations. He explained:

> A pirate is deemed, and properly deemed, *hostis humanani generis*. But why is he so deemed? Because he commits hostilities upon the subjects and property of any or all nations, without any regard to right or duty, or any pretence of public authority.

Id. Corporations, such as GRG and Newtown PTA, who violate national laws and international norms to risk sickness, death, and mass environmental corruption, in hopes to plunder a profit by exploiting developing nations, are toxic pirates. Their recklessness makes them an enemy of all mankind, and the severity of the potential risks to be protected demands that this court recognize toxic recycling as a violation of the law of nations.

Furthermore, the exportation of hazardous waste has become as widely defined today as piracy was in 1789. The Basel Convention brought the majority of the world's countries together to address the problem. In addition, Congress amended RCRA to

include a specific provision on the exportation of hazardous waste to unregulated countries. Therefore, because hazardous exporting has become a global concern and because it commits hostilities upon recipients without any regard for their citizens' health or well-being, it is comparable to piracy in 1789, and thus the lower court should have found their actions to be a violation of the law of nations.

As an alternative to jurisdiction under RCRA, FRT has a valid cause of action under the ATCA. Having established he suffered damages as a result of the tort committed by GRG and Newtown PTA, FRT has representational standing through Valdez. Furthermore, the exportation of hazardous waste without obtaining consent from Sud-Americano should be considered a law of nations arising from a United States treaty, and thus authorizing the valid application of ATCA to the case at hand.

III. IN THE INTEREST OF JUSTICE, IF THIS COURT DISMISSES FRT'S CLAIM AGAINST GRG AND NEWTOWN PTA, THE EPA SHOULD STILL BE ALLOWED TO CONTINUE LITIGATION.

Alternatively, if this court finds that FRT lacks standing, the EPA, as the administrator agency, has the right to intervene in this action, recommence the proceeding, or both. The intervention clause of RCRA's citizen suit provision was meant to enable United States agencies to enter a proceeding to prevent issues of potential significance from being decided with limited input from private litigants. *Ruotolo v. Ruotolo*, 572 F.2d 336, 338-39 (1st Cir. 1978). While there is currently a split among circuits as to whether Article III standing is necessary for an intervenor, federal law establishes that the administrator may intervene as a matter of right in any RCRA action. 42 U.S.C. § 6972(d) (2006). *Compare S. Christian Leadership Conf. v. Kelly*, 747 F.2d 777 (D.C. Cir. 1984) (equating interest necessary to intervene with interest necessary to confer standing), with *United States v. 39.36 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985) (differentiating statutorily protected interest from interest which must be greater than the interest sufficient for standing).

Should this court find the EPA's intervention is not a matter of right, RCRA violations are a judicially cognizable interest, so

imperative to the agency, that the final disposition of the matter could affect its ability to enforce its own regulations. The intent of Congress was to afford the EPA broad discretion regarding the enforcement of RCRA. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Further, the EPA has the authority to bring the action independently before this court because this is the manner in which the agency judicially enforces RCRA violations.

IV. FINDING THAT CONTAINER #VS2078 WAS SOLID WASTE, THE DISTRICT COURT SHOULD HAVE EXTENDED THIS CLASSIFICATION BEYOND ITS EXPORTATION OUTSIDE THE UNITED STATES.

As the lower court noted, determining whether a material is hazardous is a two-step analysis. First, it must be determined whether the material is solid waste; and second, whether the material is hazardous under the EPA's criteria. Although the district court found the materials collected in container #VS2078 were solid waste while in the United States, the district court incorrectly determined the materials ceased to be solid waste when they cross international borders. Federal courts have consistently held violators of RCRA, as amended by HSWA, accountable for unpermitted solid waste exported to countries without their consent. *United States v. Asrar*, No. 93-50610, 1995 WL 5796461 (9th Cir. Oct. 3, 1995); *Amlon*, 775 F.Supp. 668. The legislative history of HSWA specifically shows Congress' intent to expand the scope of RCRA to include the unregulated export of hazardous waste abroad.

A. The materials in container #VS2078 were solid waste.

The district court properly found that the UEDs in container #VS2078 became solid waste when the Newtown residents discarded them. (Order 11). The district court also stated that the UEDs not salvaged for reuse were recycled, possibly making them solid waste. (Order 11). However, the district court's application of the federal regulation defining sold waste is misguided. A solid waste is any "discarded material" that does not fall under an EPA exemption. 40 C.F.R. § 261.2(a)(1) (2009).

A material is "discarded" when it is: (a) "abandoned;" or (b) "recycled." *Id.* § 261.2(a)(2)(i). Materials are "abandoned" if they are "disposed of." *Id.* § 261.2(b). Materials are also solid waste if they are "recycled," or if they are accumulated or stored before recycling. *Id.* § 261.2(c). "Recycled" materials that are used for their original purpose are not solid waste, but materials that are "recycled" by being "reclaimed" are solid waste. *Id.* § 261.2(c)(3). Furthermore, a material is "reclaimed" if it is processed to recover a usable product." Id. § 261.1(c)(4).

As provided by 40 C.F.R. § 261.2(b), when the Newtown residents gave their UEDs to GRG and Newtown PTA, each individual "disposal" of an electronic devise created a solid waste. When some of the UEDs were "recycled" at Garcia's facility, they also fell under 40 C.F.R. § 261.2(c)'s definition of solid waste because heavy metals and other materials were "reclaimed" from about half of the UEDs. GRG and Newtown PTA accumulated the UEDs disposed of by the Newtown residents before shipping them to Garcia's facility for recycling. (Order 5). Accordingly, as in 40 C.F.R. § 261.2(c), the UEDs collectively became solid waste when they were "accumulated. . .before recycling." *Id.* § 261.2(c). Therefore, the UEDs in container #VS2078 became solid waste when they were individually disposed of, collectively accumulated, and recycled through reclamation.

B. Container #VS2078 was classified as solid waste while in the United States and retained its solid waste character when exported abroad.

When failing to extend container #VS2078's solid waste classification past the borders of the United States, the lower court incorrectly relied on the presumption that ". . . legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. . . ." *E.E.O.C. v. Arabian Am. Oil Co.*, 499 US 244, 248 (1991). Contrary to the lower court's interpretation, when "there has been significant conduct within the territory, a statute cannot properly be held inapplicable simply on the ground that absent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relations law." *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d

1326 (2d. Cir. 1991). Additionally, the lower court should have acknowledged the legislative intent of RCRA and the subsequent enactment of HSWA, both of which indicate Congress' intent to apply the classification scheme of RCRA past the borders of the United States.

The enactment of HSWA included an exportation provision that made exportation of hazardous waste to non-consenting foreign countries an illegal activity. 42 U.S.C. § 6901 (2006). The legislative history of HSWA's amendment illustrates Congress' intent for the statute to apply abroad. Such intent was embodied when, Representative Mikulskis stated,

> [O]ur country will have safeguards from the ill effects of hazardous waste upon the passage of HSWA. We should take an equally firm stand on the transportation of hazardous waste bound for export to other countries. . . If I were the U.S. Secretary of the State, I would want to be sure that no American ally or trading partner is saddled with U.S. waste it doesn't want or does not have the capacity to handle in an environmentally sound manner.

Amlon, 775 F. Supp. at 674. (*citing* 129 Cong. Rec. 27691 (1984)). Similarly, the Congressional Findings Report delineated Congress' intent on this matter. The report noted, "alternatives to existing methods of land disposal must be developed since 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). The plaintiffs in *Amlon* argued that Congress believed applying RCRA extraterritorially would alleviate international fears about United States solid waste exports. *Amlon*, 775 F. Supp. at 676. Therefore, HSWA was intended to foster mutually beneficial and necessary foreign relations. Dismissing FRT's claim on grounds that transferring solid waste is permissible once it crosses international waters would defeat the purpose of HSWA. Further, dismissal would send a message to the international community that the United States does not protect those who engage in their markets. Such a reputation would seriously undermine and cripple the United States' ability to use necessary resources of international solid waste disposal.

While the case of *Amlon* initially indicates that RCRA is not meant to apply extraterritorially, a closer examination of the case reveals the Court was willing to extend the exportation provision extraterritorially. *Id.* at 674. In fact, the court acknowledged that extraterritorial application of HSWA specifically referred to the exportation provision. *Id.* Likewise, the court in *United States v. Asrar* exemplified the proper interpretation of RCRA when analyzing exportation to non-consenting countries. *Asrar*, No. 93-50610, 1995 WL 5796461. The defendant in *Asrar* was found criminally liable ". . . for illegally transporting and exporting hazardous waste in violation of 42 U.S.C. § 6928" because he not only failed to obtain consent from the receiving country, but also because the country lacked a necessary permit for receiving hazardous waste. *Id.* at *2. GRG and Newtown PTA's practices with Pacifica parallel the actions of the defendant in *Asrar*. Sud-Americano, like Pakistan, is an unregulated country with no regulatory recycling regime. Furthermore, GRG and Newtown PTA are similar to *Asrar* because they both ignored RCRA's requirements and exported hazardous material to another country without first obtaining that country's consent. Therefore, this court should find that the exportation provision of RCRA should be extended extraterritorially.

GRG and Newtown PTA should be held liable for violating 42 U.S.C. § 6901 for two reasons. First, GRG and Newtown PTA failed to obtain consent from Sud-Americano prior to exporting hazardous solid waste. Second, the purpose of HSWA is to regulate the exportation of hazardous waste by prescribing requirements, such as gaining the consent of the recipient country. GRG and Newtown PTA violated those requirements. Considering the lower court's characterization of container #VS2078 as solid waste, the legislative intent supporting the enactment of HSWA, and the case precedent pertaining to RCRA's exportation provision, the lower court should have found that RCRA provided jurisdiction to FRT.

V. FOR THE PURPOSES OF RCRA, THE MATERIALS EXPORTED IN CONTAINER #VS2078 WERE HAZARDOUS; THEREFORE, GRG AND NEWTOWN PTA SHOULD BE HELD LIABLE FOR VIOLATING THE TESTING AND REPORTING PROVISIONS OF RCRA'S HAZARDOUS WASTE SECTIONS.

This court should find the district court made four errors of law. First, the district court should have concluded that the materials in container #VS2078 were hazardous because the primary contents of the container, "MyPhones," routinely fail the toxicity test for hazardous waste. Second, the district court should have determined that GRG and Newtown PTA were "generators" of hazardous waste. Third, the court should have found that the "household waste" exemption did not apply to the materials collected by GRG and Newtown PTA. Finally, even if the "household waste" exemption applies, the district court erred in concluding the mixture of household materials with non-household UEDs was hazardous waste. Because GRG and Newtown PTA are "generators" of solid waste, they were obligated to determine whether the materials they collected were hazardous waste under RCRA. "MyPhones" contain toxic substances, such as mercury and lead, which qualify as "characteristic" hazardous waste under RCRA provisions. However, GRG and Newtown PTA did not test the materials they collected for toxicity or abide by the regulations governing exportation of hazardous waste. Therefore, GRG and Newtown PTA should be found liable for violating RCRA.

A. "MyPhones" qualify as "characteristic" hazardous waste.

The district court erred in concluding the materials in container #VS2078 were characteristically toxic, and therefore hazardous. A solid waste is a hazardous waste if it either: (1) it exhibits an identified *characteristic* of hazardous waste or (2) is specifically *listed* as hazardous. 40 C.F.R. § 261.3(a), (c)-(d). A solid waste is characteristically hazardous if it is toxic. *Id.* § 261.24. Solid waste exhibits characteristics of toxicity if, using a test called the Toxicity Characteristic Leaching Procedure (hereinafter "TCLP"), the waste exceeds regulatory levels of

identified substances, such as mercury and lead. *Id.* UEDs, such as "MyPhones," are not listed as hazardous under § 261.3(d). Therefore, in order to be hazardous, the contents of container #VS2078 must exhibit a characteristic of hazardous waste identified under § 261.3(c).

GRG and Newtown PTA neglected to test the materials they collected for toxicity, and significantly, the materials in container #VS2078 are no longer available for testing. (Order 12). UEDs, such as "MyPhones," have been found to routinely fail the TCLP; however, the district court dismissed this pertinent fact, claiming it to be "only circumstantial evidence." (Order 12). Nevertheless, courts have generally recognized that circumstantial evidence has equal weight with direct evidence. *See United States v. Brown*, 102 F.3d 1390, 1399 (5th Cir. 1996); *United States v. de la Cruz-Paulino*, 61 F.3d 986, 999 (1st Cir. 19950) (courts in general have recognized that circumstantial evidence may, in given settings, have equal if not greater weight than direct evidence). In the present case, there are no facts in the Order that indicate the "MyPhones" in container #VS2078 were substantially different than "MyPhones" that have failed the toxicity test. Accordingly, the district court should have inferred that the "MyPhones" in container #VS2078 contained the same material as every other toxic "MyPhone." Because GRG and Newtown PTA moved for summary judgment, the district court was required to draw all reasonable inferences in a light most favorable to FRT. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986). Therefore, circumstantial evidence that "MyPhones" routinely fail the TCLP prove that the "MyPhones" in container #VS2078 were characteristically toxic, and therefore, hazardous.

B. GRG and Newtown PTA should be treated as "generators" of hazardous waste.

The district court found the UEDs in container #VS2078 became solid waste when the Newtown residents gave them to GRG and Newtown PTA, thus implying that the residents "generated" the solid waste. (Order 11). However, the district court neglected to find that GRG and Newtown PTA also generated solid waste by accumulating the discarded UEDs before shipping them overseas to be recycled. A "generator" is

any person whose act or process produces hazardous waste, or whose act first causes hazardous waste to become subject to regulation. 40 C.F.R. § 260.10 (2009).

The facts of this case indicate that two waste streams were generated. When Newtown's residents turned over their UEDs individually to GRG and Newtown PTA a waste stream existed. One resident's act of discarding his or her UED created a waste stream unique to that individual, separate and distinct from every other resident's disposal of UEDs. Stated differently, each time an individual discarded a UED, he or she generated his or her own stream of waste. GRG and Newtown PTA collected the waste. (Order 5). Had the discarded UEDs not gone anywhere, FRT's discussion would end. However, GRG and Newtown PTA's act of accumulating the waste before shipping it for recycling generated a new stream of waste. Accordingly, the district court failed to distinguish the individual acts of discarding the UEDs from GRG and Newtown PTA's accumulation of solid waste before recycling. Therefore, because much of the solid waste accumulated by GRG and Newtown PTA was characteristically toxic, GRG and Newtown PTA generated hazardous waste.

Moreover, the EPA has brought enforcement actions against parties similar to GRG and Newtown PTA. For example, *In re EarthEcycle* was a case about a company who partnered with a local organization to conduct a free electronic waste collection event. *In the Matter of EarthEcycle*, EPA Docket No. RCRA-HQ-2009-0001 (2009). At this event, the respondent company accumulated various electronic waste and subsequently shipped them to Hong Kong to be recycled. *Id.* at 6. Although the respondent merely collected the UEDs from local residents, the EPA nonetheless determined that it was a generator of hazardous waste. *Id.* at 7.

Similarly, the EPA determined that GRG and Newtown PTA are generators of hazardous waste, and the district court should have given deference to the EPA's position regarding who qualifies as a generator of solid waste. (Order 12). Referring to *In re EarthEcycle*, the district court stated: "EPA's other enforcement action, of course, is not before this court and EPA's position there, and here, are just litigation positions, not entitled to much, if any, deference." (Order 12).

In *Chevron*, the Supreme Court created a two-part test that defined the scope of judicial review of an agency's construction of the statute it administers. *Chevron,* 467 U.S. at 842. First, a reviewing court must determine whether, "Congress has directly spoken to the precise question at issue." *Id.* If so, "that is the end of the matter." *Id.* But if, "the statute is silent or ambiguous with respect to the specific issue," the court moves to the second step and must determine, "whether the agency's [interpretation] is based on a permissible construction of the statute." *Id.* at 843. The second step of the analysis centers on whether the agency's interpretation of the relevant statutory provision is "reasonable." *Id.* at 845. Furthermore, the Court in *Chevron* recognized that, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* at 844.

Upon review of the EPA's actions in *EarthEcycle* and in the present case, the district court should have applied the two-part test in *Chevron* to determine if the EPA exceeded the scope of its authority. *See In re EarthEcycle*, EPA Docket No. RCRA-HQ-2009-001; *Chevron*, 467 U.S. 837. RCRA empowers the EPA to regulate hazardous waste generators, transporters, and the owners and operators of hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. § 6921(c) (2006). Also, RCRA requires the EPA to establish standards applicable to generators of hazardous waste. *Id.* § 6922. Accordingly, RCRA is silent as to the definition of a generator because it grants authority to the EPA to promulgate regulations setting forth the standards. The district court should have applied step two of the *Chevron* test to determine whether the EPA was reasonable when it determined that GRG and Newtown PTA were generators. *Chevron*, 467 US at 843. RCRA's delegation of broad authority to the EPA to promulgate regulations applicable to generators demonstrates that Congress intended that the EPA utilize its knowledge and expertise to set the standards for generators of solid waste. Although the *EarthEcycle* respondent and GRG and Newtown PTA did not directly produce solid waste, attaching generator status to their actions is not unreasonable given the wide scope of the EPA's authority. Thus, because the EPA's finding is reasonable, GRG and Newtown PTA are generators.

As generators of hazardous waste, GRG and Newtown PTA are liable for violating RCRA's testing and reporting requirements. Federal regulations require waste generators to determine whether their waste is hazardous, manage waste in proper containers, label and date containers, inspect waste storage areas, train employees, and plan for emergencies. 40 C.F.R. § 262 (2009). Additionally, exportation of hazardous waste is prohibited without: (1) notification to the EPA of intent to export; (2) consent of the receiving country; (3) a copy of the EPA "Acknowledgment of Consent" attached to the manifest; and (4) the shipment conforming with the terms of the receiving country. *Id.* § 262.52. GRG and Newtown PTA, as generators of hazardous waste, failed to carry out all of the above the requirements. Therefore, GRG and Newtown PTA are liable under RCRA and the materials in container #VS2078 should be deemed hazardous.

C. The "Household Exemption" did not remove the materials in container #VS2078 from the RCRA regulatory scheme.

The materials in container #VS2078 do not qualify as household waste under the RCRA exemption, and are therefore still hazardous. Federal regulations provide that solid household waste, "including household waste that has been collected, transported, stored, treated, disposed, recovered. . .or reused," is not hazardous. 40 C.F.R. § 261.4(b) (2009). "Household waste" is defined as: "any material (including garbage, trash and sanitary waste in septic tanks) derived from households." *Id.* The district court found that GRG and Newtown PTA were careful to accept only UEDs that were derived from households, and thus, the UEDs fell under the household waste exemption from hazardous waste. (Order 12).

However, the lower court prematurely established that all of the UEDs GRG and Newtown PTA received at the collection event were derived from households. The district court reached its conclusion merely because donors signed a form that stated the UEDs were used in the home. (Order 5). The forms signed by the donors, however, do not conclusively establish the UEDs were actually derived from households. Signing the form was merely a perfunctory requirement and there was virtually no incentive for donors to be truthful about where their UEDs were used.

Moreover, one of Ventura's photographs shows three laptops that were stamped with the label "Property of the Unites States Government," and had barcodes which indicated that the laptops were used at the EPA office in New Union. (Order 13). It follows that GRG and Newtown PTA's form did not prevent some donors from giving away non-household UEDs.

Furthermore, based on the legislative history of RCRA, the EPA applies two criteria to define the scope of the household exclusion: "First, the waste must be generated by individuals on the *premises* of a temporary or permanent residence for individuals; that is, a household. Second, the waste stream must be composed primarily of materials found in the waste generated by consumers in their homes." Hazardous Waste Mgmt. Sys.; Identification and Listing of Hazardous Waste, 49 FR 44978 (EPA Nov. 13, 1984) (rules and regulations). However, waste from retail stores, office buildings, restaurants, etc., are not exempt because they do not serve as temporary or permanent residences for individuals, and the waste generated at these establishments are not necessarily similar to waste generated by consumers in their homes. *Id.* The household exclusion is based on a Senate Report that states: "[t]he hazardous waste program is not to be used to control the disposal of substances used in households or to extend control over general municipal waste based on the presence of such substances. S. REP. No. 94-988, at 16 (1976). Although households sometimes generate material that could fall under the hazardous waste definition, Congress recognized that it would be impossible to regulate waste from every household. *Id.*

In the present case, the solid waste at issues does not meet the EPA's two criteria for the household exemption, and thus should be considered hazardous waste. First, the waste was not generated on the *premises* of a residence for individuals when GRG and Newtown PTA accumulated it for recycling. Although some of the UEDs likely came from households, they were not "discarded" until Newtown residents gave them away at the Newtown High School parking lot. Unlike the general municipal waste that Congress referred to, GRG and Newtown PTA solicited a specific type of material, inspected each item, and thus, had constant control over the type of waste they accumulated. (Order 5). Congress did not intend to protect such activities from hazardous waste regulation under the household exemption.

Second, the waste accumulated by GRG and Newtown PTA was not the type of waste generated by consumers in their home. A typical consumer does not dispose of an entire shipping container filled with used electronics. Accordingly, the household waste exemption does not apply to UEDs that GRG and Newtown PTA accumulated.

D. Even if the household waste exemption applies, GRG and Newtown PTA generated hazardous waste because UEDs derived from households were mixed with hazardous non-household materials.

The district court should have found that the household materials in container #VS2078 were mixed with non-household hazardous waste. Finding that there was not sufficient evidence, the lower court concluded that the three EPA laptops did not come from a household. (Order 13). The lower court added that even if the laptops came directly from the EPA, the precautions taken by GRG and Newtown PTA to confine the UEDs collected to household material precluded the three laptops from changing the character of the whole container to non-household waste. (Order at 13). However, the district court erroneously neglected to analyze the regulation pertaining to mixtures of characteristic hazardous waste and non-hazardous waste.

A mixture of a characteristic hazardous waste and any other waste will be considered hazardous if the resultant mixture exhibits a hazardous waste characteristic. 40 C.F.R. § 261.3(a)(2)(i). Laptop computers consistently fail the TCLP for determining characteristic hazardous waste. TIMOTHY G. TIMOTHY ET AL., RCRA TOXICITY CHARCTERIZATION OF CPUs AND OTHER DISCARDED ELECTRONIC DEVICES (2004), available at http://www.ees.ufl.edu/homepp/townsend/Research/ElectronicLeaching/UF%20EWaste%20TC%20Report%20July%2004%20v1.pdf. Thus, this court should reasonably infer that the EPA laptops exhibited characteristics of toxicity and were thus, hazardous. Unlike the district court's finding, the mixture rule under 40 C.F.R. § 261.3 does not allow consideration of whether the "character" of the mixed waste has changed. 40 C.F.R. § 261.3(a)(2)(i). The mixture of UEDs from households and the EPA laptops would fail the TCLP for characteristic

hazardous waste. Accordingly, this court should hold the materials in container #VS2078 were hazardous waste.

Furthermore, because courts must evaluate all the facts in a light most favorable to FRT, the district court improperly found there was not enough evidence to conclude the EPA laptops did not come directly from a household. Even if a Newtown resident brought an EPA laptop from his or her home, the laptop was derived from a government office building and not generated by the household. Thus, the EPA laptops were not generated by a household and are not exempted from hazardous waste regulation.

Therefore, this court should find that the material in container #VS2078 and in particular, the "MyPhones", are hazardous waste, that GRG and Newtown PTA are not classified as generators of hazardous waste, and the household exemption does not apply to the materials in container #VS2078. Even if the household exemption did apply, however, this court should conclude that the mixture of non-hazardous household waste and toxic non-household UEDs were hazardous.

CONCLUSION

This court should find that FRT has representational standing, through either or both members Ventura or Valdez to bring this claim. All article III requisite elements, injury-in-fact, causation, and redressibility have been satisfied. Specifically, Ventura and Valdez's injuries would not exist but for GRG and Newtown PTA exporting hazardous waste to Sud-Americano without gaining the countries proper consent. Redressing their injuries through civil penalties and injunctive relief would deter similar conduct in the future. Furthermore, this court has jurisdiction to hear this claim. First, Ventura can bring a citizen's suit under RCRA for GRG and Newtown PTA's direct violation. Specifically, the material in container #VS2078 was both solid and hazardous in nature, as it did not fall under the household waste exemption of RCRA. Second, in the alternative of jurisdiction under RCRA, FRT establishes jurisdiction through Valdez under the ATCA because the injuries he suffered are a direct result of a tort committed in violation of the law of nations. Should, however, this court determine that FRT can not establish standing, the EPA can properly continue on in the litigation.