

OFFICIAL TRANSCRIPT

ORIGINAL

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: STEEL COMPANY, AKA CHICAGO STEEL AND
PICKLING COMPANY, Petitioner v. CITIZENS FOR A
BETTER ENVIRONMENT

CASE NO: 96-643 *e.p.*

PLACE: Washington, D.C.

DATE: Monday, October 6, 1997

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 STEEL COMPANY, AKA CHICAGO :

4 STEEL AND PICKLING COMPANY, :

5 Petitioner :

6 v. : No. 96-643

7 CITIZENS FOR A BETTER :

8 ENVIRONMENT :

9 - - - - -X

10 Washington, D.C.

11 Monday, October 6, 1997

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 1:00 p.m.

15 APPEARANCES:

16 SANFORD M. STEIN, ESQ., Chicago, Illinois; on behalf of
17 the Petitioner.

18 DAVID A. STRAUSS, ESQ., Chicago, Illinois; on behalf of
19 the Respondent.

20 IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; on
22 behalf of the United States, as amicus curiae,
23 supporting the Respondent.

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1 PROCEEDINGS

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 96-643, Steel Company, also known as Chicago
5 Steel and Pickling Company, v. Citizens for a Better
6 Environment.

7 Mr. Stein.

8 ORAL ARGUMENT OF SANFORD M. STEIN, ESQ.

9 ON BEHALF OF THE PETITIONER

10 MR. STEIN: Mr. Chief Justice and may it please
11 the Court:

12 This case involves the 60-day notice period in
13 the citizens provision of the Emergency Planning and
14 Community Right to Know Act, and whether that period is
15 intended to operate as a cure, thereby obviating a
16 citizen's suit, or whether citizens may sue for wholly
17 past violations even after cure.

18 As found by this Court in Gwaltney v. Chesapeake
19 Bay Foundation, and again in Hallstrom v. Tillamook
20 County, the overriding congressional purpose of
21 environmental citizen provisions is to prompt compliance
22 with environmental laws. Litigation ought to be used as a
23 last resort, when other methods have failed.

24 On receiving a 60-day notice under EPCRA, the
25 Steel Company, a small manufacturing company, came into

1 complete compliance, filing the 15 forms required, all
2 within the cure period.

3 The respondent, Citizens for a Better
4 Environment, sued anyway. They alleged no current or
5 ongoing violations.

6 QUESTION: Let me ask you a question, please, if
7 I may, Mr. Stein.

8 What if it were the EPA that were coming in
9 asking for penalties to be imposed after the fact of a
10 cure, so to speak, after the forms were actually filed,
11 but the EPA then comes in and says, well, they should have
12 been filed on X date and they weren't, and they've now
13 filed them, but we want a penalty for every day of the
14 nonfiling.

15 Under the statutory scheme, is that permissible?

16 MR. STEIN: Yes, Justice O'Connor, under our
17 reading of the statute the EPA's enforcement policy comes
18 under section 325 of the statute, a wholly different
19 section than section 326, the citizen provision.

20 QUESTION: Well, the citizen's suit provision I
21 suppose is designed to be a sort of private attorneys
22 general approach, and to let citizens pick up the slack if
23 the EPA doesn't do it, and is there any reason why the
24 citizens suit shouldn't have the same authority, then, to
25 come in and seek a penalty for the failure to file on

1 time?

2 MR. STEIN: Yes. Several reasons, as we see it.

3 First of all, section 326 is far more limited,
4 giving citizens a more limited enforcement and assistance
5 role than the EPA's authority under section 325. In the
6 citizen provision, a citizen may commence a suit upon the
7 failure to complete or submit the forms.

8 The Sixth Circuit, in analyzing the same
9 language in the United Musical case, found that it was the
10 failure that Congress was looking for. EPA's authority is
11 far broader than that.

12 Also, section 326(c) of the statute specifically
13 points out that citizens are able to invoke the court's
14 jurisdiction in the evidence of an enforcement or an
15 injunctive remedy, and then at that time the court can
16 apply penalties if it has jurisdiction through 326,
17 section 326(c).

18 In that respect, the citizen provision of EPCRA
19 is very similar to the citizen provision of the Clean
20 Water Act that this Court analyzed in Gwaltney. In
21 Gwaltney, the Court found many reasons to find that
22 Congress did not expect -- intend citizens to sue for
23 wholly past violations, but one of the most convincing was
24 section 505(a) of the Clean Water Act.

25 There, also, the Court found that before a

1 citizen could invoke the court's jurisdiction it had --
2 there had to be some kind of injunctive or abatement
3 remedy that it was seeking and then, and only then, would
4 the Court be willing to address penalties relative to a
5 citizens' action.

6 Beyond that, and further answering, we think
7 that if -- even if the court below were somehow correct
8 that they can seek wholly past violations, we think it
9 fails the Article III standing test because on that date
10 any injury that would befall a citizen had been fully
11 cured.

12 QUESTION: What about the attorneys fees and
13 costs that the claimant might have incurred in
14 investigating the claim and filing it?

15 MR. STEIN: Justice Kennedy, the costs that they
16 incur investigating are also costs that they cannot
17 recover if the EPA comes in under the -- under EPCRA.
18 They are barred from suing if EPA comes in under the --

19 QUESTION: They can recover those costs if the
20 violation is not cured after 60 days and the suit proceeds
21 and they prevail, can they --

22 MR. STEIN: If they prevail, then they can
23 assert a likelihood for fees --

24 QUESTION: Well, but then it seems to me there
25 may be a -- you have a statutory argument. I don't see

1 the Article III argument.

2 MR. STEIN: I think the Court has ruled that
3 penalties alone have to -- do not give a party standing.
4 They have to be -- a standing has to accrue as an
5 underlying part of the plaintiff's claim and just
6 investigation costs and fees are a byproduct of the
7 litigation.

8 QUESTION: And what is the proposition -- what
9 is a case for that?

10 MR. STEIN: Diamond v. Charles. Also, Lewis v.
11 Continental Bank.

12 QUESTION: That was just whether or not there
13 was an interest in being a prevailing party per se. I'm
14 not sure if it said that Congress couldn't create a cause
15 of action for attorneys fees or investigatory, preparatory
16 fees legitimately and in good faith incurred.

17 MR. STEIN: I think there was language. I don't
18 know if it said the Congress could not, but here I don't
19 think Congress did. I mean, it was -- well, there's some
20 addressed --

21 QUESTION: Well, then it's not an Article III
22 question. It's just a statutory question.

23 MR. STEIN: We believe the statutory question
24 here is far more important than -- and -- than the Court
25 could rule completely under the statute, because under the

1 plain language of that -- it is the completion and
2 submission of the forms, the failure of that action, that
3 gives rise to a citizen action, and that's what United
4 Musical found, that's what the district court found.

5 The --

6 QUESTION: So on your view, then, if the
7 compliance came after the 60-day period, let's say the
8 time sequence is 60-day period runs, suit is filed on day
9 70, the defendant comes into total compliance, files all
10 the back forms, the suit would be moot at that point, if I
11 follow your reasoning.

12 MR. STEIN: Justice Ginsburg, at that point,
13 mootness principles would apply and the burden would shift
14 to the defendant to show why mootness would apply and why
15 there would be no likelihood of a recurring violation such
16 as to relieve the court of its jurisdiction.

17 But whereas mootness will lie after the
18 complaint is filed, if it is filed with Article III
19 authority for standing, mootness standing is the
20 plaintiff's burden. It must be proven at the -- prior to
21 the complaint being filed, and we don't believe that they
22 had standing in this case at the time the complaint was
23 filed.

24 QUESTION: You're asking us to read the
25 provision in such a way that nobody would have an

1 incentive to file suit.

2 If you say that -- even when suit will properly
3 lie, according to you, initially, that is, suit is filed
4 before the defendant comes into compliance, you're saying
5 that suit will be washed out when the defendant complies.

6 MR. STEIN: Not necess --

7 QUESTION: Why would anybody file a suit? I
8 can't understand it.

9 MR. STEIN: Well, first of all, I think they may
10 file for any number of reasons. First of all, the
11 Congress was interested in compliance, and interested in
12 citizen enforcement. If the suit, which we think is
13 properly filed after the 60 days, because that's the limit
14 of the cure period -- the burden on the defendant at that
15 point is a heavy one to show that there's no further
16 likelihood of an intermittent or recurring violation, and
17 there may be cases where it is mooted, and there may be
18 cases where it is not, but I believe Congress --

19 QUESTION: Why shouldn't we say that -- I guess
20 we don't have to decide that issue in this case, but why
21 couldn't the situation be that so long as you have not
22 filed before -- after the 60-day period and before suit is
23 filed against you, you are liable for the penalty that's
24 set forth in the civil provision. Would that contradict
25 your theory of this case?

1 MR. STEIN: If you're filed before the suit
2 was -- before the suit was filed, but after the 60 days, I
3 believe standing would not lie.

4 QUESTION: If you file after suit, and after the
5 60 days, if you come into compliance with the law after
6 the suit is filed and after the 60-day period, why isn't
7 it reasonable to say that the Federal Government intended
8 to give these private attorney generals the right to the
9 penalties accruing?

10 MR. STEIN: At that point the court would have
11 jurisdiction, Justice Scalia, and the court could apply
12 and determine --

13 QUESTION: You say it's mooted as soon as --

14 MR. STEIN: Not necessarily. No, I did not say
15 it was -- I don't mean to convey that it's mooted. I
16 do -- I think that the burden severely shifts to the
17 defendant at that point, and the defendant has a heavy
18 burden under --

19 QUESTION: The penalty alone cannot suffice to
20 sustain a suit, the right to the penalty alone.

21 MR. STEIN: After -- after filing, if the party
22 did not cure within 60 days --

23 QUESTION: Mm-hmm.

24 MR. STEIN: And they did file after suit began.

25 QUESTION: Mm-hmm.

1 MR. STEIN: And the court determines that there
2 is reason for the court to retain jurisdiction, it is not
3 moot in the court's estimation because there is a
4 possibility of further violations, or that the allegedly
5 illegal conduct may continue.

6 QUESTION: Assume no possibility of further
7 violations, it's your position that the plaintiff's
8 entitlement to the penalty alone wouldn't make any
9 difference?

10 MR. STEIN: The court at that time, after a suit
11 is properly filed, would be able to assess whether its
12 jurisdiction -- whether the granting of penalties at that
13 point would have some continuing effect, or some
14 beneficial effect as to the defendant, but if it is mooted
15 the court would lose jurisdiction, I would agree, and
16 therefore the penalties would not apply.

17 QUESTION: Would the penalty ever go to anyone
18 other than the Government?

19 MR. STEIN: Not at all, Justice Souter. Under
20 section 325, the Government is the only party entitled to
21 receive the penalties.

22 QUESTION: But even if there were mootness,
23 after the 60-day period ran as a result of compliance
24 there would still be entitlement to attorney's fees, would
25 there not, because the mootness didn't come about until

1 after the case was in court.

2 MR. STEIN: If the court were to retain
3 jurisdiction after properly receiving it, then I assume
4 the court could then address the question of anything
5 within its jurisdiction, including whether or not the
6 prevailing party was the plaintiff, the citizen
7 organization in that case, and whether or not it should
8 receive fees. We do not have a problem with those issues
9 after proper filing, meaning that there is a violation
10 that is ongoing on the date that the complaint is filed.

11 QUESTION: Well, you're putting in this phrase,
12 retain jurisdiction, and I -- maybe Justice Scalia thought
13 you answered his question. I still -- I'm still not sure
14 of the answer to that question.

15 Let's assume that after the 60 days has run, the
16 suit is filed, then it's cured, then it comes before the
17 judge, the judge says there's nothing more to do, I'm
18 going to give no -- I'm going to terminate my jurisdiction
19 now, there's no necessity for me to issue some ongoing
20 injunction, but I am going to award attorney's fees. Can
21 he do that?

22 MR. STEIN: I believe, Justice Kennedy, he
23 might be able to determine in that case that because the
24 plaintiff brought the suit, and because it was cured after
25 suit, and presumably the judge could at that point say

1 that it was the action of suit that brought the defendant
2 into compliance, he might be able to find that the
3 plaintiff citizen organization at that time was the
4 prevailing party or substantially prevailing party, as the
5 statute reads, and award fees. I think that would be a --

6 QUESTION: Well, from the standpoint of mootness
7 and Article III, the precise analysis would apply if the
8 violation were cured before the 60 days.

9 MR. STEIN: If -- I disagree, because before the
10 60 days -- Congress gave a 60-day period to cure, and
11 Congress gave citizens the right to sue in the event --
12 going back to the statute, in the event cured -- in the
13 event there was a failure to comply. That is the right
14 that Congress gave citizens the opportunity to vindicate,
15 if it is vindicated either under the statute or under
16 Article III as we see it, but more strongly under the
17 statute, because we think you can decide this under the
18 statute.

19 QUESTION: Well, what if it is before the 60-
20 day period that the company files the reports, but the
21 plaintiff believes and is prepared to show that the
22 company is likely to be a repeat offender?

23 MR. STEIN: Justice, in that situation it would
24 be similar to Gwaltney, where there was a possibility, a
25 likelihood of recurrence, and in that case the court could

1 find that there was -- that jurisdiction attaches,
2 because --

3 QUESTION: Even though it had been completed and
4 filed, the forms?

5 MR. STEIN: Oh, we think under EPCRA it's a very
6 difficult standard to uphold, unlike the Clean Water Act
7 in Gwaltney, where there was complicated --

8 QUESTION: But you say that's possible, and you
9 don't tie that to any language of the statute.

10 MR. STEIN: I find it theoretically possible,
11 but only on reading the statute academically.

12 QUESTION: Isn't the significant point there's
13 no such allegation in this case? They don't allege, if I
14 remember the complaint, that there's a likelihood you will
15 not comply.

16 MR. STEIN: That is correct. They agree that
17 the violation ceases on page 14 of their brief. They
18 acknowledge that the violation ceases on the filing of the
19 forms. This is a case --

20 QUESTION: The complaint does not allege a
21 concern about future violations.

22 MR. STEIN: It does not, Justice Stevens. This
23 is a case about a wholly past violation, and that is the
24 point, and under EPCRA, which is an information-gathering
25 and information reporting statute, unlike the Clean Water

1 Act that the Court was concerned with in Gwaltney, where
2 there was -- I think the Court said the episodic, chronic
3 episodic instances of violation.

4 This is not likely to happen here because of
5 some complicated, especially engineered piece of equipment
6 that might fail. Likelihood of recurrence is extremely
7 remote. A party would have to be completely asleep. So
8 the likelihood of recurrence, the likelihood of an
9 intermittent injury here, and that's what the Court must
10 look at for a recurring violation, is very remote.

11 QUESTION: Well, why -- no, I mean, there was
12 for 8 years no filing, and then it was called to their
13 attention. By the way, when there was a filing, was it
14 for all the past years or only the most recent year?

15 MR. STEIN: No, Justice Ginsburg, they filed all
16 15 forms that were due within the cure period and, as we
17 pointed out both parties rely on the GAO report, that many
18 small companies such as the Steel Company simply were not
19 aware of their requirements, otherwise dutifully compliant
20 with a host of complex environmental laws, and their
21 unawareness -- their nonfiling was an innocent
22 unawareness.

23 But upon being given this information, the
24 notice, they filed, and we think that's part of the intent
25 of Congress here. Congress gave citizen enforcement in

1 two stages, first with a notice and cure period, and then,
2 and only then, if a party will not heed or cannot heed,
3 for whatever reason, and come into compliance, then
4 Congress gave citizens a very powerful weapon at the end
5 of that 60 days, which was the opportunity to invoke the
6 court's jurisdiction and seek penalties.

7 QUESTION: Mr. Stein, can I ask you, with regard
8 to attorneys fees and the like, they ask in their
9 complaint for all costs in connection with the
10 investigation and prosecution of this matter, including
11 fees, attorneys fees and expert witness fees.

12 Now, do you agree that the statute authorizes
13 the award of the investigation costs before suit was
14 filed, or when they were trying to make up their mind
15 whether to file suit?

16 MR. STEIN: I believe, Justice Stevens, they're
17 entitled to those fees if they're a prevailing party, but
18 not if they are not -- if they can't bring suit because
19 the defendant cured in the cure period.

20 QUESTION: I'm asking, if they are a prevailing
21 party, you agree they get the pre-suit investigation.

22 MR. STEIN: The court would be able to look
23 into -- that would be a subject before the court if they
24 are a prevailing party in a citizens' suit, not if, as
25 here, there was a cure --

1 QUESTION: But the statute says under (f) that
2 the court may award costs of litigation. That's what the
3 statute says, so I guess they are entitled to
4 investigatory costs only if those are part of the costs of
5 litigation. Is that right?

6 I mean, what we're -- I mean, what I would
7 interpret the question to be is, is there something
8 special here by way of costs that are being awarded in
9 this case that are not normally present whenever a statute
10 provides a winning party with costs of litigation?

11 MR. STEIN: And we believe not, Justice Breyer.
12 We believe this is a normal investigation cost that if the
13 EPA should step in barring them from a citizens' suit
14 within a 60-day period, they would not be entitled to
15 those costs. They're only entitled to those costs as the
16 prevailing or substantially prevailing party, and the
17 question is, is, if there is no suit, if cure occurs
18 during the first stage of the congressionally mandated
19 two-stage citizen action period, is that a cost of
20 litigation or is that a normal cost of their activities,
21 which are to assert their interest on behalf of their
22 members.

23 So we think their costs come into it if a party
24 is not able to take heed of the 60-day notice period and
25 not able to cure within that period. At that point,

1 Congress -- the congressional goal is satisfied, and the
2 congressional goals achieved.

3 Compliance was achieved with this law. The
4 citizens have information that they -- the Congress
5 entitled them to have.

6 QUESTION: Mr. Stein, may I ask you this
7 question: one of the arguments that is being made here is
8 that if standing is not found, with the opportunity to go
9 forward with penalties and, of course, get counsel fees
10 and investigatory fees and so on as a result of that, no
11 one is going to have really an incentive -- no citizen is
12 going to have an incentive ever to commence one of these
13 proceedings.

14 My question -- with that in mind my question is
15 this: is there any requirement that when a citizens
16 organization starts the 60-day period running it must then
17 have concluded that it can prove a case, or could a
18 citizens group simply come forward and say, we don't know
19 of any reason why this particular company should not have
20 been filing these reports. It looks to us as though
21 they're covered by the law. So we're going to put them on
22 notice that we think they should comply and simply wait
23 and see what happens.

24 In that latter instance if, at the end of 60
25 days, there hadn't been any compliance, then at that point

1 the citizens organization could decide whether to go ahead
2 and in effect make an investment in legal fees and
3 investigatory fees to see whether it would really be
4 worthwhile to bring action.

5 So that's why I ask the question. Can they
6 simply put them on notice, as it were, on the basis of a
7 good faith claim that they ought to be filing, or is there
8 some requirement in the statute or regulations to the
9 effect that they must in effect be ready to establish
10 probable cause, or some such thing, for a violation before
11 they even give the notice that starts the 60 days running?

12 MR. STEIN: I'm aware of no provision in the
13 statute that would require the latter. I believe it is --
14 the intent of the notice is precisely as you have
15 formulated it, to put the party on notice that they may be
16 out of compliance and that they have 60 days to cure, but
17 if at the end of that period they don't, the court's
18 jurisdiction could be invoked against them.

19 QUESTION: So nobody has to make a big
20 investment to get the 60 days running?

21 MR. STEIN: I don't believe so, as, importantly,
22 most of this information is readily available through
23 public filings on the Internet. This is -- despite what
24 the Seventh Circuit said, it is not a huge task, we don't
25 believe, to investigate these various instances of

1 innocent unawareness, as the case was here, at least
2 investment of cost, particularly for an organization that
3 is devoted, and has 180,000 dues-paying members, devoted
4 to this particular task.

5 But to be precise, we do not believe it is a
6 very costly or time-intensive activity on behalf of the
7 citizen organization.

8 QUESTION: Well, if that's so, maybe these
9 organizations could just send out standard notices to
10 everybody.

11 MR. STEIN: Perhaps, Justice Kennedy, it would
12 be a good idea to help get the word out, because as I say,
13 smaller companies that do not have huge environmental
14 staffs that are able to keep track of all of this have
15 unfortunately gotten caught in this. It would not hurt.

16 We were happy to obtain this information. The
17 Steel Company obtained it, and the first thing they did
18 is, as a dutifully compliant company, compliant with a
19 host of complex laws, said how do we comply, and how fast
20 can we do it, and can we get in within the cure period,
21 and they did, so there is no history here of a company
22 that is trying to dodge or skirt the law. It's quite the
23 contrary.

24 QUESTION: Why isn't an adequate explanation of
25 the 60-day cure period that that's the period provided so

1 that EPA itself might come in, instead of having the
2 private plaintiffs do it?

3 MR. STEIN: It's perfectly adequate. In fact,
4 quite -- as specifically set forth in the statute, section
5 326(e) says that a citizen's suit is barred. The citizen
6 organization is barred if EPA decides to assert its
7 authority to enforce this law within the 60-day period.

8 We believe -- and Hallstrom v. Tillamook looked
9 at this. We believe that that is one of the primary
10 purposes of the notice, to prompt compliance, or
11 enforcement by EPA or compliance by the alleged violator,
12 that it is EPA's primary role to enforce these statutes
13 and, as stated by Congress, by saying that if EPA comes
14 into it -- the case and brings an administrative or
15 judicial action within that period, the citizen
16 organization is barred from its complaint.

17 QUESTION: Had that provision not existed I
18 would -- I think it would be a very strong argument that
19 the only possible reason for the 60-day period is to give
20 the defaulting company an opportunity to make good, and if
21 the company makes good, then suit cannot be brought after
22 the 60 days, but there is another explanation for the 60
23 days, as you said. It's to allow EPA to come in.

24 MR. STEIN: But Your Honor, the same provision,
25 the same opportunity for the EPA to come in and bar

1 citizen action existed under the Clean Water Act when it
2 was analyzed by Gwaltney, and the Court found the same
3 reasoning. The reason for the notice to EPA is to give it
4 a chance to come in, and the reason for the notice to the
5 alleged violator is for the alleged violator to cure. The
6 Court answered the question, what else could be the
7 purpose of the notice to the alleged violator?

8 QUESTION: In Gwaltney, though, the case turned
9 on fairly specific language in that act, the present tense
10 of to be in violation, and the Seventh Circuit said they
11 thought the language of this act was different.

12 MR. STEIN: Mr. Chief Justice, Gwaltney used the
13 to be in violation formula, and EPCRA uses the failure to
14 do formulation. Beyond that, there are not a whole lot of
15 differences between the two provisions.

16 To be in violation and failure to do are both
17 infinitive phrases. Failure and violation are both nouns,
18 no temporal limitation.

19 This is a information-gathering statute.

20 QUESTION: There is a temporal -- to be in
21 violation, you're currently in violation.

22 MR. STEIN: And failure to -- and the citizens
23 can --

24 QUESTION: Failure to do means you may have
25 failed to do it in the past, and you failed to do it.

1 MR. STEIN: In Gwaltney --

2 QUESTION: Even though you later made good that
3 failure, you did fail to do it.

4 MR. STEIN: In Gwaltney, the argument was
5 advanced that to be in violation also could have a
6 temporal limitation --

7 QUESTION: That was a bad argument. This isn't
8 a bad argument.

9 (Laughter.)

10 MR. STEIN: Well, we submit that failure to do
11 is, as used here is forward-looking also, and Gwaltney
12 studied the legislative history of the Clean Water Act --
13 there's very little of it here in EPCRA -- and the Clean
14 Air Act, the templates that were used for citizen
15 provisions, and found that citizen provisions are intended
16 to be forward-looking.

17 Failure -- understand -- I'll try and make
18 clear -- I hope I make clear that failure to do is the
19 operant -- the condition before a citizen's suit can be
20 brought. In the absence of the failure, a citizen's suit
21 is not permitted, so failure to do is a phrase which talks
22 about inaction. In the absence of inaction, the presence
23 of action, a citizen's suit is barred. United Musical
24 found that.

25 QUESTION: I would like you to go back for a

1 minute to this costs, getting your cost. What is your
2 response to the following fairly simple argument that has
3 to do with whether their injury is redressable, which I
4 take it is the standing question?

5 You'd say, well, how did this hurt you, their
6 violation? Answer: you are an environmental group. The
7 violation hurt you in that you were forced to live in a
8 world without information, or you had to spend some money
9 to cure the lack of information, and the spending of money
10 involved putting the company on notice, and then they
11 cured it.

12 And so what we do in this statute is, we don't
13 allow you in respect to past violations -- we don't
14 completely help you out, but we help you a little. Either
15 they will be stopped in their tracks by the court because
16 they didn't comply, or if they did comply, we will give
17 you back some of the money you spent getting them to
18 comply, and therefore we are redressing your harm, not all
19 of it, but some of it.

20 MR. STEIN: Your Honor, if it were that simple,
21 it might be easier, but they are not asking for their
22 attorneys fees alone. They're asking for \$537 million in
23 penalties.

24 QUESTION: But I have to worry about a different
25 question. I take it one of the questions that I'd have to

1 answer in this case is whether there is standing, and the
2 reason you argue there is not is because their injury is
3 not redressable insofar as they were injured, it was
4 redressed. This lawsuit doesn't redress it. Hence my
5 question. Is the lawsuit aimed at redressing a different
6 part of their injury, namely, the cost of investigating
7 the matter and bringing it to the attention of the
8 company, and the lawsuit gives them some of that money
9 back.

10 MR. STEIN: At the time the complaint was filed,
11 they had no injury. Their costs are a byproduct of their
12 litigation. Every party who had some cost --

13 QUESTION: You're saying the statute does not
14 give them back their cost except insofar as they are
15 related to this litigation, which took place as part of
16 the litigation decision, not as the other decision?

17 MR. STEIN: That is correct.

18 QUESTION: And how do I look that up?

19 MR. STEIN: You find it in the statute, which
20 says that they are entitled to receive their cost if they
21 are the prevailing or substantially prevailing party, but
22 since they can't get to court because there is no standing
23 on the day the complaint was filed, they don't have the
24 opportunity to prevail, Congress gave the defendant in
25 this case, who should not be a defendant, the opportunity

1 to cure, obviating the suit.

2 And when Gwaltney studied this it said, you
3 know, the citizens don't get their pre-investigation costs
4 if EPA were to come in either, so the Congress was not
5 necessarily that interested in those costs, only in the
6 event a party could not heed the 60-day notice, could not
7 come into compliance, we have severe costs, then they
8 could get those extraordinary costs as being the
9 substantially prevailing party.

10 Mr. Chief Justice, I'd like to reserve the
11 balance of my time.

12 QUESTION: Very well, Mr. Stein.

13 Mr. Strauss, we'll hear from you.

14 ORAL ARGUMENT OF DAVID A. STRAUSS

15 ON BEHALF OF THE RESPONDENT

16 MR. STRAUSS: Thank you, Mr. Chief Justice, and
17 may it please the Court:

18 Let me begin with the language of section 326 of
19 EPCRA, the citizen's suit provision, both what it is and
20 what it is not.

21 Section 326 provides that a citizen may bring a
22 suit for a failure to complete and submit a form under
23 section 312, or under section 313. That citizen's suit
24 provision does not occur, that form of citizen's suit
25 provision does not occur anywhere else.

1 The kind of citizen's suit provision that was
2 before the Court in Gwaltney used the term, alleged to be
3 in violation. That provision is ubiquitous throughout
4 citizen's suit provisions that Congress has enacted.
5 Alleged --

6 QUESTION: I have three statutes that use the
7 word, occur. One is CERCLA, one is RCRA, and one is
8 TOSCA, and they all use in the venue provision the word
9 occurred, and then in the liability provision -- they're
10 rather parallel to this one, aren't they?

11 MR. STRAUSS: The venue provision uses the word
12 occur, Justice Breyer.

13 QUESTION: Yes.

14 MR. STRAUSS: What I'm focusing on is the
15 provision that authorizes citizen's suits, which in those
16 three statutes contains the phrase, alleged to be in
17 violation.

18 QUESTION: Right, and so they're parallel to
19 this one.

20 MR. STRAUSS: No, this statute does not contain
21 the phrase, alleged to be in violation.

22 QUESTION: Well, in violation of --

23 MR. STRAUSS: It says, failure to complete and
24 submit a form. The alleged to be in violation
25 formulation, which is the formulation that the Court held

1 in Gwaltney, a case with facts somewhat parallel to this,
2 led to the conclusion for which petitioners contend. That
3 formulation does not occur in this statute.

4 What this statute contains is the phrase,
5 failure to complete and submit a form under section 312
6 and section 313.

7 The evidence that this is a deliberate choice by
8 Congress is really quite overwhelming. In the very same
9 public law that enacted EPCRA, Congress also enacted the
10 Superfund amendments. The Superfund amendments contain a
11 citizen's suit provision. That citizen's suit provision
12 used the alleged to be in violation formulation. EPCRA
13 used a different one.

14 QUESTION: It couldn't have used that language
15 here. I mean, if he complies -- well, anyway, I'm sorry.
16 I'll withdraw my question.

17 MR. STRAUSS: Justice Stevens, then they could
18 have used that language. Alleged to be in violation, had
19 it been used in EPCRA, would lead quite logically --

20 QUESTION: Mr. Strauss, the violation here, the
21 only requirement is that you file a form, so then it's
22 logical to talk about failure to file or submit a form.
23 In the other statutes, perhaps more encompassing, there
24 would be a reason to use language, alleged to be in
25 violation, because there were many things that could

1 violate the statute.

2 MR. STRAUSS: Well, Justice Ginsburg, there's --
3 the requirement in EPCRA is that you file a form by a
4 certain date, and what the statute says is, failure to
5 complete and submit a form under sections 312 and 313.
6 Sections 312 and 313 contain deadlines, and it seems to us
7 that if you do not you are guilty of a failure to complete
8 and submit a form under section 312 if you don't meet the
9 deadlines in 312.

10 QUESTION: Well, you don't have to read it that
11 way. I mean, it does possibly suggest to you that if the
12 form is completed and filed, it meets the requirement
13 regardless of when.

14 MR. STRAUSS: Then I think --

15 QUESTION: It's a little -- it's open to that
16 interpretation, isn't it?

17 MR. STRAUSS: Well, Justice O'Connor, then I
18 don't know why the language about under that section would
19 be in the statute, failure to complete and submit a form
20 under section 312. In fact, I'm --

21 QUESTION: Because 312 is the statute that says
22 the forms will be filed.

23 MR. STRAUSS: Well, I'm actually -- I'm actually
24 omitting a part of the statute. It says, failure to
25 complete and submit an inventory form under section 312,

1 so the reference to section 312 wasn't even needed to say
2 which form they had in mind.

3 And not only that, Justice O'Connor, but it's
4 quite clear from the structure of the statute and from the
5 purposes of the statute that timeliness is not an
6 incidental requirement. Timeliness is at the core of what
7 the statute is about.

8 QUESTION: Well, but the 60-day notice provision
9 has to be factored in, too. It must have been there for a
10 purpose.

11 MR. STRAUSS: Well, absolutely, Justice
12 O'Connor, and Mr. Stein referred to it as a 60-day cure
13 provision, which is a curious reference for a number of
14 reasons. Here's one. The Clean Air Act contained the
15 phrase, alleged to be in violation. After this Court's
16 decision in Gwaltney, Congress -- it also has a notice
17 period. After Gwaltney, this Court amended, or the
18 Congress amended the Clean Air Act to include the phrase,
19 or to have violated, making it clear that Gwaltney was not
20 to apply to the Clean Air Act, but Congress left the
21 notice period intact in the Clean Air Act.

22 QUESTION: But wasn't it more than that? Wasn't
23 it simply that they didn't -- that they violated it on one
24 occasion, but wasn't there something built into that
25 amending language that suggests that the person was a

1 repeat violator?

2 MR. STRAUSS: Yes, exactly so, Justice Ginsburg.
3 Alleged to have violated, if there is evidence that the
4 violation has been repeated, but that could still be
5 entirely in the past. It could be a violation in the
6 past, repeated in the past.

7 QUESTION: Such evidence would allow this suit
8 to proceed anyway, on the theory that there's likely to be
9 a repetition. Opposing counsel acknowledges that.

10 MR. STRAUSS: I think that's right, Justice
11 Scalia. What --

12 QUESTION: I don't think -- how you can agree
13 with that, because the complaint doesn't allege that.

14 MR. STRAUSS: Well, Justice Stevens, what we do
15 in the complaint, we ask for an injunction that will allow
16 us to look at their property in the records.

17 QUESTION: -- and so forth, but you don't allege
18 there's any risk of continuing violations.

19 MR. STRAUSS: Justice Stevens, we don't know.
20 We don't know what the story is. All we know is, they
21 didn't file.

22 QUESTION: Then your burden, normally you have
23 to make an allegation then try and prove it.

24 MR. STRAUSS: Well, we don't know whether they
25 would or would not.

1 QUESTION: Well then, you don't have any cause
2 of action.

3 MR. STRAUSS: Well --

4 QUESTION: If you must know something to bring a
5 suit, and you don't know it, you don't have a suit.

6 MR. STRAUSS: Justice Scalia, we don't see
7 anywhere in the statute where it says this has to be a
8 repeat violation. It says there has to be a failure to
9 submit a form under a section with a deadline, a
10 deliberately chosen provision that differs from all other
11 citizen's suit provisions.

12 QUESTION: But that's fine. You could allege
13 that they didn't do this on this one occasion. You say
14 that's all that this statute required.

15 MR. STRAUSS: That's right.

16 QUESTION: I thought the question was, are you
17 asserting a continuing violation, or any reason to project
18 that there might be one, and I think the -- your answer
19 candidly is, the statute didn't require it and we didn't
20 plead it.

21 MR. STRAUSS: What we pled was, what we asked
22 for was authorization to inspect their property. We may
23 know down the road whether they are right in saying that
24 they simply didn't know about the statute and now they've
25 gotten everything in order, or maybe that's not the case.

1 We just don't know. This complaint was dismissed.

2 But the statute doesn't contain any reference to
3 repetition. The statute says, a failure to complete and
4 submit.

5 QUESTION: No, but it's relevant to the question
6 of standing, because we're trying to focus on exactly
7 what --

8 MR. STRAUSS: Mm-hmm.

9 QUESTION: -- your injury is, and if your injury
10 is a fear of continuing violations, you could allege that
11 and presumably prove it, if they were people who didn't
12 obey the law over and over again.

13 But here, the facts don't seem to suggest that,
14 and it's not alleged in the complaint. The only injury
15 that you refer to in the briefs and all is a costs of
16 investigation which you want to get reimbursed for, but
17 you don't allege in your complaint you have any costs of
18 investigation, either.

19 MR. STRAUSS: Well, we allege in the complaint
20 that we undertook an investigation.

21 QUESTION: No. You generally follow what
22 happens in the environmental community. I don't think you
23 allege you spent any money beyond your normal, routine
24 expenses in investigating this company.

25 MR. STRAUSS: Oh, absolutely, Justice Stevens.

1 We conducted an investigation of this company --

2 QUESTION: You don't allege it, is what I'm
3 saying.

4 MR. STRAUSS: I think we allege in there that we
5 conducted an investigation of the company, but I'll find
6 the page reference.

7 QUESTION: If it would suffice for standing for
8 everybody to get the costs of bringing the suit, gee,
9 everybody would have standing for any suit at all.

10 MR. STRAUSS: Justice Scalia, that's --

11 QUESTION: You know --

12 MR. STRAUSS: That's right, but that's --

13 QUESTION: -- whatever it cost you to bring the
14 suit gives you standing to bring the suit.

15 MR. STRAUSS: Here's why this statute is --
16 here's why this statute is different, Justice Scalia, and
17 why that argument, which is, of course, right, does not
18 apply, and the point Justice Kennedy and Justice Breyer
19 made in their questions to my colleague.

20 In -- before we could file the notice, we had to
21 conduct an investigation to find out information that
22 they, had they been complying with the law, would have
23 made readily available. Because they didn't comply with
24 the law and make this information available, we had to dig
25 it out. If we win the case, we'll get the money back that

1 will compensate us for doing work we only had to do
2 because they didn't give us the information.

3 QUESTION: Well, isn't that a simple matter? As
4 your opposing counsel said, it's on the Internet whether
5 or not they filed the report. If the report had been
6 filed, there it would be.

7 MR. STRAUSS: Whether they filed the --

8 QUESTION: So you find out they didn't file it.

9 MR. STRAUSS: Whether they filed the report is
10 on the Internet, Justice O'Connor. What is not on the
11 Internet is that they use and release large amounts of
12 hydrochloric acid from their premises. We can't go on
13 their premises. We have to put -- piece together from
14 various -- from tips from people in the community and
15 various sources of information --

16 QUESTION: Well, you don't need much of that.
17 You know what the companies in the business --

18 QUESTION: Is that --

19 QUESTION: -- are doing.

20 QUESTION: The gist of the action is failure to
21 file the report, not trying to show the report is untrue.

22 MR. STRAUSS: In this case they filed no report.
23 Because they filed no report, we had to dig out
24 information that should have been publicly available. The
25 purpose of the act is to make this information available

1 to us and our members. It wasn't, because they violated
2 it.

3 QUESTION: So you say you would have benefited
4 had they filed their report, because you wouldn't have had
5 to dig out the information yourself.

6 MR. STRAUSS: That's right, Mr. Chief Justice,
7 or the reverse of that, that because they didn't file
8 reports, we had to dig this information out.

9 QUESTION: Why did you --

10 QUESTION: You dug it out for some independent
11 purpose, not just to try to show that their report might
12 be false?

13 MR. STRAUSS: Well, they filed no report. We
14 dug it out to determine whether they had failed to file a
15 report. This goes to the --

16 QUESTION: Why do you need to dig it out in
17 order to determine whether they failed to file a report?

18 MR. STRAUSS: Excuse me. Whether they failed to
19 file a report that they should have filed. Whether they
20 had on their premises the kind of substances that trigger
21 the obligation to file a report.

22 QUESTION: Well, what is your answer to Mr.
23 Stein's point in responding to one of my questions that
24 you didn't have to dig at all?

25 If you had any reasonable suspicion that they

1 should have filed a report, all you had to do was put them
2 on the spot and say, we claim you should have, the 60 days
3 are running, and if at the end of the 60 days they had not
4 filed a report, then you could have -- you would have had
5 a basis for saying -- or you could have made a decision at
6 that point as to whether to invest something further into
7 this investigation, but you didn't have to do the digging,
8 according to him, that you claim you did. Is he wrong?

9 MR. STRAUSS: Justice Souter, the notice
10 provision says notice of the alleged violation. I think
11 if we sent the petitioner just a general notice that said,
12 we think you're violating EPCRA, with no specifics, they
13 would be justified in coming in when we brought suit and
14 saying, you didn't give us 60 days' notice of the alleged
15 violation. You have to tell us more than just, we think
16 you're violating the law.

17 QUESTION: Well, all you'd have to do is say, we
18 think you're discharging certain substances into the air,
19 you've filed no report, and we think you have a duty to do
20 so.

21 MR. STRAUSS: Well, we have to determine that
22 they are discharging or have on their premises certain
23 substances, which it's not easy to do. It's not easy to
24 determine not only certain substances, but the quantities
25 have to exceed certain thresholds.

1 QUESTION: You don't have to know the details.
2 Even if it's just an ounce there's a duty to file -- maybe
3 there's a minimum threshold.

4 MR. STRAUSS: There's a threshold. They have to
5 exceed the threshold.

6 QUESTION: What do you say about Mr. Stein's
7 answer to my question. He had a pretty good answer, I
8 thought, that he said that the -- as far as the harm goes
9 in respect to your not having the report filed, well, that
10 was cured, so this suit doesn't aim to get you that, and
11 as far as the costs go, in paragraph (e) of your complaint
12 what you actually ask for is to award the plaintiff all of
13 its investigation and prosecution costs and others as
14 authorized by section 326(f), and then he says, if I read
15 section 326(f) I'll see that it authorizes litigation
16 costs, pure and simple, and so it can't help you
17 redressing that kind of harm without opening the door to
18 Article III being no limitation on the lawsuits.

19 MR. STRAUSS: Justice Breyer, the statutory
20 provision authorizes an award of litigation costs. This
21 Court has said actually that a more narrow provision
22 authorizing just attorney's fees that the work must be
23 useful and of a type ordinarily necessary. That's the
24 standard the court has used.

25 QUESTION: I don't think attorney's fees is

1 narrower. I think it's broader. I mean --

2 MR. STRAUSS: Well, this says litigation
3 costs --

4 QUESTION: -- litigation costs is a --

5 MR. STRAUSS: Well, this says litigation costs
6 (including attorney's fees and expert witness fees)
7 suggesting that it's broader.

8 QUESTION: Well, necessary to redress something,
9 not necessary, as it were, in a circular fashion, merely
10 to be in a position to claim attorney's fees --

11 MR. STRAUSS: Yes.

12 QUESTION: -- or investigatory fees, so your
13 claim is still tied to an obligation to come up with some
14 injury that can be redressed by the suit, and number 1
15 there is no claim here that there's any further redress
16 that you can get for the past failures. Everything that
17 can be known is now known. There is no allegation, as I
18 read it, that in fact there is a likelihood of violation
19 in the future.

20 Number 3, if you make your claim for the
21 penalties, you don't get one red cent of that penalty
22 money, as I understand it, so that the only thing that you
23 can obtain that you do not now have is the attorney's fees
24 or the investigatory fees, and they are tied, it seems to
25 me, to litigation which has got to give you some other

1 benefit. In other words, they alone cannot under the
2 statute justify it.

3 So I guess my problem is, if I construe the
4 statute the way you want me to construe it, it seems to me
5 there is a very serious Article III question, and it makes
6 sense to construe the statute in a way which will not
7 raise this Article III question. What's wrong with that
8 argument?

9 MR. STRAUSS: Let me first address the point
10 about circularity, Justice Souter, because I do understand
11 the circularity point, and here is why we are not making a
12 circular argument about attorney's fees.

13 One of the injuries they inflicted on us was not
14 giving us information we and our members had a statutory
15 right to. As a result of that, we had to dig out that
16 information ourselves. If we win, we get our costs of
17 digging that out, therefore our injury is redressed.

18 A suit under the Clean Water Act, you don't
19 have to clean up the water.

20 QUESTION: But you're not saying, are you, that
21 the statute gives you a statutory right to that
22 independent of the section that refers to litigation
23 costs?

24 MR. STRAUSS: The litigation costs provision is
25 the provision that gives us a right to that --

1 QUESTION: Okay.

2 MR. STRAUSS: To those expenses.

3 The reason it gives us a right to those
4 expenses, to answer Justice Breyer's question on that
5 score, is, we couldn't have signed a Rule 11 statement had
6 we not conducted that investigation.

7 We couldn't have signed a statement saying we
8 believe they have hydrochloric acid on their premises had
9 we not gone out and dug up that information.

10 QUESTION: You certainly could have at the time
11 you filed your complaint, because they had already filed
12 their reports which told you those facts.

13 MR. STRAUSS: Well, but we had to --

14 QUESTION: That's when you have to file your
15 Rule 11 statement.

16 MR. STRAUSS: Well, but the complaint had to
17 follow on a notice of the alleged violation, otherwise the
18 complaint would be jurisdictionally barred.

19 QUESTION: In other words, Rule 11 applies at
20 the time you file the complaint. You had all the facts
21 then.

22 MR. STRAUSS: Well, that's right, but then it's
23 a jurisdictional prerequisite to the complaint.

24 QUESTION: In fact, it also seems clear to me as
25 we talk about it more that at the time you filed the

1 complaint your principal injury, which was you were denied
2 this information for a time when you were entitled to it,
3 you had got the information by the time you filed the
4 complaint.

5 MR. STRAUSS: Justice Stevens, what the statute
6 guarantees is timely information. People who moved into
7 petitioner's neighborhood --

8 QUESTION: I understand.

9 MR. STRAUSS: -- in 1990 aren't benefited by
10 knowing in 1995 that they've been exposed --

11 QUESTION: You are not going to get any redress
12 in this complaint for harms caused by your failure to have
13 that information 3 months ago. You don't get a remedy
14 for, we had to close our windows to keep the odors out, or
15 something like that. You don't get relief for that.

16 MR. STRAUSS: No. That is the injury. That is
17 the injury, Justice Stevens. The redress --

18 QUESTION: -- for which you are not redressed by
19 this proceeding.

20 MR. STRAUSS: That injury -- that injury that we
21 did not have the information is redressed only to the
22 extent that when we dug it out we will now get paid back
23 for mitigating the injury they inflicted on us.

24 QUESTION: Mr. Strauss, in attorney's fees
25 provisions, I mean, there are many in many statutes, and I

1 had thought that the Congress tried more or less to be
2 careful about when it is talking about litigation fees,
3 that is, fees generated post complaint, and fees that
4 happen because of investigation, fees at the agency level,
5 and when Congress speaks of litigation fees, that
6 generally has meant while you're in court, and when it
7 talks about fees before the agency or investigation,
8 that's for that earlier period. But here, the term is
9 litigation fees.

10 MR. STRAUSS: It's litigation costs, Justice
11 Ginsburg, and I agree this would not apply to an agency
12 proceeding, but the Court has made it clear that
13 litigation costs or attorney's fees include work that goes
14 into developing the complaint, as, of course it would have
15 to, investigation you have to do in order to develop, as
16 in the Court's words, the work associated with the
17 development of the theory of the case, and the drafting of
18 the initial pleadings.

19 That sort of pre-complaint work has to be
20 covered by the term. It's an integral, indispensable part
21 of litigation.

22 QUESTION: Yes, but you're saying that this
23 material is -- I mean, it seems to me you're arguing that
24 it's two different things.

25 First you're arguing it is an independent damage

1 and not associated with attorney's fees because we
2 wouldn't have known what stuff was in the air.

3 Then, you get damages for this by calling it
4 attorney's fees, or litigation -- which is it?

5 MR. STRAUSS: The question --

6 QUESTION: Did you do this investigation in
7 order to bring the lawsuit, in which case you can't rely
8 on that for standing, or, did you do it not in order to
9 bring the lawsuit, in which case it's not part of your
10 cause of action?

11 MR. STRAUSS: As I understand the standing
12 issue, Justice Scalia, the question is, are our injuries
13 being redressed?

14 If we win this lawsuit, our injuries will be
15 redressed. They'll happen to be redressed under a
16 provision that says, litigation costs, but that's
17 immaterial to the Article III question.

18 QUESTION: It depends on why they were
19 undertaken, why these investigations were undertaken.
20 Were they undertaken in order to bring this lawsuit? In
21 that case, the statute gives you a right to them, but I
22 question whether you have standing --

23 MR. STRAUSS: I think they were --

24 QUESTION: -- have Article III standing.

25 On the other hand, were they conducted not in

1 order to bring the lawsuit, but just because you wanted to
2 know what was out there in Hyde Park, or wherever, in
3 which case you clearly would have standing, but you have
4 no cause of action under this statute.

5 MR. STRAUSS: Well, they were undertaken for
6 both purposes, Justice Scalia.

7 What CBE does is to find out information about the
8 communities and if someone is in violation of the law
9 bring suit against them, but I don't know why our purpose
10 in doing this should be material to the redressability
11 inquiry.

12 Our injury will get redressed. The fact that it
13 will get redressed under a litigation cost rubric, I don't
14 see where that bears on the Article III problem.

15 QUESTION: Because it relates to whether they
16 constitute litigation costs. If you would have done this
17 stuff anyway, they're not litigation costs, which is all
18 that you've asked for.

19 MR. STRAUSS: Well, that goes to the statutory
20 question of whether they are litigation costs.

21 QUESTION: Another reason it relates is because,
22 if you say that giving a person litigation costs is
23 sufficient to create an Article III case, then there is
24 virtually -- I mean --

25 MR. STRAUSS: Yes.

1 QUESTION: -- expanded -- it's un -- you know --
2 MR. STRAUSS: No, I --
3 QUESTION: -- Congress --
4 MR. STRAUSS: I --
5 QUESTION: -- that's the problem. But if you
6 read it the other way, it seems to make a certain amount
7 of sense.
8 Those instances where the company might not
9 comply in the future, you allege that, ask for an
10 injunction, and there you have no standing problem.
11 MR. STRAUSS: Well, we --
12 QUESTION: In those cases where there's no
13 significant risk of that at all, you can't.
14 MR. STRAUSS: We --
15 QUESTION: But of course, then, there wasn't
16 really a case.
17 MR. STRAUSS: We -- well, we do ask for an
18 injunction in this case. We do ask for an injunction to
19 look at their materials.
20 As for the question of the circularity and
21 supporting any case, what's different about this statute
22 is that in order to bring this suit we have to remedy the
23 injury that was inflicted on us in order to bring the
24 suit. Usually, litigants don't have to do that.
25 QUESTION: Thank you, Mr. Strauss.

1 MR. STRAUSS: Thank you, Mr. Chief Justice.

2 QUESTION: Mr. Gornstein, we'll hear from you.

3 ORAL ARGUMENT OF IRVING L. GORNSTEIN

4 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

5 SUPPORTING THE RESPONDENT

6 MR. GORNSTEIN: Mr. Chief Justice, and may it
7 please the Court:

8 Our position is that EPCRA authorizes a
9 citizen's suit for failure to file timely reports when the
10 reports are filed only after notice of an intended
11 citizen's suit.

12 QUESTION: Do you also take the position in the
13 case of suits against the Administrator? If the
14 Administrator is given 60 days' notice, and then before
15 the 60 days expires begins to take the corrective action,
16 can the plaintiffs still sue and recover attorney's fees?

17 MR. GORNSTEIN: They could not recover civil
18 penalties for sure, against the Administrator. The
19 question would be whether there was a sufficient
20 likelihood of recurrence to give them Article III
21 standing. That would be the issue --

22 QUESTION: Gee --

23 MR. GORNSTEIN: -- in that sort of case, so --

24 QUESTION: Well, if it's that, then how do you
25 run across the problem here that they haven't alleged

1 anything about recurrence?

2 MR. GORNSTEIN: Well, I -- first of all, I read
3 the complaint a little differently to be ambiguous on that
4 point at (5) of the Joint Appendix. It says, the right to
5 know about such releases and its interest in protecting
6 and improving the environment and the health of its
7 members have been, are being, and will be adversely
8 affected by the defendant's action in failing to provide
9 timely and required information.

10 It doesn't speak backwards, it doesn't speak
11 forwards. It speaks in terms of the language of the
12 statute there, and --

13 QUESTION: It sounds as if what it's saying is
14 their failure to file in the past will continue to hurt
15 them in the future.

16 MR. GORNSTEIN: Well, that's one way of reading
17 it, but they also seek an injunction that looks towards
18 future compliance, it seems to me, that might sort out
19 that ambiguity a little.

20 And beyond that, Justice Souter, even if this
21 particular -- to answer your complaint about the,
22 shouldn't we interpret this more narrowly in light of the
23 constitutional question, even if this particular complaint
24 doesn't allege what is sufficient for a reasonable
25 likelihood of occurrence, that wouldn't mean that some

1 plaintiffs couldn't, and therefore this statute ought not
2 to be interpreted more narrowly than it is, because
3 certainly the --

4 QUESTION: Oh, I'm not suggesting the -- or, I
5 didn't mean to suggest by my question that the statute
6 should be interpreted so narrowly as to preclude standing
7 if there were an allegation of either a continuing
8 violation or the probability of a future violation, but
9 I'm concerned about the interpretive question when there
10 is no question of continuing violation in the sense that
11 they file everything that can be filed with respect to the
12 past, there is no allegation, and we'll leave the question
13 of ambiguity aside for the moment, of the likelihood of a
14 future violation, there is no penalty that can be
15 recovered that will go into the pocket of the private
16 plaintiff, and the only thing which is in issue is the
17 issue of attorney's fees or investigatory fees for the
18 time prior to the moment when litigation could be begun.

19 That's the scenario in which it seems to me
20 there is an Article III, a serious Article III question,
21 and it's on that scenario that I would suggest it might be
22 wise to interpret the statute narrowly to avoid having to
23 reach that issue.

24 MR. GORNSTEIN: Well, let me just define the
25 class of plaintiffs who have a cause of action here and

1 then say why we think that there's no Article III problem.

2 The class of plaintiffs who have standing are
3 only those class of plaintiffs where the defendants files
4 the report only after receiving notice of an intended
5 citizen's suit. That is what this statute authorized.

6 We derive that not just from the plain language
7 of the citizen's suit provision, which says that you can
8 sue for failure to file untimely reports, but by a
9 contrast between the notice --

10 QUESTION: It's not in that language. It
11 doesn't say that. Failure to complete and submit reports
12 under section so-and-so.

13 MR. GORNSTEIN: Right, and the most natural
14 reading of under in that context is that it incorporates
15 the requirements from the reporting provisions so that
16 they did not have to be repeated all over again in the
17 citizen's suit provision, and one of those requirements is
18 that there has to be timely reports, so a failure to
19 submit and complete reports under those reporting
20 provisions encompasses a suit for the filing untimely
21 reports just as it encompasses a suit for inaccurate
22 information in those reports.

23 QUESTION: Well, it may, but do you agree that
24 there is nothing further that can be done to redress the
25 prior failure?

1 MR. GORNSTEIN: And that's why the Article III
2 question turns on the reasonable likely -- the Article III
3 standing question is whether there's a reasonable
4 likelihood of recurrence in that situation, and we submit
5 that the voluntary cessation --

6 QUESTION: May I interrupt you there, because
7 it's quite important.

8 MR. GORNSTEIN: Okay.

9 QUESTION: Then you're saying the reasonable
10 likelihood of recurrence is critical to the standing
11 issue.

12 MR. GORNSTEIN: It is.

13 QUESTION: And that is not alleged here.

14 MR. GORNSTEIN: I --

15 QUESTION: And you say, well, it might be in
16 other cases, but assume it were alleged in another case
17 but not proved. It's a very difficult thing to prove, if
18 you have a company like this with a history of just an
19 inadvertence and so forth. You are saying the plaintiff
20 would have to prove there is a reasonable likelihood they
21 would not file in the future.

22 MR. GORNSTEIN: No. There is --

23 QUESTION: They can allege it without proving
24 it?

25 MR. GORNSTEIN: There is a -- no. It has to be

1 alleged that there is a sufficient likelihood of
2 recurrence.

3 QUESTION: All right.

4 MR. GORNSTEIN: But there -- the presumption
5 would come that in this scenario where somebody files a
6 report only after being given notice that he's going to be
7 sued, there should be a presumption that there is a
8 sufficient likelihood of recurrence to give the plaintiff
9 Article III standing --

10 QUESTION: Why, any more than if the police
11 engaged in a certain kind of tactic and were told that
12 that's not good to do, that they're not going to do it any
13 more? There are many cases where it's easy to allege
14 continuing violation.

15 MR. GORNSTEIN: Well, I think if this Court's
16 voluntary cessation cases do say that when someone comes
17 into compliance only after the commencement of litigation
18 there is a --

19 QUESTION: But there is a commencement of
20 litigation.

21 MR. GORNSTEIN: I realize that, but I want to
22 start with the principle that the Court has established --

23 QUESTION: That's not Article III. That's
24 entitlement to an injunction.

25 MR. GORNSTEIN: No, it's an Article III doctrine

1 that the Court?

2 QUESTION: It's mootness, and in a case called
3 mootness -- there was a case under the Constitution.
4 There's no argument. Do you think those should be
5 parallel? If they're parallel, I don't know what that's
6 going to do to standing law. I haven't really thought
7 that through. It never occurred to me that those two
8 things were parallel.

9 MR. GORNSTEIN: They are parallel in an Article
10 III sense, Justice Breyer.

11 QUESTION: So in any case in which the
12 possibility of recurrence prevents mootness, in any such
13 case, a plaintiff would have standing despite the absence
14 of any -- of any ongoing violation. That's a pretty
15 broad --

16 MR. GORNSTEIN: That there would be a prudential
17 standing barrier at that point, because the Court has not
18 carried on on its own the same rules at the standing
19 stage, the same presumptions at the standing stage that it
20 has employed at the mootness stage, but as an Article III
21 matter, any time somebody comes into compliance only
22 because someone has either told them, I'm going to sue you
23 or somebody has filed a lawsuit, there's a presumption.

24 Now, that presumption, I hasten to add, can be
25 rebutted.

1 QUESTION: What's the presumption --

2 QUESTION: What's the argument for the
3 presumption?

4 QUESTION: -- based on?

5 MR. GORNSTEIN: The voluntary cessation cases
6 that we're relying on include United States v. W. T.
7 Grant, City of Mesquite v. Aladdin's Castle, and a whole
8 series of cases.

9 QUESTION: Are they based on --

10 QUESTION: All they show is that if there was
11 originally standing, that there was -- it was established
12 that there was going to be a continuing violation.

13 That simply does not eliminate the prior
14 established standing. It's a huge leap from that to say
15 that in and of itself it establishes standing.

16 MR. GORNSTEIN: No, I don't think it is a huge
17 leap as an Article III matter, because as an Article III
18 matter, the plaintiff at that stage of the litigation has
19 to have a sufficient interest for Article III purposes to
20 carry on the litigation.

21 If the -- if it -- let's say things had been
22 remedied 1 day after this litigation commenced, 1 day
23 after, you would apply the voluntary cessation cases and
24 you would say there is a presumption that there is a
25 sufficient likelihood of recurrence to keep this case

1 alive, and that could be rebutted only if the defendant
2 has a heavy burden.

3 QUESTION: I would agree with that if the
4 complaint alleged before the voluntary compliance occurred
5 that this person was in violation and would continue in
6 violation.

7 MR. GORNSTEIN: But we have a situation, though,
8 where the person has cured that original violation, and
9 the plaintiff at that point has the burden of showing that
10 he has a continuing interest in the litigation. The only
11 way he gets there is through a presumption.

12 QUESTION: All right, but let's allege it at
13 least.

14 I mean, look, this seems like the simplest
15 approach is also the best approach. The simplest approach
16 would say, in those instances where there's some
17 likelihood of recurrence, the lawsuit's serving an
18 excellent purpose. The lawsuit is.

19 And in those cases where there is no likelihood
20 whatsoever, the only purpose it's suing is perhaps through
21 the litigation cost thing to give them some of their money
22 back.

23 Well, that would be the simple approach, and why
24 not follow that simple approach?

25 MR. GORNSTEIN: Well, I think that there's no

1 problem with carrying over the idea that there has to be
2 an allegation, but I think that the important point is
3 that there has to be a presumption with that allegation --

4 QUESTION: What's the presumption based on? Is
5 it based on our judicial notice that there's an empirical
6 likelihood that when you violate something once, you'll
7 violate it again?

8 MR. GORNSTEIN: It's not an empirical
9 likelihood, but a sufficient likelihood in the scenario
10 where the person only comes into compliance after the
11 commencement of litigation.

12 If somebody is coming into compliance --

13 QUESTION: Why is that a likelihood here, when
14 one of the problems is, is that this company just didn't
15 have notice of the statute? It just didn't know about it?

16 MR. GORNSTEIN: Well, that's what the company
17 asserts, Justice Kennedy, and that would be something that
18 would --

19 QUESTION: Isn't this going to be a likelihood
20 in a significant number of these early cases?

21 MR. GORNSTEIN: Well, this is no longer at
22 the --

23 QUESTION: I don't know what your presumption is
24 based on.

25 MR. GORNSTEIN: There's no longer -- we're far

1 distant from the time in which this statute was enacted at
2 this point.

3 If the Court has --

4 QUESTION: Thank you, Mr. Gornstein.

5 Mr. Stein, you have 4 minutes remaining.

6 REBUTTAL ARGUMENT OF SANFORD M. STEIN

7 ON BEHALF OF THE PETITIONER

8 MR. STEIN: Relative to the term under, the term
9 under appears 27 times in section 326, the citizen
10 provision of EPCRA. We assert in our briefs that under
11 simply relates back, identifies the section of the statute
12 that the citizen opportunity refers to.

13 QUESTION: But isn't it equally reasonable to
14 think that it refers to in compliance with the provisions
15 of, rather than just the statute by name?

16 MR. STEIN: Mr. Chief Justice, *Ardonesti v. INS*
17 says that the term under should be taken from the context
18 of the statute, and the --

19 QUESTION: I don't think we need that case to
20 tell us that.

21 (Laughter.)

22 MR. STEIN: Well, in any event --

23 QUESTION: -- what was the name of that case --

24 MR. STEIN: -- in the context of this statute,
25 though, I think in the context of the history surrounding

1 the statute, and the context of the way this Court has
2 analyzed citizen suit provisions as being forward-looking,
3 under simply is a relation back.

4 Again, they -- respondent suggests that under
5 means in accordance with, but at section 326(a)(1)(B)(iv),
6 and again in section 321(a)(1)(C), Congress did use the in
7 accordance with formulation, and therefore Congress knows
8 how to say, in accordance with, if it wishes to
9 incorporate the specific provisions of the related-to
10 section, and it knows how to use under, as it did 27
11 times.

12 So we think the better reading, as the United
13 Musical Court looked at it. Under simply relates back,
14 and did not get into what that Court --

15 QUESTION: So you think if you filed a statement
16 of emissions that was entirely wrong, all the elements and
17 all the quantities are wrong, you'd -- suit would not lie?

18 MR. STEIN: No, Justice Scalia. We --

19 QUESTION: It would have been filed under that
20 provision.

21 MR. STEIN: The -- but it's also --

22 QUESTION: It's just not in compliance with it,
23 that's all.

24 MR. STEIN: No. We think that the complete
25 portion of the complete and submit language suffices for

1 that. A form would certainly not be complete --

2 QUESTION: It's completed. There's no blank in
3 the whole thing. He just writes in the wrong elements and
4 the wrong quantities.

5 MR. STEIN: But we think Congress would not give
6 such an obviously glaring omission in a statute. The
7 complete language connotes some kind of completeness in
8 terms of proper and accurately complete. That's what
9 complete seems to me.

10 QUESTION: But the language certainly is open,
11 and if it's open, why wouldn't it make a lot of sense to
12 say, in the instance where there's some reason to think
13 they'll do it again, they did it before, maybe they'll do
14 it again. Or they didn't do it before, maybe they won't
15 do it again. In such a case, it authorizes the suit.

16 MR. STEIN: It would be inconsistent to apply --
17 if we're talking about under, still, and the timeliness
18 element, it would be inconsistent to apply the timely
19 provisions of section 312 and 313, because Congress had
20 readily available options which it used in other statutes.
21 It could have said, failure to complete and timely submit.
22 It could have said, failure to have completed and
23 submitted. It had many options. It could have given the
24 opportunity to --

25 QUESTION: Of course, it could have used the

1 language it did in all these other statutes, too.

2 But what's your response to his argument when
3 Congress amended the other statute in response to Gwaltney
4 they just didn't adopt this route?

5 MR. STEIN: Well, by amending the Clean Air Act
6 in 1970 -- 1990, to say that the -- they can sue for a
7 past violation in the event there is evidence of a
8 repeated violation certainly doesn't amend EPCRA. It only
9 amends the Clean Air Act, or any of the other statutes
10 that use these various formulations in citizen's suits.

11 United Musical drew strength from the fact that
12 Congress amended the Clean Air Act but not EPCRA to say
13 EPCRA must mean what the citizen's 60-day cure periods
14 mean in 17 other statutes, all 17 of which were cited in a
15 footnote in Hallstrom.

16 So looking at the case as a whole, looking at
17 the context, we think that --

18 QUESTION: A later Congress' amendment doesn't
19 necessarily show what the earlier Congress meant, anyway.
20 I mean --

21 MR. STEIN: No.

22 QUESTION: It's as reasonable to think the
23 amendment was meant to change what preexisted as it is to
24 think that it was meant to confirm what preexisted, isn't
25 it?

1 MR. STEIN: But we don't think there's any
2 likelihood that Congress would have done that without
3 citing any of that in its legislative history of the Clean
4 Air Act.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Stein.

6 MR. STEIN: Thank you.

7 CHIEF JUSTICE REHNQUIST: The case is submitted.

8 (Whereupon, at 2:01 p.m., the case in the above-
9 entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

STEEL COMPANY, AKA CHICAGO STEEL AND PICKLING COMPANY, Petitioner
v. CITIZENS FOR A BETTER ENVIRONMENT
CASE NO: 96-643

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Mari Fedele-----

(REPORTER)