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Is Voting Necessary? Organization Standing and Non-Voting Members of Environmental Advocacy Organizations

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IS VOTING NECESSARY? ORGANIZATION STANDING AND NON-VOTING MEMBERS OF ENVIRONMENTAL ADVOCACY ORGANIZATIONS

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The United States Supreme Court declared in *Sierra Club v. Morton*[1] that public interest environmental organizations could not rely on their own institutional interest in environmental resources and issues to establish standing to sue,[2] but rather, must rely on the interests of identifiable

[1] 405 U.S. 727 (1972).
[2] *See infra* notes 11-18 and accompanying text for an explanation of the "standing to sue" concept.

members of the organization.[3] Ever since, environmental organizations that litigate have been required to establish standing by identifying specific individual members whose environmental interests would be adversely affected by the action challenged.

The Supreme Court also established, in *Hunt v. Washington Apple Advertising Commission*,[4] that representational standing is not limited to traditional membership organizations.[5] The Court specifically recognized standing for a state commission that legally had no members, but was a membership organization "for all practical purposes."[6] *Hunt* clearly stipulates that having a legally recognized class of members is not an absolute prerequisite for standing.[7] *Hunt* leaves less clear the question of what minimum factors are necessary to establish standing for an organization that is "for all practical purposes" a membership organization.

Many public interest environmental organizations are organized as non-membership organizations, or other organizational forms in which the organization's constituency does not vote to select the board of directors or officers of the organization.[8] Typically, these organizations have a "self perpetuating" board of directors, in which the sitting board of directors elects both officers and new board members of the organization.[9] For these organizations, the question of whether membership voting rights are an essential element of representational standing assumes great importance. A few decisions, with varying results and rationales, have addressed the question of whether voting rights are essential to organizational standing.[10]

This article will examine the law of standing, and specifically, the conflicting decisions concerning the importance of voting rights in order to establish organizational standing. The article concludes that voting rights should not be essential to the assertion of representational standing. Nevertheless, the article will also consider alternate forms of organization

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[3] *Sierra Club*, 405 U.S. at 739-40.
[4] 432 U.S. 333 (1977).
[5] *Id.*
[6] *Id.* at 344.
[7] *See generally Hunt*, 432 U.S. 333.
[8] *See* Charles H. Steen & Michael B. Hopkins, *Corporate Governance Meets the Constitution: A Case Study of Nonprofit Membership Corporations and Their Associational Standing Under Article III*, 17 REV. LITIG. 209, 211 (1998).
[9] *See* Robin Dimieri & Stephen Weiner, *The Public Interest and Governing Boards of Nonprofit Health Care Institutions*, 34 VAND. L. REV. 1029, 1043 (1981) (discussing nonprofit corporation statutes).
[10] *See* Steen & Hopkins, *supra* note 8, at 221-51.

that will improve an organization's chances of establishing representational standing, while addressing the concerns that lead organizations to avoid a voting membership in the first place.

I. BACKGROUND OF ENVIRONMENTAL REPRESENTATIONAL STANDING

A. Environmental Organizations Lack Standing to Represent Their Own Interest in Environmental Issues—Sierra Club v. Morton

Sierra Club v. Morton is often regarded as the seminal case concerning standing for environmental organizations. The standing doctrine involves the issue of who (if anyone) is entitled to bring a particular legal claim in court;[11] the question, "who has standing to sue?," is vitally important to the enforcement of the nation's major environmental laws. A number of federal environmental protection laws, including the Clean Air Act[12] and the Endangered Species Act,[13] contain "citizen suit provisions" that confer standing on citizens to sue violators of the law.[14] The U.S. Supreme Court has clearly established a standing requirement and has grounded this requirement in Article III, section 2 of the Constitution, which grants the judiciary the power to hear "cases" and "controversies."[15] Under modern standing doctrine,[16] a plaintiff must meet three requirements to have Article III standing: first, the plaintiff must show that he or she has suffered an "injury in fact"; second, he or she must establish causation, showing that the alleged injury can be fairly traced to the challenged action; third, the plaintiff must show that the injury "is likely to be redressed by a favorable decision" of the court.[17] However, before these criteria were formally defined, the 1972 Supreme Court held in *Sierra Club v. Morton* that "standing to sue" means that a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.[18]

In the *Sierra Club* case, the plaintiffs sought to prevent the lease of several thousand acres of national forest land near Mineral King Valley in

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[11] *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.").

[12] Pub. L. No. 109-80, 69 Stat. 322 (1955).

[13] 16 U.S.C. §§ 1531-1544 (2000).

[14] *See* 42 U.S.C. § 7604 (2000); 16 U.S.C. § 1540(g).

[15] U.S. CONST. art. III, § 2, cl. 1 ("The Judicial Power shall extend to all Cases . . . [and] to Controversies . . . .").

[16] These criteria were articulated in the 1992 Supreme Court's decision in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), in explaining 1970s era standing precedents.

[17] *See generally Lujan*, 504 U.S. 555.

[18] *Sierra Club*, 405 U.S. at 731-32.

the Sierra Nevada Mountains in California for a proposed ski resort development.[19] The Supreme Court advanced the law of environmental standing by clearly recognizing that the environmental plaintiffs could assert non-economic environmental interests, such as recreational interests and aesthetics, to establish standing.[20] Nevertheless, the Court rejected the standing of the Sierra Club to sue in the case, holding that an environmental organization lacks any direct cognizable injury based solely on its own longstanding interest in environmental issues.[21] The Court held that an interest in the issue being litigated was not, by itself, sufficient to establish standing.[22] Rather, the organization would have to establish a concrete injury to a cognizable corporate interest, or assert representational standing on behalf of specific members who themselves suffered cognizable environmental harms to aesthetic or recreational interests.[23]

Such representational standing was nothing new to the Supreme Court. The Court had previously recognized the standing of a trade association to represent its members,[24] and the right of a public interest organization to assert the constitutional rights of its members to avoid discovery of membership lists in litigation.[25] The Supreme Court in *Sierra Club* thus gave organizational environmental plaintiffs a key to the standing threshold: locate members who would have individual standing (as users of the affected environmental resource, for example) and base organizational standing on the representation of these members. The question, however, of

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[19] *See id.* at 727, 728-31.
[20] *Id.* at 734.
[21] *Id.* at 739-40.
[22] *Id.*
[23] *Id.* at 738. Since *Sierra Club*, there have been no reported cases where environmental organizations have been successful in asserting their own, direct corporate interests in the environment to establish standing. The few reported cases have rejected attempts by environmental organizations to assert standing based on direct corporate interests. *See* Sierra Club v. SCM Corp., 747 F.2d 99 (2d Cir. 1984); Citizens for a Better Environment v. Caterpillar, Inc., 30 F. Supp. 2d 1053 (C.D. Ill. 1998). One court went so far as to suggest that the idea of a corporation (albeit a business corporation) asserting aesthetic injury of its own accord was "beyond the realm of legal fiction and belongs in the realm of poetic license." Citizens Coordinating Comm. on Friendship Heights v. Washington Metro. Area Transit Auth., 765 F.2d 1169, 1173 (D.C. Cir. 1985) (*citing* MACLEISH COLLECTED POEMS 1917-1952, 22 (1952)).
[24] Nat'l Motor Freight Ass'n v. United States, 372 U.S. 246 (1963).
[25] NAACP v. Alabama, 357 U.S. 449, 458-60 (1958).

exactly who may be designated as a "member"[26] that an organization can represent was neither raised nor considered in the *Sierra Club* case.

B. Hunt *and the Representational Standing of Organizations Without Any Legal Members*

Hunt v. Washington Apple considered the organizational standing of a state-created commission, the Washington Apple Advertising Commission (Commission), which was fashioned to promote the state's apple growers.[27] All apple growers and dealers in Washington State were required to pay an assessment to support the Commission's activities; these same growers and dealers selected the members of the Commission, who were also growers and dealers.[28] The Commission sued in 1974 to challenge certain apple packaging and labeling restrictions adopted by North Carolina,[29] which put Washington apple growers at a competitive disadvantage in the North Carolina market.[30] The Commission alleged that these restrictions violated the dormant Commerce Clause[31] of the Constitution and were an unlawful restraint on interstate commerce.[32]

The Supreme Court rejected a challenge to the Commission's organizational capacity to assert the interests of its constituent apple growers.[33] In doing so, the Court specifically held that a collective entity need not have legally recognized "members"[34] in order to assert

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[26] To reduce confusion, this article will use the term "member" to refer to persons formally recognized as members of an organization as that organization is constituted under governing state law. Individuals identified for standing purposes by an organization who are not legally "members" will be referred to as the organization's constituents, even though the organization may itself call them members.

[27] *Hunt*, 432 U.S. at 336.

[28] *Id.* at 336-37.

[29] In 1973, North Carolina enacted a statute, which required all closed containers of apples sold, offered for sale, or shipped into the state to bear "no grade other than the applicable U.S. grade or standard." N.C. Gen. Stat. § 106-189.1 (1973).

[30] *Hunt*, 432 U.S. at 337-39.

[31] The Dormant Commerce Clause doctrine in United States case law limits the power of states to legislate in connection with interstate commerce. The Clause does not expressly exist in the text of the U.S. Constitution; it is a doctrine of congressional power inferred by the U.S. Supreme Court from the actual Commerce Clause in Article I, § 8 of the Constitution. *See* Gibbons v. Ogden, 22 U.S. 1 (1824); H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949). Article I, § 8 authorizes Congress to "regulate commerce among the states." U.S. CONST. art. I, § 8.

[32] *Hunt*, 432 U.S. at 339.

[33] *Id.* at 346.

[34] Members may be those that elect members and are the only ones to serve on the Commission, and those that pay dues and finance activities. *Id.* at 334.

organizational standing; rather, the Court would look to whether the persons whose concrete interests were affected "possessed all of the indicia of membership in an organization."[35] The Court therefore looked at the functions performed by the Commission, and concluded that "it has engaged in advertising, market research and analysis, public education campaigns, and scientific research" in support of promoting the Washington apple industry.[36] The Court then concluded that the growers and dealers possessed the necessary "indicia of membership" akin to members of a traditional trade association.[37] The "indicia of membership" recited by the Supreme Court in *Hunt* included the facts that "[t]hey alone elect the members of the Commission; they alone may serve on the Commission; [and] they alone finance its activities, including the costs of this lawsuit, through assessments levied upon them."[38] The fact that participation in the Commission was mandatory, not voluntary, for apple growers and dealers in Washington State, did not preclude organizational standing.[39] According to the Court, this situation is no different than compulsory membership in a union or state bar association, as such organizations usually have representational standing.[40]

Although *Hunt* adopts a functional equivalence test[41] for determining whether an entity without members may assert representational standing for its constituents, the Court did not explicate the Article III interests served by these functions. Other Supreme Court cases, however, make these interests more explicit. The Court has repeatedly asserted that the purposes of the Article III standing inquiry include assuring that the plaintiff has "a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court

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[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at 344-45.
[39] *Id.* at 345.
[40] *Id.* (adopting the concept of "representational standing" by formulating the *Hunt* three-part test, see *infra* note 41).
[41] *Id.* at 333 ("[a]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit"). *See also* Roger Beers, Environmental Litigation Files, *When Does a Membership Organization Have Standing?*, http://www.rbeerslaw.com/standing.html#When%20Does%20a%20Membership%20Organization%20Have%20Standing? (last visited Dec. 17, 2005).

so largely depends for illumination of difficult constitutional questions . . . ."[42]

Subsequent to *Hunt*, the Court in *International Union v. Brock*,[43] rejected an invitation to reconsider the *Hunt* Court's broad embrace of organizational standing, and further explained the rationale for organizational standing:

> The Secretary's presentation, however, fails to recognize the special features, advantageous both to the individuals represented and to the judicial system as a whole, that distinguish suits by associations on behalf of their members from class actions. While a class action creates an ad hoc union of injured plaintiffs who may be linked only by their common claims, an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir or expertise and capital. "Besides financial resources, organizations often have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack." Note, *From Net to Sword: Organizational Representatives Litigating Their Members' Claims*, 1974 U. ILL. L. FORUM 663, 669. These resources can assist both courts and plaintiffs. As one court observed of an association's role in pending litigation: "[The] interest and expertise of this plaintiff, when exerted on behalf of its directly affected members, assure 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.'" Harlem Valley Transportation Assn. v. Stafford, 360 F. Supp. 1057, 1065 (S.D.N.Y. 1973), *quoting* Baker v. Carr, 369 U.S. 186, 204 (1962).
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> In addition, the doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others.[44]

Implicitly, for an organization to bring this necessary "concrete adverseness" to litigation, it must be sufficiently responsive to those of its constituents who have suffered an "injury in fact" and bring the same full and zealous representation as the individuals would themselves.[45] Such responsiveness might certainly be accomplished by holding management

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[42] Baker v. Carr, 369 U.S. 186, 204 (1962).
[43] 477 U.S. 274 (1986).
[44] *Id.* at 282-83.
[45] *Id.* at 297.

(such as the governing board of the organization) subject to dismissal at the next election if the constituents are dissatisfied. As will be discussed later in this article, however, that is certainly not the only means of assuring organizational responsiveness to the constituents' interests.

Thus, in *Hunt* and its progeny, the Supreme Court recognized representational standing for an organization without formal members as long as the traditional indicia of membership were present, but failed to spell out what the irreducible minimum of such indicia were. The Court held eligibility for service on the governing board, a vote for the board, and financing of the organization's activities, taken together, were sufficient.[46] Conspicuously absent from these factors was the voluntariness of the association. The Court also left unaddressed which of these factors were the bare minimum necessary conditions to representative capacity.

C. Why Many Environmental Organizations Do Not Provide For a Voting Membership

The extent to which *Hunt* established an irreducible minimum of membership indicia may be an important consideration in evaluating the standing of environmental non-governmental organizations that litigate to advance their environmental interests. Like the commission involved in *Hunt*, many such organizations lack formal members under state law.[47] Unlike *Hunt*, the supporting constituents of these organizations voluntarily associate with the organization. Also unlike *Hunt*, very often the supporting constituents of these organizations do not vote for the organization's directors; rather, the board of directors is self-sustaining and elects its own successors.[48]

There are several reasons why non-governmental advocacy organizations may prefer not to have a voting membership. Perhaps one issue is administrative convenience: having a voting membership imposes an extra level of administrative burden on the not-for-profit corporation, with requirements to conduct annual meetings and elections and provide formal legal notice of such meetings.[49] Another perhaps more compelling

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[46] *Hunt*, 432 U.S. at 344-45.

[47] *Id.* at 333-34.

[48] Stephen G. Greene, *Hostile Takeover or Rescue?*, CHRON. OF PHILANTHROPY, April 15, 2004, at 24, *available at* http://philanthropy.com/free/articles/v16/i13/13002401.htm.

[49] *See* Health Research Group v. Kennedy, 82 F.R.D. 21, 24 (D.D.C. 1979) (organization citing "convenience" as reason for not having voting membership); *see generally* ABA SECTION OF BUSINESS LAW, NONPROFIT GOVERNANCE AND MANAGEMENT 337-54 (V. Futter, ed. 2002) (noting that such burdens requiring an intrusion upon the organization's time

reason why organizations prefer not to have voting membership is the fear of a hostile takeover[50] organized by institutions opposed to an organization's advocacy purpose.[51] A recent example of this phenomenon can be seen in the 2004 hostile proxy battle conducted for control of the Sierra Club.[52] The proxy battle was instigated by political organizations opposed to immigration.[53] These groups sought to re-characterize immigration as an "environmental" issue and make an anti-immigration policy a formal part of the Sierra Club's organizational mission.[54] In order to be an eligible voting member of the Sierra Club, a person need simply pay $25 to join;[55] Sierra Club estimated that approximately 8,000 new members signed up just to vote in the contested board election.[56]

Any organization with an open membership structure and formal voting rights is susceptible to this sort of hostile attack. Environmental advocacy organizations may be particularly vulnerable given the nature of the issues they take on and the finances available to the institutions they oppose. Therefore, these groups have come up with a variety of means to respond to threats of outside attack. Some groups impose strict membership requirements, commanding a demonstration of commitment to the organizational cause before offering membership.[57] Other organizations allow only a limited number of board members to be nominated by the membership.[58] Yet another approach is to provide for two or more classes of

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include: electing a board of directors, approving governing structures and policies, and authorizing major transactions).

[50] Acquiring control of an organization by stock purchase or exchange of directors, which goes against the wishes of the target company's management and board of directors. InvestorWords.com, Definition, Hostile Takeover, http://www.investorwords.com/2344/hostile_takeover.html (last visited Dec. 20, 2005).

[51] *See* Greene, *supra* note 48.

[52] *Id.* The Sierra Club Web site can be found at http://www.sierraclub.org/.

[53] Greene, *supra* note 48.

[54] *Id.* Although this particular attempt was unsuccessful, it has caused many organizations to reconsider their voting structure and their vulnerability to an organized attempt to hijack the organizational mission. *Id.*

[55] *See* Sierra Club, Join or Give, Join Online!, https://ww2.sierraclub.org/membership/ (last visited Dec. 17, 2005).

[56] Greene, *supra* note 48.

[57] *See, e.g., id.* Greenpeace (Web site available at http://www.greenpeace.org/ international/) requires its members to have been active in its mission for at least six years as either staff or volunteer before they may become full members with voting rights. As a result, Greenpeace only has 66 voting members. *Id.*

[58] *See, e.g., id.* National Audubon Society (Web site available at http://www.audubon.org/) allows only six of its 36 directors to be nominated by the membership; the remainder is nominated by the Board and subject to ratification by the membership. *Id.*

membership, with voting rights restricted to a smaller class of members that have established their qualification.[59]

For the aforementioned reasons, a formal membership structure with full voting rights is not the norm in environmental advocacy organizations. Indeed, one leading handbook for the governance and management of non-profit organizations questions whether the concept of membership is outdated, and concludes that:

> For most nonprofits serving humanity, the current thinking is to cast as wide a net as possible to further the cause and to communicate electronically with members and nonmembers alike. Supporting a membership, however, is expensive. Cutting-edge nonprofits, particularly mission-driven organizations, will rethink the value of membership to gain the competitive advantage in serving society.[60]

If there is indeed a trend away from a full voting membership structure in "mission-driven" organizations, such as environmental advocacy organizations, then the judicial system will eventually have to decide whether such organizations without a voting membership can still establish the necessary indicia of a membership organization to qualify as litigating representatives of their constituents.[61]

II. INCONSISTENT JUDICIAL APPLICATION OF THE *HUNT* "INDICIA OF MEMBERSHIP" TEST TO ORGANIZATION VOTING RIGHTS

After *Hunt*, a few judicial decisions addressed organizational standing in situations where there is either a non-existent or limited voting membership.[62] Some courts have rejected any claim to representational standing on behalf of persons lacking voting membership rights,[63] while other courts have found there to be "de facto" membership with little or no

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[59] *See, e.g.*, NRDC v. Costle, 1980 U.S. Dist. LEXIS 17298, at **12-13 (D.D.C. 1980) (Natural Resources Defense Council consists of "two classes of members; they are: (a) regular members who elect themselves to office as NRDC's 'Board of Trustees' and who authorized the bringing of this suit, and (b) general members who receive newsletters, progress reports, annual reports, etc.").

[60] ABA SECTION OF BUSINESS LAW, *supra* note 49, at 353-54.

[61] *See, e.g., NRDC*, 1980 U.S. Dist. LEXIS 17298, at **12-13.

[62] *See, e.g.*, Sierra Club v. ALCOA, 585 F. Supp. 842 (N.D.N.Y. 1984).

[63] *See* Am. Legal Found. v. FCC, 808 F.2d 84 (D.C. Cir. 1987); *Health Research Group*, 82 F.R.D. 21.

discussion of the extent of members' voting rights.[64] Some of the more interesting decisions are unpublished, adding to the practitioner's difficulty in making sense of this area of the law.[65] A review of these decisions taken together indicates that courts generally require some level of influence over the advocacy decisions of the organization by the standing members, but that actual voting control may not be necessary.[66]

A. Early Rejection of Organizational Standing for Non-Voting "Supporters" by the District of Columbia Circuit

Two early decisions handed down by the District of Columbia Circuit emphatically rejected attempts by non-membership organizations to assert representational standing.[67] Although neither of these cases arose in the environmental context, they illustrate one approach to the issue of organizational standing. *American Legal Foundation v. FCC*[68] represents an extreme example. American Legal Foundation (ALF) sued the Federal Communications Commission (FCC), arguing that the FCC improperly failed to pursue allegations that the ABC Television Network violated the fairness doctrine by presenting biased reporting of alleged improper activities by the Central Intelligence Agency.[69] ALF claimed to sue on behalf of all television viewers who watched ABC News, and submitted affidavits from several ABC viewers who expressed their support for the ALF suit.[70] As recited by the decision,

> ALF has no members. In fact, the Foundation's corporate charter expressly prohibits it from having any. . . . Instead of claiming to speak for a discrete membership body, ALF purports to represent the interests of all members of the public who regularly watch ABC News (and other network news broadcasts). ALF submitted three

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[64] *See* Pac. Legal Found. v. Gorsuch, 13 ELR 20,105 (9th Cir. Oct. 20, 1982) (holding that PLF lacked standing because "it [did] not allege that any of its directors, members, supporters, or contributors has authorized or asked it to represent them in the suit").

[65] *See, e.g., id.* (although published in advance sheets as 690 F.2d 725 (9th Cir. 1982), the decision was subsequently withdrawn from publication and does not appear in any bound volume. *See infra* note 97 for further explanation on the decision not to publish). *See also* Roger Beers, *supra* note 41, at http://www.rbeerslaw.com/standing.html#When%20Does%20a%20Membership%20Organization%20Have%20Standing?.

[66] *See* discussion *infra* Part II.B.

[67] *See Am. Legal Found.*, 808 F.2d 84; *Health Research Group*, 82 F.R.D. 21.

[68] 808 F.2d 84.

[69] *Id.* at 85.

[70] *Id.* at 88.

> affidavits to the Commission to buttress its claim that the Foundation represents the views of at least some ABC viewers.[71]

The Court of Appeals found this definition of ALF's representative capacity to be far too broad and lacking any definable limit.[72] Accordingly, after discussing the *Hunt* Court's "indicia of membership" factors,[73] the DC Circuit emphatically rejected ALF's claim to organizational standing:

> ALF's relationship to its "supporters" bears none of the indicia of a traditional membership organization discussed in *Hunt*. With its broadly defined mission as a "media watchdog," ALF serves no discrete, stable group of persons with a definable set of common interests. To the contrary, ALF's constituency of supporters is completely open-ended; ALF could, consistent with this "institutional commitment," purport to serve all who read newspapers, watch television, or listen to the radio. Furthermore, it does not appear from the record that ALF's "supporters" play any role in selecting ALF's leadership, guiding ALF's activities, or financing those activities. Finally, we can discern no linkage between ALF's interest in the outcome of this kind of litigation and those of its supporters.[74]

The rejection of ALF's organizational standing is hardly surprising, given the lack of any discernable membership criteria other than the near-universal category of network television viewers, and the lack of any voluntary affiliation or common interest on the part of those ALF claimed to represent.[75] In ALF, the purported standing members were not even identified as contributors to the organization.[76] Not only were these "supporters" lacking in any sort of organizational influence or control,[77] they lacked even the financing element that the *Hunt* Court found so important.[78]

More troubling for representational standing of non-membership corporations, is an earlier decision by the D.C. Circuit that rejected organizational standing of a non-membership corporation even when it

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[71] *Id.*
[72] *Id.* at 90.
[73] *Hunt*, 432 U.S. at 333; *see also supra* note 41.
[74] *Am. Legal Found.*, 808 F.2d at 90.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Hunt*, 432 U.S. at 344-45.

sought to represent the interests of its contributors. In *Health Research Group v. Kennedy*,[79] the D.C. Circuit rejected such standing based on its application of the *Hunt* "indicia of membership"[80] test.[81] The court recognized that the plaintiff organization received financing for its activities from the persons whose interests it asserted for standing, and that "individual supporters and contributors 'influence [the organization's] activities through their financial support and their letter writing.'"[82] Nevertheless, the court focused on the lack of formal voting rights that the supporters of the corporate plaintiff possessed.[83]

According to the *Health Research Group* (HRG) court, effective control over the organization's advocacy efforts was the touchstone of the *Hunt* test:

> Members, as the Court implicitly acknowledged in *Hunt*, normally exercise a substantial measure of power or control over an organization which, in typical circumstances, they themselves have created. In *Hunt*, "the indicia of membership" were present because the growers and dealers alone elected the members of the Commission, served as members of the Commission, and financed its activities . . . .
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> Absent this element of control, there is simply no assurance that the party seeking judicial review represents the injured Party, and not merely a well-informed point of view. Ultimately, unless an organization truly represents an injured party, its position will not be meaningfully different from that of the environmental organization in *Sierra Club v. Morton* which sought standing as a "representative of the public."[84]

After considering that the directors of HRG were appointed by a director, and that all litigation and advocacy decisions were made by HRG employees, the court found insufficient control over the organization to satisfy its reading of the *Hunt* requirements for organizational standing.[85]

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[79] 82 F.R.D. 21.
[80] *Hunt*, 432 U.S. at 333; *supra* note 41.
[81] *Health Research Group*, 82 F.R.D. at 28.
[82] *Id.* at 24.
[83] *Id.* at 27.
[84] *Id.* at 26-27.
[85] *Id.* at 28.

B. Mixed Decisions Applying Voting Control Tests in Environmental Cases

Organizational plaintiffs in environmental cases have fared somewhat better than the advocacy groups in the pair of District of Columbia cases. An early Ninth Circuit decision, subsequently withdrawn from publication, rejected an organization's claim to represent its "supporters";[86] however, the circumstances of this decision and its withdrawal from publication make it tenuous precedent. In more recent years, courts have recognized "de facto" membership organizations for standing purposes, with varying degrees of inquiry into the level of control exerted by the standing members over the organization's management.[87] One district court rejected any requirement that the subclass of members who would have standing in a particular case be large enough to exert effective control over the organization.[88] Another district court explicitly recognized standing of an organization to represent its supporters even in the absence of any membership voting rights.[89] Still, despite this precedent, recent decisions continue to reject organizational environmental standing in the absence of traditional membership voting rights.[90]

1. Ninth Circuit Case Rejects Organizational Standing for Pacific Legal Foundation, but Keeps it a Secret

One early and inscrutable case, *Pacific Legal Foundation v. Gorsuch*,[91] rejected an environmental group's[92] attempt to assert standing on behalf of its "members, supporters, and contributors."[93] Pacific Legal Foundation (PLF) sued the Environmental Protection Agency (EPA) Administrator under the citizens suit provision of the Clean Air Act,[94] alleging that the Administrator neglected a mandatory duty to impose a state implementation

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[86] *Pac. Legal Found.*, 13 ELR 20,105.
[87] *See infra* Part II.B.2.
[88] *ALCOA*, 585 F. Supp. 842.
[89] Cal. Sportfishing Prot. Alliance v. Diablo Grande, Inc., 209 F. Supp. 2d 1059 (E.D. Cal. 2002).
[90] *See* Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta, 986 F. Supp. 1406 (N.D. Ga. 1997); Basel Action Network v. Maritime Admin., 370 F. Supp. 2d 57, 68-70 (D.C. Cir. 2005).
[91] 13 ELR 20,105.
[92] Although PLF asserted environmental claims in this suit, a visit to the organization's Web site reveals that it is not now, and never was, organized to promote environmental protection. *See* PLF, Rescuing Liberty From the Grasp of Government, http://www.pacificlegal.org/ (last visited Nov. 6, 2005). This suggests the possibility that the litigation was commenced collusively to make law limiting organizational standing.
[93] *Pac. Legal Found.*, 13 ELR at *20,107.
[94] Clean Air Act § 304, 42 U.S.C. § 7604.

plan on the State of California. The plaintiffs claimed that imposing the plan would have prevented California from losing its federal highway funding.[95] The Ninth Circuit rejected PLF's standing to assert these claims, noting that:

> All of the [PLF]'s trustees, members, supporters, and contributors are, so far as this case is concerned, anonymous. None of them is alleged to have authorized the [PLF] to represent his or her personal, direct interests in this case. If any of them "can show 'injury in fact' resulting from the action which they seek to have the court adjudicate," . . . he or she is not identified, nor is he or she shown to have authorized the [PLF] to represent him or her in making such a showing. They simply are not here.[96]

Thus, PLF failed to identify any individual members to support its standing claim, and the case was subsequently withdrawn from publication.[97] Therefore, it was hardly surprising when another circuit court similarly rejected the Sierra Club's claim of organizational standing where the Sierra Club refused to identify at least one member with standing.[98] Other parties

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[95] The state implementation plan requirement appears at 42 U.S.C. § 7410(a). Somewhat paradoxically, PLF's suit also claimed a violation of the Constitution's guaranty of a republican form of government, U.S. CONST. art. IV, § 4, in that "unelected" EPA officials were forcing political decisions upon the State of California.

[96] *Pac. Legal Found.*, 13 ELR at *20108.

[97] Footnote 5 of the *ALCOA* case lends an explanation as to why *Pac. Legal Found. v. Gorsuch* was never published. After the court cited to *Pac. Legal Found.*, 690 F.2d 725 (9th Cir. 1982), the court noted that

> The citation to *Pacific Legal Foundation* raise[d] an interesting problem. Counsel for Alcoa advised the Court in a footnote to its memorandum that "[t]hat decision . . . appeared in West Reporting Service's Advance Sheets, but has been omitted from the bound volume. Upon telephoning the Office of the Clerk of the Ninth Circuit, Alcoa's counsel was instructed that the *Pacific Legal Foundation* decision stands as the law of the Ninth Circuit and may be cited for precedent." Defendant's Memorandum in Support of Motion to Dismiss at 8-9 n.**. An Editor's Note appearing at page 725 of volume 690 of West's Federal Reporter 2d Series states: "The opinion of the United States Court of Appeal [sic], Ninth Circuit in *Pacific Legal Foundation v. Gorsuch* published in the advance sheet at this citation, 690 F.2d 725-731, was withdrawn from bound volume at the request of the court." In the interest of accuracy, this Court contacted the chambers of Judge Duniway, author of the *Pacific Legal Foundation* panel decision. Judge Duniway advised that the decision is *not* to be cited as *binding precedent* of the Ninth Circuit in light of that court's determination to withdraw the decision. Accordingly, this Court feels justified in attributing little precedential weight to the result reached in that case.

ALCOA, 585 F. Supp. at 842 n.5.

[98] *SCM Corp.*, 747 F.2d 99.

have since cited the *Pacific Legal Foundation* case in support of a broader argument for membership voting control,[99] but with little success.

2. Northern District of New York Rejects a "Control Test" in *Sierra Club v. ALCOA*

In its Clean Water Act[100] citizen suit against Aluminum Company of America (ALCOA),[101] the Sierra Club did not make the same mistake it did in its earlier cases against Morton[102] and SCM.[103] This time Sierra Club identified 55 individual members who lived near and recreated in the waters affected by ALCOA's pollution.[104] Citing the withdrawn *Pacific Legal Foundation* opinion, however, ALCOA argued that the affected members lacked sufficient control over the organization, which had 340,000 voting members, to permit Sierra Club to assert representational standing.[105]

The court rejected this attack on Sierra Club's representational capacity, but in doing so, the court implicitly endorsed the concept that represented members exercising some form of voting control over the organization's management was requisite to organizational standing. According to the court,

> [s]imply because the members who are affected by defendant's activities represent but a small segment of the Sierra Club's membership does not entitle defendant to belittle or demean these members' ability to assert control over their organization. The Sierra Club is indeed "totally a creature of the parties it purports to represent," . . . at least to the extent it is an organization founded upon participation and involvement by its members. The fact that members, to the extent possible, retain effective control over the direction the Club chooses to pursue distinguishes it significantly from the organization described by Judge Sirica in *Health Research Group*.[106]

The *ALCOA* case thus implies that voting rights are a *sine qua non* element of those members on whose behalf an organization would assert

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[99] *See ALCOA*, 585 F. Supp. at 842.
[100] 33 U.S.C. §§ 1251-1387 (2000).
[101] *See ALCOA*, 585 F. Supp. 842.
[102] In *Sierra Club*, 405 U.S. 727.
[103] In *SCM Corp.*, 747 F.2d 99.
[104] *ALCOA*, 585 F. Supp. at 851-52.
[105] *Id.* at 849-50.
[106] *Id.* at 851.

standing. At the same time, the holding suggests that those members with standing need not have anything close to majority voting status within the organization; indeed, a small minority of members suffices.[107] For the *ALCOA* court, membership voting rights were more important than actual organizational control—this holding seems at odds with the approach of the *Hunt* Court, which refused to elevate form over substance, and looked to the actual control of an agency that had no legal members.[108] Nevertheless, the *ALCOA* holding seems to indicate that voting rights without control are sufficient to satisfy the *Hunt* "indicia of membership" test.[109]

a. Eastern District of California Accepts Standing on Behalf of Members Without Voting Rights in *California Sportfishing Protection Alliance*

At least one court has held that as long as an organizational plaintiff legally has members, the *Hunt* "indicia of membership" has no application, and the organization may assert representational standing on behalf of its legal members. In *California Sportfishing Protection Alliance v. Diablo Grande, Inc.*,[110] the plaintiff organization of sportfishers brought a Clean Water Act citizen suit[111] against a developer responsible for stormwater discharges.[112] The defendant developer challenged the Alliance's standing, claiming that "Plaintiff's individual members have no ability to influence Plaintiff's decisions in Clean Water Act lawsuits."[113] The Eastern District of California rejected this challenge, reasoning that an organization that is formally organized as a membership corporation under state law does not need to satisfy *Hunt's* "indicia of membership" test; its representational capacity was automatic.[114] According to the court,

> [p]laintiff brings suit here on behalf of its associate members such as CSPA Chairman Bill Jennings; no non-member individuals' claims are alleged in the Complaint. *See* Complaint; Doc.48, Exh.S, p.2 ("Any person who pays the annual individual membership dues to this corporation, as prescribed by the Board of Directors, shall be an Associate Member."). Defendant presents no evidence Plaintiff is not a traditional voluntary membership organization. The "indicia of

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[107] *See, e.g., id.*
[108] *Hunt*, 432 U.S. at 333-34.
[109] *See id.* (describing the "indicia of membership" test).
[110] 209 F. Supp. 2d 1059.
[111] Under 33 U.S.C. § 1365.
[112] *See Cal. Sportfishing Prot. Alliance*, 209 F. Supp. 2d 1059.
[113] *Id.* at 1065.
[114] *Id.* at 1066.

> membership" test is not applicable. Defendant presents no evidence that at least one of CSPA's members would not have standing to sue in his own right.[115]

The *California Sportfishing* approach presents the converse of *Hunt*'s form over substance test for organizational standing: as long as the organization is legally chartered as a membership organization, actual voting rights or control is not relevant to the representational standing inquiry.[116] However, *California Sportfishing* would certainly suggest that voting rights are not an absolute requisite for organizational standing, going a step farther than the *ALCOA* court's holding that voting control was not necessary.[117]

b. Several Circuits Have Recognized "De Facto" Membership Organizations Despite Lack of Formal Organizational Membership

Following the *Hunt* preference for form over substance, several courts have rejected standing challenges for organizations that legally lacked members in environmental cases.[118] In some cases, these holdings were almost entirely bereft of analysis. For example, in *Upper Chattahoochee Riverkeeper Fund v. City of Atlanta*,[119] the court simply recited, without discussion, that the plaintiff was a "de facto membership corporation."[120] In *Public Interest Research Group v. Magnesium Elektron, Inc.*,[121] the Third Circuit rejected a challenge to the plaintiff's capacity to assert organizational standing on the grounds that Public Interest Research Group's (PIRG) charter prohibits it from having members.[122] In so doing, the court referred to *Hunt* for the proposition that "to meet the requirements of organizational standing, PIRG . . . need only prove that their members possess the 'indicia of membership' in their organizations."[123]

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[115] *Id.*

[116] State not-for-profit corporation law may limit, however, an organization's ability to create membership classes without voting rights. *See infra* Part IV.A.

[117] *See supra* Part II.B.2.

[118] *See* Public Interest Research Group v. Magnesium Elektron, Inc., 123 F.3d 111 (3d Cir. 1997); *Upper Chattahoochee Riverkeeper*, 986 F. Supp. 1406.

[119] 986 F. Supp. 1406.

[120] *Id.* at 1409.

[121] 123 F.3d 111.

[122] *Id.* at 125.

[123] *Id.* at 119 (citing the *Hunt* test, *Hunt*, 432 U.S. at 333). Although the Third Circuit rejected the challenge to PIRG's organizational capacity to sue on behalf of its members, it went on to find that PIRG's members themselves lacked the "injury in fact" necessary to support standing, as the District Court had specifically found that the defendants' violations caused

In *Friends of the Earth v. Chevron Chemical Company*,[124] the Fifth Circuit provided the most considered application of the "de facto membership" concept to environmental organizational standing.[125] In *Friends of the Earth*, Friends of the Earth (FOE) brought a citizen suit for penalties and injunctive relief for Chevron's violation of its Clean Water Act permit.[126] Chevron challenged FOE's standing, alleging that as a matter of District of Columbia law (where FOE was incorporated), FOE legally had no members as the organization had failed to adopt by-laws establishing classes and qualifications of membership and voting rights.[127] Instead of formal membership criteria, FOE simply considered any person who donated money, or who had money donated in their name, to be a "member."[128] The lower court dismissed FOE's suit on this basis, reasoning that in the absence of legal members, FOE could not assert organizational standing.[129]

On appeal, the Fifth Circuit reversed, specifically recognizing the concept of a "de facto membership" organization that satisfies the requisites of representational standing despite the lack of members recognized as a matter of corporation law.[130] The court noted that the Supreme Court in *Hunt* had rejected exactly that sort of formalistic analysis of organizational capacity in favor of a more substantive "indicia of membership" test.[131] The court applied the *Hunt* test to the organizational structure of FOE and found it sufficient:

> The Court in *Hunt* looked to who elected the governing body of the organization and who financed its activities. The purported members of FOE meet both these elements. Additionally, the members have voluntarily associated themselves with FOE, in contrast to the apple growers who financed the Commission through mandatory assessments. The individuals testified in court that they

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no harm to the environment. *Id.* at 119-23. The Supreme Court subsequently rejected this approach to the "injury in fact" element of standing in environmental cases. Friends of the Earth v. Laidlaw Envtl. Serv., 528 U.S. 167 (2000) (holding that the injury in fact element is satisfied by an injury to the plaintiffs' environmental interests, whether or not there is a perceptible injury to the environment).

[124] 129 F.3d 826 (5th Cir. 1997).

[125] *Id.*

[126] *Id.* at 826.

[127] *Id.* at 827.

[128] *Id.*

[129] Friends of the Earth v. Chevron Chemical Co., 919 F. Supp. 1042 (E.D. Tex. 1996).

[130] *Friends of the Earth*, 129 F.3d at 829.

[131] *Id.*

> were members of FOE. FOE has a clearly articulated and understandable membership structure. This suit clearly is within FOE's central purpose, and thus within the scope of reasons that individuals joined the organization.[132]

The *Friends of the Earth* court also rejected formal membership under corporation law as a prerequisite to organizational standing.[133] At the same time, the court explicitly assumed that voting rights are part of the necessary "indicia of membership" under the *Hunt* test, in effect looking to "who elected the governing body of the organization."[134] The court did not seem to examine too closely the relationship between voting rights and those members identified for standing purposes before the court; nor did the court inquire whether anyone who had ever given money to FOE was given an annual ballot to vote for directors.[135] The court, as an additional factor not present in *Hunt*,[136] noted that the members of the plaintiff organization voluntarily associated themselves with the organization.[137]

c. District Court Decision in *USPIRG v. Bayou Steel*[138] Implicitly Rejects Voting Rights as a Prerequisite to Organizational Standing

There is one unreported decision that upholds organizational standing for an organization that made no claim that it provided voting rights to its constituents. In *United States Public Interest Research Group v. Bayou Steel*,[139] the Eastern District of Louisiana considered the organizational capacity of United States Public Interest Research Group (USPIRG) to assert standing on behalf of its contributors, even though its Articles of Incorporation specifically provided that "the Corporation shall have no members."[140] Like FOE, USPIRG consistently treated all those who

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[132] *Id.*

[133] *Id.* at 826.

[134] *Id.* at 829 (applying the *Hunt* test).

[135] There is no suggestion in the briefs filed by FOE in the Fifth Circuit that FOE's members actually voted for directors of the organization. *See* Appellant's Brief, *Friends of the Earth*, 129 F.3d 826 (5th Cir. Jan. 30, 1997) (No. 96-40590), 1997 WL 33572771; Appellant's Reply Brief, *Friends of the Earth*, 129 F.3d 826, (5th Cir. Apr. 09, 1997) (No. 96-40590), 1997 WL 33572768.

[136] *Hunt*, 432 U.S. at 342 (noting that the commission is not a voluntary organization).

[137] *Friends of the Earth*, 129 F.3d at 829.

[138] United States Public Interest Research Group v. Bayou Steel, Inc., Civ. No. 96-0432, slip op. (E.D. La. Sept. 12, 1997) (on file with author).

[139] *Id.*

[140] Although USPIRG subsequently amended its Articles of Incorporation to provide for a class of members, even with the amendment the charter provided for no membership voting rights: "The corporation shall have one class of members, who shall have no voting rights."

contributed to its organization as members.[141] Applying *Hunt's* indicia of membership approach broadly, the Eastern District of Louisiana concluded that "USPIRG [has] provided a means of expressing the collective views of its members and protected their collective interests in environmental issues," and accordingly held that USPIRG had representational standing in its Clean Air Act suit against Bayou Steel.[142]

The *Bayou Steel* opinion does not explicitly consider whether USPIRG's de facto members had voting rights; however, the briefing before the court makes clear that they did not.[143] Thus, contrary to the District of Columbia decisions in *Health Research Group*[144] and *American Legal Foundation*,[145] the Eastern District of Louisiana apparently determined that voting rights are not the *sine qua non* of organizational standing, and concluded that an organization could nonetheless serve as the collective advocate for persons who were its contributors.[146]

d. DDC Rejects Standing for Non-membership Organization in *Basel Action Network v. Maritime Administrator*[147]

Still, *Bayou Steel* is not the last word of the federal district courts on the necessity of voting control to establish environmental associational standing. In *Basel Action Network v. Maritime Administrator*,[148] the District Court for the District of Columbia again rejected representational standing asserted by a plaintiff organization who gave no voting or control rights to those injured individuals it sought to represent.[149] The Basel Action Network (BAN) sued to challenge a determination by the U.S. Maritime Administrator to dispose

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Memorandum of Plaintiff in Opposition to Motion to Dismiss at 5, *Bayou Steel, Inc.*, Civ. No. 96-0432 (E.D. La. Sept. 12, 1997) (on file with author).

[141] *Id.*

[142] *Id.*

[143] Plaintiff's Brief, *Bayou Steel, Inc.*, Civ. No. 96-0432, slip op. (E.D. La. Sept. 12, 1997) (on file with author).

[144] 82 F.R.D. 21.

[145] 808 F.2d 84.

[146] *Bayou Steel, Inc.*, Civ. No. 96-0432. While this decision appears on its face to contradict the *Health Research Group* approach, the underlying facts developed by *Bayou Steel* may have served to distinguish USPIRG's relationship to its members from that of HRG. The represented "members" claimed by HRG had done nothing more, apparently, than to have donated money to HRG's affiliate, Public Citizen. USPIRG, on the other hand, established that it maintained close communications with its members, including personal visits, surveys, calls, and written communications. *Bayou Steel*, Civ. No. 96-0432.

[147] 370 F. Supp. 2d 57.

[148] 370 F. Supp. 2d 57.

[149] *Id.* at 70.

of a fleet of World War II era cargo vessels by selling them for transfer to a ship-wrecker in Great Britain.[150] BAN claimed to represent the interests of fishermen and other recreational users of the Chesapeake Bay.[151] As in the earlier *Health Research Group* case,[152] the organizational structure of the BAN was somewhat complex, as BAN was a "Sub-project" of an organization known as the Tides Center.[153] Tides Center was incorporated as a not-for-profit corporation, with articles of incorporation that specifically provided that the corporation would have no members.[154]

In analyzing BAN's standing claim, the district court considered the Tides Project to be the real party in interest, and determined that, without effective control over the management of the corporation by those individuals the corporation sought to represent as "members," the plaintiff could not satisfy *Hunt's* "indicia of membership" test.[155] The court explicitly found the control element as part of the irreducible minimum of the *Hunt* test:

> Three main characteristics must be present for an entity to meet the test of functional equivalency . . . it must represent individuals that have all the "indicia of membership" including (i) electing the entity's leadership (ii) serving in the entity, and (iii) financing the entity's activities; and (3) its fortunes must be tied closely to those of its constituency.[156]

Citing the D.C. Circuit's *American Legal Foundation* decision,[157] the court noted that "[t]here is no evidence that the Projects or Sub-Projects exercise any control over the organizational direction of the Tides Center."[158] Accordingly, the court rejected BAN's claim of representational standing.[159]

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[150] *Id.* at 60-61.
[151] *Id.*
[152] 82 F.R.D. 21.
[153] *Basel Action Network*, 370 F. Supp. 2d at 60-61.
[154] *Id.* at 68-70.
[155] *Id.*
[156] *Id.* at 69-70 (citing Fund Democracy v. SEC, 278 F.3d 21 (D.C. Cir. 2002)).
[157] *Am. Legal Found.*, 808 F.2d at 84.
[158] *Basel Action Network*, 370 F. Supp. 2d at 70.
[159] *Id.* (determining that co-plaintiff Sierra Club did have associational standing, the court proceeded to determine the merits of the case).

C. Oregon Advocacy Center[160] *and* Stincer[161]: *the Advisory Board Line of Cases*

Well outside the context of environmental standing, another string of cases has held that "advisory boards" may be used to establish the functional equivalent of membership for organizational standing purposes.[162] Such advisory boards may suffice even where none of the represented class of persons has the right to vote for the organization's board. These cases arise under federal legislation that affirms the standing of such organizations: in 1986, Congress enacted the Protection and Advocacy for Mentally Ill Individuals Act[163] (PAMII) "to ensure that the rights of individuals with mental illness are protected"[164] and "to assist States to establish and operate a protection and advocacy system for individuals with mental illness which will protect and advocate the rights of such individuals through activities to ensure the enforcement of the Constitution and Federal and State statutes."[165] The PAMII Act recognizes and provides support to state-chartered "advocacy systems," which may be either independent state agencies or private not-for-profit entities.[166] To be eligible for financial support as an advocacy system, PAMII requires the organization to establish an advisory council on which "at least 60 percent [of] the membership . . . shall be comprised of individuals who have received or are receiving mental health services or who are family members of such individuals."[167] In addition, the "governing board" of an advocacy organization under PAMII must consist of "members who broadly represent or are knowledgeable about the needs of the clients served by the system."[168] The system is specifically authorized to include members who "have received or are receiving mental health services and family members of such individuals."[169]

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[160] Or. Advocacy Ctr. v. Mink, 322 F.3d 1101 (9th Cir. 2003).
[161] Doe v. Stincer, 175 F.3d 879 (11th Cir. 1999).
[162] *See Stincer*, 175 F.3d 879; *Or. Advocacy Ctr.*, 322 F.3d 1101; and the cases discussed *infra* note 176, below.
[163] Pub. L. No. 99-319, 100 Stat. 478 (1986). For a history of PAMII and associated statutes supporting protection and advocacy systems for mentally ill and developmentally disabled persons, *see generally* M. Bowman, Note, *Open Debate Over Closed Doors: The Effect of the New Developmental Disabilities Regulations on Protection and Advocacy Programs*, 85 KY. L.J. 955 (1998).
[164] 42 U.S.C. § 10801(b)(1).
[165] *Id.* at § 10801(b)(2)(A).
[166] *Id.* at § 10804 (a)(1).
[167] *Id.* at § 10805(a)(6)(B).
[168] *Id.* at § 10805(c)(1)(B)(ii).
[169] *Id.* at § 10805(a)(6)(B).

Under PAMII, an advocacy organization for the mentally disabled has the authority to "pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State,"[170] and "pursue administrative, legal, and other appropriate remedies on behalf of an individual who . . . was an individual with a mental illness."[171] Congress thus contemplated in PAMII the existence, in at least some states, of litigation involving advocacy organizations that may not have formal membership, and which might have advisory boards that include some (but by no means a majority) of the constituent persons with mental illness. As predicted, the federal courts were asked to address the organizational standing of such member-less organizations.

One early case rejected the standing of such organizations, specifically on the grounds that the constituents the organization sought to represent had none of the "indicia of membership" established in *Hunt*.[172] In *Association of Retarded Citizens v. Dallas County Mental Health & Retardation Center Board of Trustees*,[173] the Fifth Circuit reasoned that such an advocacy organization lacked standing because the individual whose interests the organization sought to represent was "not a 'member'" of the plaintiff organization, and "the organization [bore] no relationship to traditional membership groups because most of its 'clients'—handicapped and disabled people—[were] unable to participate in and guide the organization's efforts."[174] In formulating its decision, the Fifth Circuit determined that effective participatory control in the plaintiff organization by its constituents was essential to organizational standing.[175]

Most jurisdictions, however, have taken a more expansive view of organizational standing for PAMII advocacy organizations.[176] In *Stincer*, the

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[170] *Id.* at § 10805(a)(1)(B).
[171] *Id.* at § 10805(a)(1)(C)(i).
[172] *See* Ass'n of Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees, 19 F.3d 241 (5th Cir. 1994).
[173] *Id.*
[174] *Id.* at 244.
[175] *Id.*
[176] The seminal case is *Stincer*, 175 F.3d 879. Other decisions finding organizational standing to advocacy organizations under PAMII include Brown v. Stone, 66 F. Supp. 2d 412, 422-23 (E.D.N.Y. 1999); Tenn. Prot. and Advocacy Serv., Inc. v. Bd. of Education of Putnam County, 24 F. Supp. 2d 808, 814 (M.D. Tenn. 1998); Rubenstein v. Benedictine Hospital, 790 F. Supp. 396 (N.D.N.Y. 1992); Mich. Prot. and Advocacy Serv., Inc. v. Babin, 799 F. Supp. 695, 702 n.12 (E.D. Mich. 1992); Prot. & Advocacy, Inc. v. Murphy, No. 90 C 569, 1992 WL 59100, *10 (N.D. Ill. 1992); Goldstein v. Coughlin, 83 F.R.D. 613, 614 (W.D.N.Y. 1979).

Eleventh Circuit specifically rejected the *Association of Retarded Citizens* case.[177] In doing so, the Eleventh Circuit took a broad view of *Hunt's* "indicia of membership" test, finding it to be satisfied by the constituents' means to communicate to and influence the organization:

> [P]rotection and advocacy organizations must have advisory councils, sixty percent of whose membership as well as the chair of the council must be "comprised of individuals who have received or are receiving mental health services or who are family members of such individuals." [42 U.S.C.] § 10805(a)(6)(B), (C); 42 C.F.R. § 51.23(b)(1), (2). Additionally, PAMII provides that a protection and advocacy organization must afford the public with an opportunity to comment on the priorities and activities of the protection and advocacy system and must establish a grievance procedure for clients. . . . Much like members of a traditional association, the constituents of the Advocacy Center possess the means to influence the priorities and activities the Advocacy Center undertakes.[178]

The Eleventh Circuit reasoned that "the fact that the Advocacy Center [had] constituents rather than members does not deprive it of Article III standing."[179] Notably, the court did not seem to consider the question whether the "constituents" of the plaintiff had any voting rights.[180]

The Ninth Circuit adopted *Stincer* and expanded upon its reasoning in another case under PAMII, *Oregon Advocacy Center v. Mink*.[181] Like the state defendants in *Stincer*, the Oregon State Hospital (whose failure to provide facilities to mentally ill criminal defendants was challenged) argued that the lack of some form of voting control by the organization's constituents precluded representational standing:

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[177] *Stincer*, 175 F.3d 879 (rejecting *Ass'n of Retarded Citizens*, 19 F.3d 241).
[178] *Stincer*, 175 F.3d at 886.
[179] *Id.* at 885.
[180] Paradoxically, the Eleventh Circuit in *Stincer* ultimately held that the Advocacy Center had failed to establish standing because it failed to identify a particular constituent who had suffered "injury in fact." *Id.* at 887. Despite earlier language in the opinion stating that "Nor must the association name the members on whose behalf suit is brought" to establish representational capacity of an organization, *id.* at 882, the court apparently reasoned that identification of such an individual member was still necessary to establish that an individual member would have standing in their own right, as required by *Hunt*.
[181] 322 F.3d 1101. *Stincer* was also adopted and followed by the District of Maine in Risinger v. Concannon, 117 F. Supp. 2d 61 (D. Me. 2000).

> Put in starkest terms, OSH's membership argument is that because "individuals with mental illness [do not] actually control OAC's activities and finances," OAC cannot claim standing to represent their interests. In constitutional terms, the essence of OSH's position is that without a direct membership linkage to incapacitated defendants, OAC cannot rely on injuries to those mentally ill defendants to meet the injury in fact requirement and establish the personal stake in the outcome of the litigation that the Constitution demands.[182]

In rejecting these arguments, the Ninth Circuit carefully considered the import of clear Congressional intent that advocacy organizations under PAMII have standing to sue.[183] The court reasoned that since the first prong of the *Hunt* test for organizational standing requiring the existence of a member with individual standing[184] was part of the irreducible constitutional minimum for representational standing, Congress could not abrogate or short circuit that element.[185]

Nevertheless, like the *Stincer* court, the Ninth Circuit determined that the Oregon Advocacy Center's mentally disabled constituents had sufficient indicia of membership to satisfy the *Hunt* test.[186] The court focused on the statutorily required participation of mentally disabled persons on both the governing board and the advisory board of the Advocacy Center.[187] Significantly, the court acknowledged that the Advocacy Center's constituents possessed less than all of the indicia of membership required by *Hunt*:

> Admittedly, the constituents of OAC do not have all the indicia of membership that the Hunt apple growers and dealers possessed. OAC is funded primarily by the federal government, and not by its constituents. OAC's constituents are not the only ones who choose the leadership of OAC, and they are not the only ones who may serve on OAC's leadership bodies. Nevertheless, OAC's constituents do possess many indicia of membership—enough to

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[182] *Or. Advocacy Ctr.*, 322 F.3d at 1110.
[183] *Id.* at 1113.
[184] *Hunt*, 432 U.S. at 333 ("[a]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right . . . .").
[185] *Or. Advocacy Ctr.*, 322 F.3d at 1110 (citing United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 551 (1996)).
[186] *Id.* at 1112-13.
[187] *Id.* at 1111 (*quoting* 42 U.S.C. § 10805(c)(1)(B)).

> satisfy the purposes that undergird the concept of associational standing: that the organization is sufficiently identified with and subject to the influence of those it seeks to represent as to have a "personal stake in the outcome of the controversy."[188]

Oregon Advocacy Center represents a significant departure in the law of standing from cases such as *American Legal Foundation*,[189] *Health Research Group*,[190] and *Basel Action Network*.[191] Significantly, the *Oregon Advocacy* court explicitly held that the factors found sufficient in *Hunt* were not the irreducible minimum to establish indicia of membership.[192] While the court discussed the presence on both the advisory and governing boards of members of the constituent class,[193] the court deemed it unnecessary to consider whether the constituent group as a whole had any right to participate in the selection of governing or advisory board members.[194] Also implicit in the decision is the court's acceptance of a class of constituent members consisting of all mentally disabled people in the State of Oregon[195]—a class of putative membership nearly as broad as the class of "all television viewers" emphatically rejected by the *American Legal Foundation*[196] court—without reference to whether they took any action to become "constituents." Nor did the court inquire whether any constituents in the subclass at issue in the case—mentally disabled criminal defendants—were present on the advisory board or governing board.

It is tempting to distinguish *Oregon Advocacy Center* as a special case, involving a constituency (mentally disabled people) that by definition may not be able to exercise full membership rights of voting and control. However, *Oregon Advocacy Center* and *Stincer* also involve specific congressional legislation,[197] potentially distinguishing these cases from the environmental standing cases which lack specific laws on point. But as *Oregon Advocacy Center* acknowledged, Congress cannot reduce the minimum Article III requirements for organizational standing,[198] which,

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[188] *Id.* at 1111 (*quoting* Vill. of Arlington Heights v. Metro Hous. Dev. Corp., 429 U.S. 252, 261 (1977)).
[189] 808 F.2d 84; *see also supra* Part II.A.
[190] 82 F.R.D. 21; *see also supra* Part II.A.
[191] 370 F. Supp. 2d 57; *see also supra* Part II.B.2.d.
[192] *Or. Advocacy Ctr.*, 322 F.3d at 1113.
[193] *Id.* at 1112.
[194] *Id.* at 1113.
[195] *Id.* at 1112-13.
[196] *Am. Legal Found.*, 808 F.2d at 90-91.
[197] In the form of the PAMII Act, Pub. L. No. 99-319, 100 Stat. 478.
[198] *Or. Advocacy Ctr.*, 322 F.3d at 1108.

according to the Supreme Court, include some concept of equivalence to a membership organization.[199] *Oregon Advocacy Center* thus establishes standing for advocacy groups organized without a formal voting membership, based on more indirect means of influencing organizational policy.[200] This holding may well serve as a model for standing of similarly organized environmental advocacy groups.

III. HOW CONSTITUENTS INFLUENCE ORGANIZATIONS: A FUNCTIONAL ANALYSIS OF *HUNT'S* "INDICIA OF MEMBERSHIP"

As noted above, federal courts have not yet developed a consistent approach to applying *Hunt*'s "indicia of membership" test[201] to organizations lacking a voting, formally recognized, legal membership. Development of the constitutionally requisite "concrete adverseness" for Article III standing[202] requires some measure of organizational responsiveness to the constituents the organizations would represent in court. Nevertheless, the minimum adequate means of accomplishing this responsiveness remains unclear. While some courts, such as the *ALCOA,*[203] *Basel Action Network,*[204] *Health Research Group,*[205] and *Friends of the Earth*[206] courts, have assumed or held that voting rights on the part of an organization's constituents are essential to this responsiveness,[207] other cases, such as *Bayou Steel*[208] and *Oregon Advocacy Center*[209] have found representational standing in the absence of constituent election of the organization's governing body.[210] Courts also take differing views on the extent of active affiliation of the organization's constituents: *Hunt* itself accepted standing for an organization whose constituents were compelled to participate[211] and *Oregon Advocacy Center* likewise accepted representational standing for constituents who apparently took no voluntary action whatsoever to affiliate themselves with the organization.[212] On the

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[199] *Id.* at 1111 (addressing the decision in *Vill. of Arlington Heights*, 429 U.S. at 261).
[200] *Id.*
[201] *See supra* note 41.
[202] *Baker*, 369 U.S. at 204 (addressing the criteria of U.S. CONST. art. III, § 2).
[203] *ALCOA*, 585 F. Supp. 842; *see also supra* Part II.B.2.
[204] 370 F. Supp. 2d 57; *see also supra* Part II.B.2.d.
[205] 82 F.R.D. 21; *see also supra* Part II.A.
[206] 129 F.3d 826; *see also supra* Part II.B.2.b.
[207] *See generally supra* Parts II.A., II.B.2.b., & II.B.2.d.
[208] *Bayou Steel, Inc.*, Civ. No. 96-0432; *see also* Part II.B.2.c.
[209] 322 F.3d 1101; *see also* Part II.C.
[210] *See generally supra* Part II.B.2.c.; *Or. Advocacy Ctr.*, 322 F.3d at 1111-1112.
[211] *See Hunt*, 432 U.S. at 334.
[212] *Or. Advocacy Ctr.*, 322 F.3d at 1113.

other hand, *American Legal Foundation*[213] emphatically rejected the notion that a non-membership organization could represent the interests of a class of constituents who had taken no steps to affiliate themselves with the plaintiff organization.[214]

According to the Supreme Court, the standing doctrine under Article III of the Constitution is meant to ensure the "concrete adversariness" necessary for adequate presentation of justiciable issues to the courts.[215] The organizational standing doctrine, ensures this concrete adversariness by making sure that there exists some real person with real interests underlying the litigation, and that the organization litigating on his or her behalf responds to those interests.[216] In essence, the court must be able to attribute the litigation decisions—when to litigate, what to litigate, how to litigate—to the class of interested (and injured) persons themselves, and not to an organizational "interested bystander."[217]

Examination of these standing interests reveals that, although voting rights are one means of promoting organizational responsiveness to the interested constituents, they are neither the only such means nor the most effective. Voluntary association with an organization combined with substantial financing for the organization's activities, is, as a practical matter, at least as effective a means of enforcing board responsiveness as voting rights, particularly within larger organizations.

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[213] 808 F.2d 84; *see also supra* Part II.A.

[214] *Am. Legal Found.*, 808 F.2d at 90.

[215] *Baker*, 369 U.S. at 204.

[216] *Hunt*, 432 U.S. at 342-343, *quoting Warth*, 422 U.S. at 511 ("Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.").

[217] United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687 (D. Col. 1973) (The Court reiterated that in *Sierra Club*, 405 U.S. at 735, it stressed "the importance of demonstrating that the party seeking review be himself among the injured, for it is this requirement that gives a litigant a direct stake in the controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders.").

A. Voting Rights

To be sure, membership voting rights promote board responsiveness to membership interests. A credible threat of not being re-elected at the next annual membership meeting certainly sharpens the minds of board members, improves communications, and generally promotes responsiveness to membership concerns. As a matter of principle, one can fairly attribute an elected board's litigation decisions to the membership that elected that board. This is even more true for smaller membership groups with geographically cohesive interests, such as the group of apple producers involved in *Hunt*.[218]

As organizational size increases and membership diversity likewise increases in terms of geography and interests, voting rights may become less effective as a means of ensuring organizational responsiveness. The Northern District of New York was seemingly correct in *ALCOA*, affirming that the Sierra Club could assert organizational standing on behalf of its upstate New York members.[219] Nevertheless, it is difficult to say that that handful of members exerted any real influence in the Sierra Club's decision to seek out and litigate against ALCOA. In fact, ALCOA itself argued that the Sierra Club uncovered its violations and commenced the lawsuit without first consulting any of the members it relied on for standing purposes.[220]

B. Board Eligibility

The Supreme Court in *Hunt* specifically included the exclusive eligibility to serve on the association's board as one of the "indicia of membership" necessary for standing.[221] As noted, the *Oregon Advocacy Center* court found this factor to be non-essential and recognized organizational standing on the part of an organization whose board was not exclusively limited to the constituency served by the organization.[222] Certainly, a board consisting exclusively of members of the constituency whose litigation interests the organization represents would be more likely to respond to those constituents' concerns, ensuring the necessary "concrete adverseness"[223] in the litigation. One might find it more difficult to define

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[218] *Hunt*, 432 U.S. 333.
[219] *ALCOA*, 585 F. Supp. at 852.
[220] *Id.*
[221] *Hunt*, 432 U.S. at 334.
[222] *Or. Advocacy Ctr.*, 322 F.3d at 1101; *see supra* Part II.C.
[223] *Or. Advocacy Ctr.*, 322 F.3d at 1109 (referring to *Baker*, 369 U.S. at 204, which explained standing: "[h]ave the appellants alleged such a personal stake in the outcome of the controversy as to assure that *concrete adverseness* which sharpens the presentation of issues

this factor in the case of an environmental advocacy organization. In *Hunt,* the class of apple producers and marketers involved in the litigation was relatively well-defined (and indeed, already legally defined by the state as it collected assessments).[224] With environmental organizations, defining the class of those interested in a particular environmental resource becomes somewhat nebulous, as one can expect that the universe of persons with a sufficient interest in the resource to support standing would be much larger than the group sufficiently committed to the resource to participate in an advocacy organization. At some level, the environment affects every human being. Unless there are defined membership criteria, however, the statement that the environment must affect a person in order for him to serve on the board is fairly meaningless, and cannot be expected to ensure sufficient responsiveness and "adverseness" on the part of the board. Moreover, simple membership in the group of affected persons does not necessarily ensure that an individual responds to and represents the sentiments of a consensus of the group.

C. Voluntary Affiliation

Voluntary association as an indicia of membership was lacking in the *Hunt* case.[225] While the *Hunt* Court found this factor non-essential,[226] there remains the question whether voluntariness of association with the litigating organization can substitute for one of the other factors that was present in *Hunt*, such as voting rights.

Voluntariness of association should provide at least as much influence on organizational management as board participation in the constituent group. Indeed, the affirmative action of an organization's constituents to affiliate with the organization in order to support its advocacy efforts, and to disaffiliate with the organization when they are dissatisfied with those efforts, may provide nearly as much practical influence on management as the bare right to vote for directors, especially where that right to vote is highly diluted by a large membership. As noted, the Fifth Circuit found the voluntariness of the constituents' affiliation with *Friends of the Earth* to be one of the crucial factors supporting organizational standing.[227] Most public interest organizations rely on the numbers of their membership both for

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upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing." (emphasis added)).

[224] *Hunt*, 432 U.S. at 333.

[225] *See Hunt*, 432 U.S at 344-45 for indicia that were included. *See also supra* note 41.

[226] *Hunt*, 432 U.S. at 345.

[227] *Friends of the Earth*, 129 F.3d at 869.

fundraising and to assert their influence before government agencies; therefore, loss of membership numbers can cripple an organization's effectiveness. The ability of an organization's constituents to join or quit the group would appear to be a very effective means of ensuring the responsiveness of the organization's management—and also ensuring the "concrete adverseness" required for organizational standing.[228] As noted by Professor Paul Wapner in a symposium on international nongovernmental organizations (NGOs),

> Members are the life-blood of many NGOs. They provide institutional strength, insofar as they can be called upon to write letters, protest, or otherwise mobilize on behalf of the organization. Merely by virtue of their numbers, members can serve to demonstrate the legitimacy of the organization's agenda. Developing a membership does not come as a matter of course; neither does sustaining it. NGOs must engage their members. They must act in ways that satisfy and even excite members and garner additional support. When an NGO fails to do so, it loses members and, thus, loses support and institutional strength. It is important to realize that loss (or gain) of membership does not happen every two, four, or any other particular number of years (as it does in many states) but can happen immediately. When supporters no longer feel satisfied by the NGO, they are no longer available to be mobilized or otherwise advocate on behalf of the group. Members vote with their feet.[229]

The influence of voluntary participation on organizational management takes on added importance when combined with the constituents' ability to give, or withhold, funding for the organization.

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[228] *See Baker*, 369 U.S. at 204.

[229] Paul Wapner, *The Democratic Accountability of Nongovernmental Organizations: Defending Accountability in NGOs*, 3 CHI. J. INT'L L. 197, 201 (2002).

D. Financial Support

The *Hunt* Court found it telling that the apple businesses involved in the litigation financed the Apple Advertising Commission through mandatory assessments.[230] It is unclear how such mandatory assessments would ensure Commission responsiveness to its constituents' concerns any more than financing from general state revenues. At the extreme, bankrupting the Washington apple industry would remove the Commission's financing as well as its reason for existence. However, it is still difficult to see how reliance on mandatory assessments from a particular industry promotes responsiveness to that industry.

Voluntary financing of an organization's activities, on the other hand, might be the most effective means of ensuring responsiveness. Many grass roots environmental organizations almost wholly depend on small contributions from individual constituents,[231] regardless of whether the donor can vote. If those constituents are dissatisfied with the direction the organization is taking, or with its advocacy efforts, they may then "vote with their pocketbooks" and cease financial support for the organization. As noted by Wapner,

> Members also vote with their pocketbooks. Few NGOs are self-funded to the degree that they are free from the burden of developing a dues-paying membership base or reaching outside the organization for funds. Raising money for operations is often a full-time endeavor. When members exit because they disagree or fail to be excited by an NGO's activities, they take their money with them, reducing not only the amount of regular dues, but also the periodic donations that many groups depend upon to mobilize for specific projects. In this latter regard, NGOs are perpetually accountable to the membership insofar as periodic donations for particular campaigns provide both an affirmation of an NGO's activities and the financial ability actually to carry out specific projects.[232]

To be sure, the influence member contributions have on a group's direction will vary greatly from organization to organization. True grass

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[230] *Hunt*, 432 U.S. at 333 (mandatory assessments are annual dues paid by membership in order to finance the organization's activities).

[231] *See, e.g.*, Sierra Club, *supra* note 55, at https://ww2.sierraclub.org/membership/.

[232] Wapner, *supra* note 229, at 201. Professor Wapner finishes his essay with the conclusion that these non-constitutional controls on NGO conduct (voluntary membership and voluntary financing) provide a level of accountability to constituents that is comparable to, if not exceeding that, of a liberal democratic state. *Id.*

roots organizations that depend primarily on small donations from many constituents can be expected to be more responsive to membership concerns; organizations funded chiefly through large grants or donations from a few individuals may be less responsive to constituent concerns.

E. Summary: Organizational Responsiveness and Voting Rights

Although there is little literature on the accountability of non-profit organizations to their members, such literature as there is suggests that voluntary membership and voluntary financial support are at least as important to securing organizational accountability to an organization's constituents as membership voting rights in governing board elections.[233] *Hunt* found that voting rights and involuntary financial support were sufficient indicia of membership to support the "concrete adverseness" necessary to establish standing.[234] However, the Court did not explicitly state whether other factors might also provide sufficient indicia of membership in the absence of voting rights.[235] From this, then, alternative means of ensuring responsiveness and "concrete adverseness," such as reliance on voluntary financial support from an organization's constituents who individually have standing could suffice to establish organizational standing even in the absence of formal voting rights. The sufficiency of voluntary constituent financial support may depend on the particular circumstances of the organization in question. It seems likely that an organization primarily relying on contributions from a grass roots constituency, which would individually have standing could be found to have sufficient "indicia" of being a membership organization even without formal membership voting rights per the organizational standing requirements found in *Hunt*.[236]

IV. RECOMMENDATIONS TO ACCOMMODATE VOTING RIGHTS AND THE NEED FOR INDEPENDENCE FROM HOSTILE TAKEOVER

Although the preceding analysis shows that advocacy organizations could potentially rely on voluntary financial support from its constituency to establish organizational standing for that constituency, the cases discussed in the second section of this Article demonstrate that the applicable law is far from certain.[237] Reliance solely on a non-voting, financially supportive

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[233] *See, e.g., id.*
[234] *Hunt*, 432 U.S. at 344-45 (citing *Baker*, 369 U.S. at 204).
[235] *Id.*
[236] *Id.*
[237] *See, e.g., supra* Part II.

constituency to establish standing brings the risk of an adverse decision should a court rely on more restrictive precedents.[238]

While granting members voting rights makes organizational standing more likely, conversion of advocacy organizations to formal membership corporations with full membership voting rights has disadvantages. Conversion carries with it the administrative burdens of maintaining membership records; conducting annual membership meetings; and distributing, collecting, and counting ballots. It also poses the organizational risk of hostile takeover by adverse interests as discussed above.[239] Little can be done to reduce the administrative burdens of maintaining a formal membership structure. However, there are defensive measures that an advocacy organization may take to prevent a hostile takeover, or at least to make such a conflict more difficult. This section of the Article explores some of the alternative measures an organization may take to improve a claim for standing, while minimizing its exposure to hostile takeover.

A. Applicable Corporation Law Principles

The effectiveness and potential implementation of any of these defensive measures will depend, to some extent, on the applicable not-for-profit corporation law of the state of incorporation of an advocacy organization. Some states have adopted versions of the Revised Model Nonprofit Corporation Act (RMCNPCA);[240] other states have developed their own, homegrown nonprofit corporation statutes. Typically, these statutes control the terms of directors, provide for establishment of different classes of membership, provide for removal of directors, or require full voting rights for certain classes of members. While a survey of all the nonprofit corporation laws of the fifty states is well beyond the scope of this article, this section will discuss pertinent provisions of the RMNPCA, as well as salient provisions of the nonprofit corporation laws of New York,[241] the District of Columbia,[242] and California[243]—jurisdictions where many advocacy organizations are incorporated.

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[238] *See Health Research Group*, 82 F.R.D. 21, 26-28 (holding that to gain organizational standing, an organization must have indicia of membership or some other substantial nexus).
[239] *See supra* Part I.C.
[240] REVISED MODEL NONPROFIT CORP. ACT (1987).
[241] *See* N.Y. NOT-FOR-PROFIT CORP. LAW (2000).
[242] D.C. CODE §§ 29-301.01–29.301.58 (2001).
[243] CAL. CORP. CODE §§ 5000-14551 (2004).

B. Non-Voting Membership Defensive Measures to Assure Responsiveness

1. Advisory Boards

The *Oregon Advocacy Center*[244] and *Stincer*[245] line of cases have endorsed the implementation of advisory boards that include the represented constituency as a factor supporting *de facto* membership.[246] An environmental advocacy organization might simply constitute an advisory board and include constituents likely to have standing on that board.[247] This measure does not actually entail altering the structure of the organization to include a formal voting membership, and thus the organization can avoid the administrative burdens associated with a voting membership. There exists some administrative burden, however, with arranging for selection of advisory board members and their attendance at meetings. Advisory boards generally do not have any final authority in the management of an organization.[248] However, board members may attend meetings and make recommendations.

It remains to be seen whether courts will accept advisory boards that include standing constituents to satisfy the *Hunt* "indicia of membership" test.[249] An environmental advocacy organization might find it difficult to ensure that its advisory board will have the appropriate standing witnesses as members for a given litigation. Nevertheless, constituting an advisory board may prove an effective means of improving an advocacy organization's responsiveness and representational capacity without either

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[244] 322 F.3d 1101.

[245] 175 F.3d 879.

[246] *See Or. Advocacy Ctr.*, 322 F.3d at 1111-12; *Stincer*, 175 F.3d at 886.

[247] *See Hunt*, 432 U.S. at 342 ("an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right . . . ."). *See also* John S. Applegate, *Beyond the Usual Suspects: The Use of Citizen Advisory Boards in Environmental Decision Making*, 73 IND. L.J. 903 (1998) (discussing the role of citizen advisory boards within the environmental decision making process which explores the role of these boards in allowing greater discussion of issues and increased participation by members).

[248] REVISED MODEL NONPROFIT CORP. ACT § 8.25 authorizes a board of directors to delegate limited board authority to committees consisting of "members of the board." The New York Not-for-Profit Law, California Corporation Code, and D.C. Code similarly provide that any committee with delegated authority from the board of directors shall consist of board members. N.Y. NOT-FOR-PROFIT LAW § 712; CAL CORP. CODE § 5212; D.C. CODE § 29-301.22.

[249] 432 U.S. at 345; *see Or. Advocacy Ctr.*, 322 F.3d at 1113 (holding "that in light of the role Congress assigned by statute to advocacy organizations such as OAC, Congress abrogated the third prong of the *Hunt* test." Therefore the court did not address the need of participation by persons with individual standing in the suit).

the risk of hostile takeover or the administrative burdens associated with a voting membership.

2. Constituents on Board for Standing Purposes

Another solution to ensure representational standing without opening full control of the board to a voting membership is to select board members with an eye to ensuring that at least some of the directors would have individual standing in the areas that the environmental advocacy organization litigates. Since such directors participate fully in the management of the organization, it would be hard for a court to deny that at least the directors of a self-perpetuating board can supply the necessary individual standing to support representational standing by the organization. It may be difficult, however, to ensure that individual board members will have standing in all the geographic and environmental areas of interest to the organization, particularly in the case of a larger national or regional organization.

C. Structuring a Voting Membership

If an organization decides to go the route of incorporating a voting membership, several means may be available to minimize or eliminate the risk of a hostile takeover of the organization by an organized group antithetical to the organization's purposes. The RMNPCA, as well as other state statutes, all allow classification of membership, with different classes of membership having different voting rights.[250] It may thus be possible to ensure that the at-large membership does not control the board of directors. Similarly, it may be possible to structure the Board of Directors so that only a minority of directors is elected by the membership at large. Even if all directors are elected by the at-large membership, staggered director's terms combined with relatively long terms of office would make it difficult for an opposition group to gain control.[251] Finally, the organization may impose waiting requirements or other formal membership requirements to ensure that no group is successful in co-opting control of the organization.[252]

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[250] REVISED MODEL NONPROFIT CORP. ACT § 6.10. *See also* N.Y. NOT-FOR-PROFIT LAW § 601(a); CAL. CORP. CODE § 5330; D.C. CODE § 29-301.12.

[251] *See* Dennis J. Block, Jonathan M. Hoff, & H. Ester Cochran, *Defensive Measures in Anticipation of and in Response to Hostile Takeover Attempts,* 972 PLI/CORP. 93, 109-110 (1997).

[252] *See generally id.*

1. Classification of Members

The RMNPCA, as well as the state statutes examined, provide that a membership organization may set up different classifications of members with different voting rights.[253] Thus, some classes of members may have limited voting rights, or even no voting rights, as long as some combination of membership classes possesses all the voting rights.

With classified membership, an organization might split its membership into "associate members," who become members automatically upon joining the organization, and "sustaining members" (or some other similar category) who are elected to such membership by the board. Full membership voting rights, with the right to elect a majority of the board, might be reserved to board members, or might be reserved for persons who have been associate members for a specified number of years first.[254] The class of "associate members" could have the right to elect some portion of the board of directors, but far less than a majority, ensuring that no upheaval among the associate membership could wrest control of the organization from its core founders. Standing witnesses could be drawn from the ranks of these associate members with some confidence that the *Hunt* representative standing test would be satisfied.[255] These associate members would elect directors, and while they could not thus control the organization, their voice would be heard on the board. As the *ALCOA* court suggested that voting control was not necessary to satisfy *Hunt*,[256] individual members who cannot elect a majority of board directors should not defeat organizational standing.

2. At-Large Election of Less Than a Majority: Ex Officio Directors

One solution to the hostile takeover problem would be to allow the membership to elect some board members, but less than a majority of the board, with the remaining majority of directors elected by the board. This hybrid, self-perpetuating organizational structure might seem to be precluded by statutory requirements that necessitate some combination of

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[253] REVISED MODEL NONPROFIT CORP. ACT § 6.10; N.Y. NOT-FOR-PROFIT LAW § 601(a); CAL. CORP. CODE § 5330; D.C. CODE § 29-301.12.

[254] *Id. See, e.g.*, Greenpeace, *supra* note 57.

[255] *Hunt*, 432 U.S. at 343; *see supra* text accompanying note 41 for discussion of the *Hunt* representative standing test.

[256] *ALCOA*, 585 F. Supp. at 851-52 (the court found that the Sierra Club met the requisite elements of associational standing according to the Supreme Court's opinions and refused to consider the additional restriction of voting control).

membership class have full voting rights.[257] If some directors are elected by the board rather than a combination of membership classes, no combination of membership classes would be deemed to have full voting rights.

However, there may yet be ways to structure a not-for-profit board to allow the board to select a majority of its members. The nonprofit corporation statutes contemplate that some directorships may be accorded to people by virtue of their office with the corporation or otherwise be "designated" or "appointed."[258] These ex-officio board seats are typically not subject to election (other than the means by which the by-laws establish).[259] While the most obvious situation would be to have a board seat set aside for the corporation's president, vice-president, or executive director, there does not seem to be any limit on the number or type of such offices created.[260] A not-for-profit could designate a majority of board slots for persons designated to a specific organizational function—perhaps the office of "watershed steward" for particular watersheds or some similar designation. The by-laws could provide that these offices would be filled by vote of the board of directors for a specified term, while the remaining directors' seats (a minority) could be elected by the at-large membership, without risk of hostile takeover.

3. Staggered Directors' Terms

By staggering the terms of directors and providing for lengthy directors' terms in office, a hostile takeover of a board of directors becomes difficult, as it may require passage of several election cycles before an opposition group could obtain a majority of seats on the board. The RMNPCA and other statutes specifically allow directors' terms to be staggered,[261] and

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[257] *See* N.Y. NOT-FOR-PROFIT CORP. LAW § 612. *But see generally* REVISED MODEL NONPROFIT CORP. ACT; D.C. CODE §§ 29-301.01-29.301.58; CAL. CORP. CODE §§ 5000-14551 (containing no similar requirement).

[258] N.Y. NOT-FOR-PROFIT CORP. LAW § 703(a) provides that persons may be become directors by appointment or by virtue of their holding a particular office within the corporation. *See also* REVISED MODEL NONPROFIT CORP. ACT § 8.04(a); CAL. CORP. CODE § 5220(d); and D.C. CODE § 21-301.19(b) (each providing for directors who are "designated" or "appointed" rather than being elected).

[259] *Id.*

[260] *See* REVISED MODEL NONPROFIT CORP. LAW § 8; CAL. CORP. CODE § 5220; D.C. CODE § 29-301,19; N.Y. NOT-FOR-PROFIT CORP. LAW §§ 702-703.

[261] REVISED MODEL NONPROFIT CORP. ACT § 8.06; CAL. CORP. CODE § 5220(A); D.C. CODE § 29-301.19(c); N.Y. NOT-FOR-PROFIT CORP. LAW § 704(a).

impose a maximum term for directors of five years.[262] It would take three annual election cycles to gain control of the board in such a situation.

There are two potential risks with this approach, however. First, the RMNPCA provides that any director may be removed at any annual meeting by a majority of members entitled to elect that director, with or without cause.[263] Other statutes require cause for such a removal.[264] In a state where the RMNPCA applies, staggered terms would provide no defense against an orchestrated attempt to gain control of the organization by an outside group. Second, with lengthy terms come likely director defections and resignations before terms end. While many corporate by-laws contemplate that the board may fill an unexpired term of a resigning director by simple majority vote, the New York Not-for-Profit Corporation Law specifically provides that such a replacement is limited to a term ending at the next annual membership meeting, at which time the seat is open to a membership vote.[265] This requirement poses the risk that a majority of board seats could come up for vote at any time.

4. Membership Qualifications

Finally, an organization may achieve some measure of defense against an organized attempt to co-opt the organization by imposing membership qualification or approval requirements. At a minimum, a would-be member could be required to contribute to the organization regularly for a period of years before being granted full membership status. Alternatively, membership could be subject to a formal approval process, either by the board of directors, or by a committee, which would ensure that each applicant for membership shares the organization's values and goals.

While potentially effective, these alternatives may impose huge administrative costs. Reviewing each proposed membership for consistency with the organization's mission requires a large investment of time, either by board members or organizational staff. While a waiting period may be

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[262] REVISED MODEL NONPROFIT CORP. ACT § 8.05; N.Y. NOT-FOR-PROFIT CORP. LAW § 703(b). *See also* D.C. CODE § 29-301.19 (providing no limit on board of directors terms); CAL. CORP. CODE § 5220(a) (limiting directors terms to three years).

[263] REVISED MODEL NONPROFIT CORP. ACT § 8.08. *See also* CAL. CORP. CODE § 5222; D.C. CODE § 29-301.19 (unless the by-laws provide for removal only for cause).

[264] N.Y. NOT-FOR-PROFIT CORP. LAW § 706 (unless by-laws provide for removal without cause).

[265] N.Y. NOT-FOR-PROFIT CORP. LAW § 705(c). *See also generally* REVISED MODEL NONPROFIT CORP. ACT; CAL. CORP. CODE §§ 5000-14551; D.C. CODE §§ 29-301.01–29.301.58 (providing no such limit).

self-administering, such a requirement would preclude recruiting members specifically to ensure standing for a particular litigation. Ultimately, these sorts of membership controls are probably impractical in a large organization.

V. CONCLUSION

Because many public interest organizations, like environmental advocacy groups, are organized in such a way that the organization's constituency does not vote to select the board of directors or officers of the organization,[266] the question of whether membership voting rights are an essential element of representational standing is of great importance. Despite the Supreme Court's declaration in *Sierra Club v. Morton*[267] that public interest environmental organizations must rely on the interests of identifiable members of the organization,[268] voting rights should not be essential to ascertain such representational standing.

As indicated above, courts have applied the Supreme Court's "indicia of membership" test[269] for organizational standing inconsistently to advocacy organizations that do not afford voting rights to their members. A functional analysis of the *Hunt* factors[270] indicates that a constituency that provides substantial voluntary financial support to an organization is at least as effective in ensuring organizational responsiveness and the "concrete adversity"[271] necessary to support standing. Given the uncertainty in the law, however, there are several measures organizations may take to constitute a voting membership without risking hostile takeover or other similar adverse action. Perhaps one of several alternate forms of association listed in this Article will improve an organization's chances of establishing standing in order to litigate issues that concern its constituency.

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[266] *See* Steen & Hopkins, *supra* note 8, at 211.
[267] 405 U.S. 727.
[268] *Id.* at 739-40.
[269] *See Hunt*, 432 U.S. at 344-45.
[270] *Id.*
[271] *See Baker*, 369 U.S. at 204.