

---

---

## CIRCUIT APPROACHES TO MOOTNESS IN THE ASSOCIATIONAL-STANDING CONTEXT

Organizations may bring claims in federal court in two primary ways. First, an organization, like an individual plaintiff, may bring a claim when it has itself experienced an injury as a result of another party's conduct. Second, an organization may assert "associational standing," which allows it to bring a claim on behalf of its injured members. To assert associational standing, an organization must generally identify members who have been injured by the challenged conduct. The organization, in turn, asserts the standing of those injured members.

Because associational standing permits an organization to assert the standing of injured organizational members, complications arise when those members cease to have a live claim. If the members upon whom associational standing is premised no longer have an ongoing case or controversy, is the organization's claim similarly moot?

Circuit courts have addressed this question inconsistently and with imprecision. Some circuits, following a strict approach to mootness, have held that the organization's claim is moot or have required the organization to identify additional organizational members with live claims in order to preserve a live case or controversy. On the other hand, the case law of at least one circuit can be read as assuming a more flexible approach, permitting an organization to proceed with its claims so long as there is a reasonable probability that additional, unidentified organizational members are experiencing the alleged harm. The remaining circuits that have addressed the issue have done so with imprecision.

While the Supreme Court has yet to decide this issue, the Court's justiciability doctrine and the conceptual underpinnings of associational standing counsel in favor of a strict approach. Both a comparison to the class action context and the Court's mootness jurisprudence, moreover, counsel against a flexible approach.

This Note proceeds in three Parts. Part I provides background regarding associational standing and the Supreme Court's mootness jurisprudence. Part II sets forth the current circuit landscape regarding mootness in the associational-standing context. Part III articulates an affirmative case for a strict approach to mootness in the associational-standing context and argues that a flexible approach is both without support in the Supreme Court's justiciability doctrine and untethered from the conceptual underpinnings of associational standing.

### I. BACKGROUND

In order to bring a case in federal court, a plaintiff must have "standing."<sup>1</sup> The "irreducible constitutional minimum of standing contains

---

<sup>1</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

three elements”<sup>2</sup>: “The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”<sup>3</sup>

An organizational plaintiff has standing to sue under two circumstances. First, an organization has standing if it can satisfy “the same inquiry as in the case of an individual.”<sup>4</sup> That is, the organization must have a “direct stake in the outcome”<sup>5</sup> — a causal, redressable injury — rather than a mere “organizational interest.”<sup>6</sup> Second, an organization has associational standing when it can satisfy the three-part test set forth in *Hunt v. Washington State Apple Advertising Commission*.<sup>7</sup> Under this test, an organization may “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.”<sup>8</sup> To invoke associational standing, an organization must generally identify the members on whose behalf it is bringing suit.<sup>9</sup>

Even if an organizational plaintiff has standing to assert a claim in the first instance, a federal court must subsequently decline to hear the claim if it becomes moot.<sup>10</sup> Because “federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them,”<sup>11</sup> a federal court cannot hear a case when the underlying “controversy between the parties has . . . clearly ceased to be ‘definite and concrete’ and no longer ‘touch[es] the legal relations of parties having adverse legal interests.’”<sup>12</sup> Under such circumstances, a case is considered moot.<sup>13</sup>

<sup>2</sup> *Id.*

<sup>3</sup> *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan*, 504 U.S. at 560–61).

<sup>4</sup> *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982).

<sup>5</sup> *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

<sup>6</sup> *Id.* at 739 (quoting *Env’t Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1097 (1970)); *see also id.* at 739–40. If, for example, an organization is forced to divert its resources to counteract unlawful conduct, it has standing in its own right. *See Havens*, 455 U.S. at 378–79.

<sup>7</sup> 432 U.S. 333 (1977).

<sup>8</sup> *Id.* at 343.

<sup>9</sup> *Summers v. Earth Island Inst.*, 555 U.S. 488, 498–99 (2009); *see also id.* (“This requirement of naming the affected members has . . . been dispensed with . . . only where *all* the members of the organization are affected by the challenged activity.”).

<sup>10</sup> *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam).

<sup>11</sup> *Id.* (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).

<sup>12</sup> *Id.* at 317 (alteration in original) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937)).

<sup>13</sup> *See id.* at 316–17. Although the Court previously equivocated with regard to whether mootness poses a constitutional or merely prudential bar, *see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 201–02 (7th ed. 2015), the Court has since clarified that a moot case does not pose “a ‘Case’ or ‘Controversy’ for purposes of Article III” and therefore falls “outside the jurisdiction of the federal courts,” *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)).

The Court has identified two “exceptions” to mootness.<sup>14</sup> First, an action for injunctive relief generally is not moot when a defendant voluntarily ceases their allegedly unlawful conduct, unless “there is no reasonable expectation that the wrong will be repeated.”<sup>15</sup> Second, a federal court may hear an otherwise moot case if the complained-of conduct is “capable of repetition, yet evading review.”<sup>16</sup> To prove this exception, a party must establish that “(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.”<sup>17</sup> While the capable-of-repetition-yet-evading-review exception does not require that every “legally relevant” characteristic of the case will recur,<sup>18</sup> it does require the recurrence of “materially similar” circumstances.<sup>19</sup>

## II. CIRCUIT APPROACHES

The Court’s mootness doctrine raises a vital question for an organizational plaintiff that asserts a claim based upon a theory of associational standing — does such a plaintiff’s claim become moot if the organizational members on whose behalf the organization is asserting associational standing cease to have a live claim?

Circuit courts have not answered this question in a uniform manner. Both the D.C. and Seventh Circuits have held that an organization’s associational-standing claim becomes moot when the members upon whom the claim is based cease to have a live case or controversy. The Seventh Circuit has implied, however, that the organization may be able to maintain a live claim if it identifies additional harmed members, a view also endorsed by the Sixth Circuit. The Sixth, Ninth, and Eleventh Circuit case law on this issue is imprecise. The Ninth Circuit has appeared to permit organizations to proceed with their claims based upon a reasonable probability that additional, unidentified organizational members are experiencing the alleged harm. And all three circuits can be read as endorsing such a flexible approach in the context of claims that are capable of repetition yet evading review.

A basic framework can help to navigate the case law on this issue. Throughout this Part, this Note identifies the following four broad approaches to mootness in the associational-standing context:

---

<sup>14</sup> *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Although the Supreme Court has used the term “exceptions,” it has made clear that Article III must still be satisfied when such “exceptions” apply. *See id.* at 180.

<sup>15</sup> *DeFunis*, 416 U.S. at 318 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

<sup>16</sup> *Id.* at 318–19 (quoting *S. Pac. Terminal Co. v. Interstate Com. Comm’n*, 219 U.S. 498, 515 (1911)).

<sup>17</sup> *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam).

<sup>18</sup> *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 463–64 (2007).

<sup>19</sup> *Id.* at 463 (quoting *Wis. Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 197 (2006)).

**STRICT APPROACH:** An organization's associational-standing claim becomes moot when the individual members upon whom that claim is based cease to have a live case or controversy.

**MODIFIED STRICT APPROACH:** An organization's associational-standing claim becomes moot when the individual members upon whom that claim is based cease to have a live case or controversy, unless the organization can identify additional harmed members.

**FLEXIBLE APPROACH:** An organization's associational-standing claim does not become moot when the individual members upon whom that claim is based cease to have a live case or controversy so long as there is a reasonable probability that other organizational members continue to experience the alleged harm.

**MODIFIED FLEXIBLE APPROACH:** An organization's associational-standing claim does not become moot when the individual members upon whom that claim is based cease to have a live case or controversy so long as there is a reasonable probability that other organizational members continue to experience the alleged harm and the alleged harm is capable of repetition yet evading review.

#### A. *Strict Approaches — The D.C. and Seventh Circuits*

The D.C. Circuit has adopted the strict approach, holding that when an organization asserts associational standing on behalf of its injured members, the organization's claims become moot when those members' claims become moot.<sup>20</sup>

In *Munsell v. Department of Agriculture*,<sup>21</sup> the American Association of Meat Processors sought declaratory and injunctive relief against federal regulations and an enforcement action.<sup>22</sup> The Association, which brought suit on behalf of its members, was joined by one of its members bringing suit in its individual capacity.<sup>23</sup> After bringing suit, the individual plaintiff sold its "meat processing facilities, thereby eliminating all of [its] business operations that were subject to [Department of Agriculture] regulation and oversight."<sup>24</sup> The court held that this divestment mooted the individual plaintiff's enforcement-action challenge and that the Association therefore "ha[d] no basis upon which to pursue

---

<sup>20</sup> See, e.g., *Chamber of Com. of the U.S. v. EPA*, 642 F.3d 192, 207 (D.C. Cir. 2011) ("If [the organizational plaintiff] ha[d] standing, it is only because at least one of [its members] ha[d] standing, and if the claims of [the members] are moot, then [the organization's] claims are moot as well." (citation omitted) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 498–99 (2009); *Munsell v. Dep't of Agric.*, 509 F.3d 572, 584 (D.C. Cir. 2007))); *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1205 (D.C. Cir. 2013) ("And because the individual hunters' due process claims are moot, so too are the same claims raised by the safari clubs in their capacity as representatives of those hunters." (citing *Munsell*, 509 F.3d at 584)).

<sup>21</sup> 509 F.3d 572.

<sup>22</sup> *Id.* at 584.

<sup>23</sup> *Id.* at 574.

<sup>24</sup> *Id.*

[the] challenge.”<sup>25</sup> In reaching this holding, the court noted that the individual plaintiff was the only Association member that had challenged the enforcement actions. “Therefore,” the court reasoned, “it follows that if [the Association] seeks to appear on behalf of [the individual plaintiff] to challenge the disputed agency enforcement actions and [the individual plaintiff’s] claims are moot, then [the Association’s] claims are moot as well.”<sup>26</sup> The D.C. Circuit has since cited *Munsell* for the proposition that “when an association sues on behalf of its members, its claims become moot if its members’ claims become moot.”<sup>27</sup>

While the Seventh Circuit also seems to have adopted the strict approach, it has gestured toward the modified strict approach in dicta. In *Milwaukee Police Ass’n v. Board of Fire & Police Commissioners*,<sup>28</sup> Melissa Ramskugler brought suit against the Board of Fire and Police Commissioners of Milwaukee, alleging that the Board violated her due process rights when it fired her without following state statutory requirements.<sup>29</sup> Her union joined the suit.<sup>30</sup> The district court granted summary judgment in favor of the Board, and the plaintiffs appealed.<sup>31</sup> Prior to oral argument on appeal, however, Ramskugler settled with the Board and signed a general release of claims.<sup>32</sup> The Seventh Circuit subsequently dismissed the appeal, holding that “[t]he union never had standing to bring suit on its own behalf, and any claims previously derived from its membership [were] . . . moot” following Ramskugler’s settlement.<sup>33</sup> Although acknowledging that the union “likely had associational standing at the time the complaint was filed,”<sup>34</sup> the court found that its claims were moot because it had neither identified nor alleged the existence of another union member in Ramskugler’s “particularized position.”<sup>35</sup> The court thus implied that the union’s claims might not be moot if it could identify similarly affected union members.<sup>36</sup>

### B. Flexible Approaches — The Sixth, Ninth, and Eleventh Circuits

In comparison to the D.C. and Seventh Circuits, the Sixth, Ninth, and Eleventh Circuits have addressed the issue of mootness in the associational-standing context with imprecision. Both the Sixth and Ninth Circuits have at times seemed to adopt the flexible approach,

---

<sup>25</sup> *Id.* at 584.

<sup>26</sup> *Id.*

<sup>27</sup> *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1205 (D.C. Cir. 2013) (citing *Munsell*, 509 F.3d at 584).

<sup>28</sup> 708 F.3d 921 (7th Cir. 2013).

<sup>29</sup> *Id.* at 923.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*; see also *id.* at 925.

<sup>33</sup> *Id.* at 923–24.

<sup>34</sup> *Id.* at 929.

<sup>35</sup> *Id.* at 930.

<sup>36</sup> See *id.*

permitting an organization's claims to proceed where the members' claims upon which the organization's associational-standing claims are based become moot so long as there is a reasonable probability that other organizational members continue to experience the alleged harm. And all three circuits have used language that seems to contemplate the modified flexible approach for claims that are capable of repetition yet evading review.

The Ninth Circuit's limited case law on this issue lacks clarity. In *Oregon Advocacy Center v. Mink*,<sup>37</sup> the Oregon Advocacy Center brought suit on behalf of its constituent, A.J. Madison, a "mentally incapacitated criminal defendant," against the Superintendent of the Oregon State Hospital and the Director of Oregon's Department of Human Services (collectively, OSH) in their official capacities.<sup>38</sup> Oregon Advocacy Center alleged that the defendants were "violating mentally incapacitated defendants' due process rights by unreasonably delaying such defendants' transfer from county jails to [the state mental hospital] for treatment" as required under Oregon law.<sup>39</sup>

The Ninth Circuit held that the case was not moot, despite the fact that "all seven persons held in county jails awaiting admission to OSH at the time the action was filed were in fact admitted to OSH by the time the trial began."<sup>40</sup> Emphasizing the "flexible character of the Art[icle] III mootness doctrine,"<sup>41</sup> the court identified two reasons the case continued to present a live controversy.<sup>42</sup> The court first emphasized that "the detention of incapacitated criminal defendants for weeks or months in Oregon county jails [was] an ongoing, pervasive[,] and systemic problem."<sup>43</sup> Analogizing to the class action context, the court reasoned that an individual detainee was unlikely to be detained long enough for judicial resolution of their claims.<sup>44</sup> The court thus held that the "inherently transitory nature of the claims,"<sup>45</sup> combined with the fact that "the constant existence of [Oregon Advocacy Center] constituents suffering the deprivation [was] certain," sufficed to preserve the organization's claims.<sup>46</sup>

The court separately held that the organization's claims were not moot because the organization "challenge[d] not only OSH's delay in admitting the seven individuals held in county jails at the time the suit was brought, but also *the policy that result[ed] in such delays.*"<sup>47</sup>

---

<sup>37</sup> 322 F.3d 1101 (9th Cir. 2003).

<sup>38</sup> *Id.* at 1105.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1116.

<sup>41</sup> *Id.* at 1117 (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1980)).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *See id.* at 1117–18.

<sup>45</sup> *Id.* at 1117.

<sup>46</sup> *Id.* at 1118.

<sup>47</sup> *Id.*

Without assessing the existence of an ongoing injury to an identified member of the organization, the court held that “[t]he continued and uncontested existence of the policy that gave rise to [Oregon Advocacy Center’s] legal challenge foreclose[d] OSH’s mootness argument.”<sup>48</sup> In both of these arguments, the *Oregon Advocacy Center* court’s mootness analysis appeared to turn on the likelihood of an ongoing injury as to *some* member of the organization, rather than as to the members upon whom associational standing was based or other specifically identified members.

Read broadly, *Oregon Advocacy Center* can be interpreted as permitting an organization to maintain a live case or controversy when the claims of the members upon whom the organization’s associational standing is based cease to have a live claim so long as there is a reasonable probability that other members will continue to face the same alleged harm. While it does not appear that subsequent case law has cited *Oregon Advocacy Center* for this broad proposition, it arguably remains a viable reading of the court’s analysis, given the fact that the court found that the case was not moot without requiring the organization to identify additional harmed members.

Read more narrowly, *Oregon Advocacy Center* can be interpreted as adopting a flexible approach to mootness in the associational-standing context for claims that are capable of repetition yet evading review. Admittedly, the *Oregon Advocacy Center* court mentioned this “exception” only briefly in a footnote in the course of describing a case to which it was analogizing.<sup>49</sup> However, the court specifically emphasized the “transitory nature of the claims” before it.<sup>50</sup> And, while the court’s separate finding that the organization’s claims were not moot because the organization challenged an ongoing government policy could be read as not involving the capable-of-repetition-yet-evading-review exception, subsequent Ninth Circuit case law has not made such a distinction.<sup>51</sup> Indeed, the Seventh Circuit has characterized *Oregon Advocacy Center* as “shoehorn[ing] ongoing policy challenges into th[e] exception.”<sup>52</sup>

<sup>48</sup> *Id.* (citing *Ukrainian-Am. Bar Ass’n v. Baker*, 893 F.2d 1374, 1377 (D.C. Cir. 1990)).

<sup>49</sup> *See id.* at 1117 n.9.

<sup>50</sup> *Id.* at 1117. Indeed, later cases have cited *Oregon Advocacy Center* in assessing mootness in the context of “functional class actions with inherently transitory claims,” *United States v. Sanchez-Gomez*, 859 F.3d 649, 658 (9th Cir. 2017) (en banc) (citing *United States v. Howard*, 480 F.3d 1005, 1009–10 (9th Cir. 2007); *Or. Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1117–18 (9th Cir. 2003)), *vacated and remanded*, 138 S. Ct. 1532 (2018), though subsequent Supreme Court case law has made clear that existing justiciability doctrine does not support a “freestanding exception to mootness outside the class action context,” *Sanchez-Gomez*, 138 S. Ct. at 1538; *see also infra* section III.B, pp. 1448–53.

<sup>51</sup> *See, e.g., Howard*, 480 F.3d at 1010 (citing *Or. Advoc. Ctr.*, 322 F.3d at 1118) (characterizing *Oregon Advocacy Center* as holding that “a case is capable of repetition when the defendants are challenging an ongoing government policy”).

<sup>52</sup> *Milwaukee Police Ass’n v. Bd. of Fire & Police Comm’rs*, 708 F.3d 921, 932 (7th Cir. 2013). The Supreme Court has occasionally treated requests for declaratory relief regarding ongoing government policies as within the exception. *See, e.g., Preiser v. Newkirk*, 422 U.S. 395, 401–03 (1975).

The Sixth Circuit, for its part, has at times seemed to adopt positions that align with both of these readings. In *Cleveland Branch, NAACP v. City of Parma*,<sup>53</sup> a branch of the NAACP, alongside the NAACP itself, brought suit against the City of Parma, Ohio, alleging racial discrimination in the city's recruitment, selection, and hiring processes for city employees.<sup>54</sup> The organizations identified seven organizational members who had allegedly been injured as a result of this discrimination,<sup>55</sup> and the court found that the organizations had established associational standing through at least one of those seven individuals.<sup>56</sup>

Although the City removed the residency requirement that served as the basis for the identified member's alleged injury, the Sixth Circuit held that the case was not moot.<sup>57</sup> First, the court held that the City "failed to prove that its alleged discriminatory recruitment, selection, and hiring practices, including the use of a residency requirement, could not reasonably be expected to recur."<sup>58</sup> Second, the court held that the City "failed to prove that interim relief or events had irrevocably eradicated the effects of the allegedly discriminatory conduct," noting that the City had "fail[ed] to eradicate the effects of [its] allegedly discriminatory actions."<sup>59</sup>

The *Cleveland Branch* court's mootness analysis appeared to assume the flexible approach, focusing on whether the alleged harm could recur as to NAACP members broadly, rather than as to the member upon whom associational standing was based.<sup>60</sup> For this reason, the Sixth Circuit has at times characterized *Cleveland Branch* as "appearing to hold that even if a named member's claims ha[ve] become moot, the association retain[s] standing because the named member had standing at the outset of the litigation."<sup>61</sup> And, in *Cleveland Branch* itself, Judge Boggs argued in dissent that the NAACP's case was moot because "[t]he single plaintiff that the court relie[d] upon in order to hold that the NAACP ha[d] standing . . . no longer ha[d] a personal stake [in the outcome]."<sup>62</sup>

---

<sup>53</sup> 263 F.3d 513 (6th Cir. 2001).

<sup>54</sup> *Id.* at 516.

<sup>55</sup> *Id.* at 521.

<sup>56</sup> *Id.* at 526.

<sup>57</sup> *Id.* at 531.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 532–33.

<sup>60</sup> *See id.* at 530–33.

<sup>61</sup> *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 257 (6th Cir. 2018) (citing *Cleveland Branch*, 263 F.3d at 525); *see also* *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 570 (6th Cir. 2021) (Moore, J., dissenting) ("Read faithfully, *Cleveland Branch* . . . establishes that even where a complaining party must show that a controversy could reasonably be expected to recur as to itself in order to establish that its case is justiciable, an organizational plaintiff can do so without reference to an individual member who served as the basis for its associational standing."). *But see id.* at 559 (majority opinion) (arguing that *Waskul* "conflate[s] *Cleveland Branch*'s analysis of the standing redressability requirement with that case's mootness analysis").

<sup>62</sup> *Cleveland Branch*, 263 F.3d at 541 (Boggs, J., dissenting).



Despite these characterizations, the Sixth Circuit later seemed to walk back *Cleveland Branch*. In *Memphis A. Philip Randolph Institute v. Hargett*,<sup>63</sup> the court held that an organization's associational claim was moot where "the only affected member [the organization] identified" had a moot claim.<sup>64</sup> In *Memphis*, two registered Tennessee voters and five Tennessee organizations brought suit against Tennessee government officials involved in election enforcement to challenge a law that required first-time voters to vote in person, rather than absentee.<sup>65</sup> The Sixth Circuit held that the named plaintiff through whom the organizations asserted associational standing no longer qualified to cast an absentee ballot under Tennessee law and therefore "no longer ha[d] an actual, ongoing stake in [the] litigation."<sup>66</sup>

While the plaintiffs attempted to rely on *Cleveland Branch* to assert that the organization retained standing, the court found that such an argument failed to distinguish between standing and mootness.<sup>67</sup> The plaintiffs, the court held, "[could not] rely on *Cleveland Branch*'s standing analysis to save their case if [the named member's] claim [was] moot, given that [the named member was] the only affected member plaintiffs [had] identified."<sup>68</sup>

After finding the organizations' claims moot, the Sixth Circuit further held that the claims did not satisfy the capable-of-repetition-yet-evading-review exception because they were "inextricably tied to the COVID-19 pandemic, a once-in-a-century crisis."<sup>69</sup> In holding that the organization's claims did not satisfy this exception, the court found that there was "not a reasonable expectation that [the named member], other members of the plaintiff organizations, or the public will face the same burdens as voters did in the fall of 2020."<sup>70</sup> This language implies that the court may not have found the case moot had the plaintiff organization successfully argued that the alleged harm was capable of repetition yet evading review as to other, unnamed organization members.

The Sixth Circuit has elsewhere permitted an organization's associational-standing claim to proceed in the face of mootness concerns where the organization identifies another similarly situated member with a live controversy.<sup>71</sup> In the Sixth Circuit, an organization may therefore assert "associational standing with one named member in the complaint and then maintain[] a live controversy after the original

---

<sup>63</sup> 2 F.4th 548.

<sup>64</sup> *Id.* at 559.

<sup>65</sup> *See id.* at 553–54.

<sup>66</sup> *Id.* at 558.

<sup>67</sup> *Id.* at 559.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 560.

<sup>70</sup> *Id.* at 561.

<sup>71</sup> *See Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1037 (6th Cir. 2022).

member's claim is extinguished by identifying some other named member who would have a live claim in his own right."<sup>72</sup>

The Eleventh Circuit, like the Sixth and Ninth Circuits, has seemed to endorse a modified flexible approach to mootness in the associational-standing context for claims that are capable of repetition yet evading review. In *Arcia v. Florida Secretary of State*,<sup>73</sup> Florida voters and organizational plaintiffs brought suit against Florida's Secretary of State, alleging that Florida had violated a federal law that requires states to "complete, not later than 90 days prior to the date of [an election], any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters."<sup>74</sup> Although the election passed before the plaintiffs successfully litigated their claims, the Eleventh Circuit held that the case was not moot, finding that "there [was] a reasonable expectation that the plaintiffs [would] be subject to [a voter list removal provision] again" given that the lower court had interpreted the relevant federal law to allow for systematic removal programs within ninety days of an election and the Secretary had not offered to refrain from such removal in future elections.<sup>75</sup>

The court's analysis was imprecise. It is not clear whether the court determined that the capable-of-repetition-yet-evading-review exception applied to the organizational plaintiffs because the organization's members generally could again be subject to the challenged conduct or because the specific members upon whose behalf the organizations asserted associational standing could again be subject to the challenged conduct.<sup>76</sup>

But, in analyzing *Arcia* and *Cleveland Branch*, it is worth noting that federal courts sometimes apply the capable-of-repetition-yet-evading-review exception more liberally in the election-law context. The Supreme Court's doctrine on this issue has not been a model of clarity.<sup>77</sup>

---

<sup>72</sup> *Id.*

<sup>73</sup> 772 F.3d 1335 (11th Cir. 2014).

<sup>74</sup> 52 U.S.C. § 20507(c)(2)(A); see *Arcia*, 772 F.3d at 1338–39.

<sup>75</sup> *Arcia*, 772 F.3d at 1343. Mootness in *Arcia* was unique insofar as the claims of all organizational members were mooted by the passing of the election; once the election process was complete, the organization necessarily could not identify additional members with live claims.

<sup>76</sup> See *id.* at 1342–43 (noting that "there is a reasonable expectation that the plaintiffs will be subject to the same action again," *id.* at 1343, but not differentiating between individual plaintiffs and organizational plaintiffs). It is worth noting that the court seemed to find that the organizations had associational standing based upon a "high probability" that their members were harmed by the challenged actions. See *id.* at 1342. The court determined that the "organizational plaintiffs . . . represent a large number of people, like [the individual plaintiffs], who face a realistic danger of being identified in the Secretary's removal programs because of their names or status as naturalized citizens." *Id.* From this language, it is not clear whether the individual plaintiffs were in fact members of the three plaintiff organizations or merely similar to the organizations' members. It is therefore unclear upon whom the court's associational-standing analysis was based — though the "high probability" language seems to indicate the court did not base the organizations' associational standing upon specifically identified organizational members.

<sup>77</sup> See *Van Wie v. Pataki*, 267 F.3d 109, 114 (2d Cir. 2001) (collecting cases).

In *Storer v. Brown*,<sup>78</sup> the Court found that the case before it was not moot without specifically examining the likelihood of repetition with respect to the complaining parties.<sup>79</sup> Other circuits have split on the application of the same-complaining-party rule in the election-law context.<sup>80</sup> The Fifth, Sixth, and Ninth Circuits do not appear to adhere to a strict application of the rule in election-law cases — which might help explain the dicta in *Cleveland Branch*.<sup>81</sup> The Second and Eleventh Circuits, on the other hand, have adhered to the rule even in the election-law context, requiring direct evidence that the complaining party will likely again be subject to the challenged behavior.<sup>82</sup> Other circuits have at times adopted a relaxed approach to the same-complaining-party rule in such cases, subjecting complaining parties to a lower evidentiary standard.<sup>83</sup>

The election-law context, then, may only add to the confusion. The Eleventh Circuit's seeming preference for a strict approach to the same-complaining-party rule, even in the election-law context, would logically imply that the *Arcia* court determined that the capable-of-repetition-yet-evading-review exception applied to the organizational plaintiffs because the members on whose behalf the organizations asserted associational standing could again be subject to the challenged conduct. However, as noted above, the *Arcia* court's reasoning was not clear on this point. It is thus possible that the Eleventh Circuit would consider an organization — rather than the organizational members on behalf of whom the organization asserts associational standing — to be the “same complaining party” for the purpose of the capable-of-repetition-yet-evading-review exception to mootness. Under such an approach, the court would need to determine not whether the alleged harm might recur against the organizational members upon whom associational standing was based, but only whether the alleged harm might recur against

<sup>78</sup> 415 U.S. 724 (1974).

<sup>79</sup> See *id.* at 737 n.8 (“[T]his case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections.”).

<sup>80</sup> See *Barr v. Galvin*, 626 F.3d 99, 105 (1st Cir. 2010) (noting that the “case law admits of some imprecision” regarding the application of the rule in the election-law context).

<sup>81</sup> See, e.g., *Kucinich v. Tex. Democratic Party*, 563 F.3d 161, 164–65 (5th Cir. 2009) (noting that election-law cases “differ[] from . . . traditional mootness jurisprudence by dispensing with the same-party requirement,” *id.* at 165 (citing *Honig v. Doe*, 484 U.S. 305, 335 (1988) (Scalia, J., dissenting))); *Lawrence v. Blackwell*, 430 F.3d 368, 372 (6th Cir. 2005) (finding that “the fact that the [subject] controversy almost invariably [would] recur with respect to some future potential candidate or voter” was “sufficient” to overcome mootness); *Schaefer v. Townsend*, 215 F.3d 1031, 1032–33 (9th Cir. 2000) (rejecting the rule in a ballot-access case).

<sup>82</sup> See *Van Wie*, 267 F.3d at 114–15; *Hall v. Sec’y, Ala.*, 902 F.3d 1294, 1305 (11th Cir. 2018).

<sup>83</sup> See, e.g., *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 37 n.12 (1st Cir. 1993); *Belitskus v. Pizzigrilli*, 343 F.3d 632, 648–49, 648 n.11 (3d Cir. 2003); *N.C. Right to Life Comm. Fund for Indep. Pol. Expenditures v. Leake*, 524 F.3d 427, 435–36 (4th Cir. 2008); *Majors v. Abell*, 317 F.3d 719, 723 (7th Cir. 2003); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1547 (8th Cir. 1995); *Parker v. Winter*, 645 F. App’x 632, 635 (10th Cir. 2016); *LaRouche v. Fowler*, 152 F.3d 974, 978–79 (D.C. Cir. 1998).

the organization's members generally. Indeed, district courts in the Eleventh Circuit have occasionally assumed this line of reasoning.<sup>84</sup>

Notwithstanding this election-law wrinkle, *Oregon Advocacy Center*, *Memphis*, and *Arcia* each evidence an apparent willingness to find that an associational-standing case is capable of repetition yet evading review (and therefore not moot) because the organization's members generally may again face the same alleged harm.<sup>85</sup>

### III. ANALYSIS

The application of mootness to the associational-standing context is undertheorized. As set forth above, circuit approaches to mootness in the associational-standing context are perhaps better characterized as underdeveloped than as split. Not every circuit seems to have addressed the issue, and those that have done so have sometimes lacked precision in their approach. At the same time, no legal scholarship has been devoted to the intersection between associational standing and mootness.

This Part aims to lend doctrinal clarity to this area of justiciability doctrine. Section A argues in favor of the strict or modified strict approach and against the flexible and modified flexible approaches. Section B defends the strict(er) approaches against analogies to the class action context. Section C defends the strict(er) approaches against "prudential" considerations.

#### A. *The Case for a Strict(er) Approach*

The strict and modified strict approaches to mootness in the associational-standing context are firmly grounded in Article III and the Supreme Court's justiciability doctrine. "In limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law."<sup>86</sup> The doctrines of standing and mootness "reflect this fundamental limitation"<sup>87</sup> by ensuring that

---

<sup>84</sup> See, e.g., *Ass'n for Disabled Ams., Inc. v. Reinfeld Anderson Fam. Ltd. P'ship*, No. 1:12-CV-23798, 2015 WL 1810536, at \*5 (S.D. Fla. Apr. 21, 2015) ("While Ruiz may no longer obtain medical care from Dr. Reinfeld, members of the Association may seek to obtain care. Thus, there is a reasonable expectation that, at least with respect to the Association, the plaintiff would be subject to the same action again.").

<sup>85</sup> Although the D.C. Circuit has at times appeared to assume a similar stance, see *Abigail All. for Better Access to Developmental Drugs v. Von Eschenbach*, 469 F.3d 129, 136 (D.C. Cir. 2006), the District Court for the District of Columbia recently rejected this approach, see *Nat'l Treasury Emps. Union v. United States*, 444 F. Supp. 3d 108, 117 n.8 (D.D.C. 2020).

<sup>86</sup> *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). But see Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 637-41 (1992) ("[T]he historical evidence that the words 'cases' and 'controversies' were meant to exclude moot cases is distinctly underwhelming." *Id.* at 641.).

<sup>87</sup> *Summers*, 555 U.S. at 493.

plaintiffs allege and maintain a sufficient personal stake in the outcome of the controversy to warrant federal court jurisdiction.<sup>88</sup>

When organizations bring associational-standing claims, they “assert the standing of their members,”<sup>89</sup> not of themselves.<sup>90</sup> In this way, an organization asserting associational standing is not a mere plaintiff but rather a plaintiff bringing suit “on behalf of” members who “would otherwise have standing to sue in their own right.”<sup>91</sup> It is for this reason that an organization asserting associational standing must identify specific members who have been injured by the challenged action; absent the injuries of such members, the organization has no associational standing. When the claims of these specifically identified members become moot, the organization logically ceases to have a “personal interest in the dispute,”<sup>92</sup> at least absent the identification of additional harmed members.

That some organizational members *may* be similarly harmed — the conceptual underpinning of the flexible approach — is not sufficient to support a live claim. To allow an organization to maintain a live controversy merely by establishing a generalized likelihood that similarly situated members continue to face the alleged harm would be to diminish the showing necessary to avoid mootness vis-à-vis the showing necessary to establish associational standing. Although mootness is not merely “standing set in a time frame,”<sup>93</sup> permitting an organization to circumvent mootness in this manner does not simply diminish the organization’s burden — it alters it completely. Furthermore, the Court has explicitly and firmly rejected a framework under which an organization may assert standing by establishing that “there is a statistical probability that some [organizational] members are threatened with concrete injury,” calling such a framework “hitherto unheard[ of].”<sup>94</sup> There is no reason to believe that the Court would be more amenable to such an approach in the context of mootness.

For similar reasons, the two strict(er) approaches to mootness are appropriate even for claims that are capable of repetition yet evading review. In *Memphis, Oregon Advocacy Center*, and *Arcia*, the Sixth, Ninth, and Eleventh Circuits evidenced a willingness to entertain the modified flexible approach, under which an organization’s associational-standing claims may not be moot if the alleged harm is capable of

---

<sup>88</sup> See *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021).

<sup>89</sup> *Summers*, 555 U.S. at 494.

<sup>90</sup> Of course, an organization may also assert standing on its own behalf. See *supra* p. 1435.

<sup>91</sup> *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977).

<sup>92</sup> *Uzuegbunam*, 141 S. Ct. at 796.

<sup>93</sup> *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); see also *id.* (“[T]here are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.”).

<sup>94</sup> *Summers*, 555 U.S. at 497.

repetition yet evading review as to the organization's members in general, rather than as to the members upon whom associational standing was based in particular. However, such an approach is untethered from the conceptual underpinnings of associational standing and the relevant doctrine. In the absence of a class action, the capable-of-repetition-yet-evading-review exception requires that the alleged harm recur with respect to the *same complaining party*.<sup>95</sup> The "complaining party" in an associational-standing case is not the organization but the members upon whom associational standing is based. In contrast to direct organizational standing, under which the organization asserts its own causal, redressable injury,<sup>96</sup> associational standing permits an organization to assert the injuries of *specifically* identified organizational members.<sup>97</sup> Because the complained-of conduct and injury occur as to those specifically identified members, not to the organization itself, the relevant parties for the same-complaining-party rule are the specifically identified organizational members. To reason otherwise would be to diminish the same-complaining-party rule, an approach that existing doctrine supports only in the class action context.<sup>98</sup>

While these considerations counsel in favor of the strict(er) approaches to mootness in the associational-standing context, they do not distinguish fully between the strict approach and the modified strict approach. While this Note will not purport to select the better of the two, a few considerations are helpful in considering the merits of each.

On the one hand, the strict approach is fully grounded in the Court's justiciability doctrine and the theoretical underpinnings of associational standing. If an organization asserting associational standing asserts its claims on behalf of individual members who themselves have standing to sue, it would seem that the organization's claim is inexorably intertwined with the claims of the members upon whom its associational standing is based. To permit the organization to continue to assert a claim when the initially identified members themselves cease to have a live case or controversy would arguably dissociate these claims, permitting the organization to proceed in a more fluid representational capacity that is not contemplated by the associational-standing framework. While identifying additional harmed organizational members

---

<sup>95</sup> See FALLON ET AL., *supra* note 13, at 203 (citing *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)).

<sup>96</sup> See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982).

<sup>97</sup> See *Summers*, 555 U.S. at 498–99.

<sup>98</sup> See *Sosna v. Iowa*, 419 U.S. 393, 401 (1975) ("[A] case such as this, in which . . . the issue sought to be litigated escapes full appellate review at the behest of any single challenger, does not inexorably become moot by the intervening resolution of the controversy as to the named plaintiffs." (citing *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Vaughan v. Bower*, 313 F. Supp. 37, 40 (D. Ariz.), *aff'd*, 400 U.S. 884 (1970) (mem.)); *Weinstein*, 423 U.S. at 149 (acknowledging that *Sosna* altered the same-complaining-party rule in the class action context); see also *infra* section III.B, pp. 1448–53.

admittedly ensures *a* live controversy in which the organization has a stake,<sup>99</sup> it does not preserve *the* live controversy represented by the organization's original claims.

On the other hand, the modified strict approach does not appear fully foreclosed by the Court's case law or Article III. It is possible to argue that, although an organization asserts associational standing on the basis of specific members who have standing to bring suit in their own right, it brings its claims on behalf of all similarly harmed members, whether specifically identified or not. In other words, the organization must establish that *Hunt*'s first prong — and Article III — is satisfied by identifying individual members with standing, but it nevertheless brings its claims on behalf of all members with such standing. Under this reasoning, if the specifically identified members' claims become moot, the organization can maintain a live case or controversy by pointing to additional members not previously identified but represented from the beginning. Indeed, the Court's language does not directly foreclose this reasoning. While the Court has stated that organizations bringing associational-standing claims "assert the standing of their members"<sup>100</sup> and bring suit "on behalf of" members who "would otherwise have standing to sue in their own right,"<sup>101</sup> the Court has not said that these members are coextensive with those that the organization specifically identifies.

Current doctrine, then, is not conclusive in selecting between the strict approach and the modified strict approach.

### B. (Dis)analogies to the Class Action Context

The affirmative case for either of the strict(er) approaches is not undercut by analogies to class action lawsuits. While the Ninth Circuit drew upon such analogies in *Oregon Advocacy Center*, subsequent Supreme Court case law likely forecloses this reasoning.

As the Ninth Circuit acknowledged in *Oregon Advocacy Center*, federal courts have wrestled with mootness problems in the context of class action lawsuits.<sup>102</sup> In *Sosna v. Iowa*,<sup>103</sup> the Supreme Court held that the claims of unnamed members of a certified class do not necessarily become moot upon the termination of a class representative's claim.<sup>104</sup>

---

<sup>99</sup> Cf. *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555–56 (1996) ("*Hunt*'s second prong . . . raises an assurance that the association's litigators will themselves have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant's natural adversary.").

<sup>100</sup> *Summers*, 555 U.S. at 494.

<sup>101</sup> *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

<sup>102</sup> *Or. Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1117–18 (9th Cir. 2003).

<sup>103</sup> 419 U.S. 393 (1975).

<sup>104</sup> *Id.* at 401–02. The Court subsequently extended *Sosna* to denials of class action certifications. See *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980); see also *Genesis HealthCare Corp.*

*Sosna*'s holding, however, was rather narrow: where the nature of the claim is such that "the issue sought to be litigated escapes full appellate review at the behest of any single challenger . . . the intervening resolution of the controversy as to the named plaintiffs" does not moot the claims of the unnamed plaintiffs.<sup>105</sup>

Although *Sosna* thus seemed to require that a claim fall within the capable-of-repetition-yet-evading-review exception to mootness,<sup>106</sup> the Court has frequently read *Sosna* broadly. One year after *Sosna* was decided, the Court permitted a class action to proceed despite the fact that the only named class representative's claims were moot, asserting that "nothing in our *Sosna* or [other] opinions holds or even intimates that the fact that the named plaintiff no longer has a personal stake in the outcome of a certified class action renders the class action moot unless there remains an issue 'capable of repetition, yet evading review.'"<sup>107</sup> Instead, the Court continued, "[g]iven a properly certified class action, *Sosna* contemplates that mootness turns on whether, in the specific circumstances of the given case at the time it is before this Court, an adversary relationship sufficient to fulfill this function exists."<sup>108</sup> Based on this reasoning, the Court concluded that unnamed class members' continued adversary relationship with respect to the underlying cause of action may preserve a live controversy, even where the named class member's claim is moot.<sup>109</sup> The modern Court has similarly characterized *Sosna* in broad terms,<sup>110</sup> while "emphasiz[ing] the filing of a motion for certification as the pivotal moment in determining whether a collective action becomes moot when the named plaintiff's claim is mooted."<sup>111</sup>

There are superficially compelling reasons to treat mootness in the associational-standing context like mootness in the class action context. At first appearance, an organization asserting associational standing seems to serve a representational purpose similar to that of a named class action plaintiff. Furthermore, the contexts present similar policy

---

v. Syczyk, 569 U.S. 66, 74–75 (2013) ("The [*Geraghty*] Court held that where an action would have acquired the independent legal status described in *Sosna* but for the district court's erroneous denial of class certification, a corrected ruling on appeal 'relates back' to the time of the erroneous denial of the certification motion." (citing *Geraghty*, 445 U.S. at 404 & n.11)).

<sup>105</sup> *Sosna*, 419 U.S. at 401; see also *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) (characterizing *Sosna* as applying to a "narrow class of cases").

<sup>106</sup> FALLON ET AL., *supra* note 13, at 210.

<sup>107</sup> *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 754 (1976).

<sup>108</sup> *Id.* at 755–56.

<sup>109</sup> See *id.* at 756. The unnamed class members were, however, "identifiable individuals, individually named in the record." *Id.*; see also FALLON ET AL., *supra* note 13, at 210.

<sup>110</sup> See, e.g., *Genesis HealthCare Corp. v. Syczyk*, 569 U.S. 66, 74 (2013) ("In *Sosna*, the Court held that a class action is not rendered moot when the named plaintiff's individual claim becomes moot after the class has been duly certified." (citing *Sosna*, 419 U.S. at 399)).

<sup>111</sup> FALLON ET AL., *supra* note 13, at 210; see also *Genesis HealthCare*, 569 U.S. at 74–75 (explaining that *Sosna* and *Geraghty* do not apply where the named class plaintiff's claim becomes moot prior to class certification).



concerns. In particular, the Court has evidenced anxiety regarding class action defendants' "opportunistic use of mootness doctrine" to "moot the named plaintiff's claim before the potentially more-damaging class action becomes viable."<sup>112</sup> Similar concerns arguably arise in the associational-standing context if the potential shared claims of unidentified organizational members are mooted when the claims of organizational members upon whom associational standing is based become moot.

The *Sosna* Court's reasoning, however, counsels against applying its holding to the associational-standing context. In *Sosna*, the Court's mootness determination turned on the fact that the lawsuit at issue was a class action lawsuit.<sup>113</sup> Had the appellant brought a claim in an individual capacity on only her own behalf, the Court reasoned, her case would be moot.<sup>114</sup> Instead, she brought her suit as a class action lawsuit in a representative capacity.<sup>115</sup> Thus, "[w]hen the District Court certified the propriety of the class action, *the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant.*"<sup>116</sup> As the Court noted, "[t]he certification of a suit as a class action has important consequences for the unnamed members of the class," including with regard to the binding nature of a subsequent judgment on the merits and procedural requirements for settlement and dismissal of claims.<sup>117</sup> For these reasons, the *Sosna* Court determined that the separate legal status afforded to unnamed class members "significantly affect[ed] the mootness determination."<sup>118</sup>

The special circumstances on which the *Sosna* Court's reasoning turned are not present in the associational-standing context. As Justice Powell once explained, "organizational standing differs in controlling respects from the typical class action."<sup>119</sup> First, an organization's assertion of associational standing does not confer separate legal status upon the organization's members. Second, while the class action context requires that there be "an identity of interests among all plaintiffs before the court" in order to "assure adequate representation,"<sup>120</sup> no such

<sup>112</sup> *The Supreme Court, 2015 Term — Leading Cases*, 130 HARV. L. REV. 307, 433 (2016).

<sup>113</sup> See *Sosna*, 419 U.S. at 399.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (emphasis added).

<sup>117</sup> *Id.* at 399 n.8.

<sup>118</sup> *Id.* at 399.

<sup>119</sup> *Int'l Union, UAW v. Brock*, 477 U.S. 274, 297 n.\* (1986) (Powell, J., dissenting); see also *Frazier v. Consol. Rail Corp.*, 851 F.2d 1447, 1456 (D.C. Cir. 1988).

<sup>120</sup> *Int'l Union*, 477 U.S. at 297 n.\*. Mere class action certification does not necessarily ensure "an identity of interests among all plaintiffs before the court." *Id.* In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208–14 (2021), the Court held that only 1853 of 8185 members of a certified class had experienced a concrete injury in fact sufficient to assert standing for one of the asserted claims and only the named plaintiff experienced a concrete injury in fact sufficient to assert standing for the remaining two claims. *TransUnion* may be read as suggesting that no special legal status is

identity is required for associational standing. Instead, the organization need only assert that, among other things, “its members would otherwise have standing to sue in their own right” and that “the interests [the organization] seeks to protect are germane to the organization’s purpose.”<sup>121</sup> Thus, while a class representative represents a class of individuals who have *all* been injured in a common manner,<sup>122</sup> an organizational plaintiff asserting associational standing alleges that “its members, *or any one of them*, are suffering . . . injury as a result of the challenged action.”<sup>123</sup> When the named class plaintiff’s claim becomes moot, there remains an entire class of individuals who have experienced the alleged harm and who have gained separate legal status.<sup>124</sup> When the claims of the organizational members upon whom an organization has asserted associational standing become moot, there remains only an unascertained group of organizational members who may or may not have been harmed. And, under some circumstances, the interests of the unascertained group of organizational members may even be adverse to those of the organization or each other.<sup>125</sup>

Supreme Court case law, moreover, does not support “a freestanding exception to mootness outside the class action context.”<sup>126</sup> In *United States v. Sanchez-Gomez*,<sup>127</sup> the Supreme Court vacated a Ninth Circuit opinion that held that four criminal defendants’ claims challenging the use of full-body restraints during pretrial proceedings were not moot, notwithstanding the fact that their criminal cases had already

---

associated with the class action context for justiciability purposes. *Cf. Sosna*, 419 U.S. at 413 (White, J., dissenting) (“The legal fiction employed to cloak this reality is the reification of an abstract entity, ‘the class,’ constituted of faceless, unnamed individuals who are deemed to have a live case or controversy with appellees.”). However, *TransUnion* is more conservatively — and persuasively — read as suggesting only that an improperly certified class does not ensure “an identity of interests,” *Int’l Union*, 477 U.S. at 297 n.\*, not that a properly certified class would not do so. That is, while mere class certification may not be sufficient to ensure standing, a properly certified class will have experienced the same concrete harm, caused by the same challenged actions of the defendant, and redressable by the same requested relief.

<sup>121</sup> *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977).

<sup>122</sup> FED. R. CIV. P. 23(a)(2); *see also* *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (“[A] class representative must be part of the class and ‘possess the same interest and suffer the same injury’ as the class members.” (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974))).

<sup>123</sup> *Hunt*, 432 U.S. at 342 (emphasis added) (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)); *see id.* at 343–44 (requiring only that “some” organizational members experienced the alleged injury, *id.* at 343).

<sup>124</sup> Though it is worth noting that the *Sosna* Court seemed to hold that a class action claim may proceed “as long as there is a live controversy ‘between a named defendant and a member of the class,’ not every member of the class.” Daniel Wilf-Townsend, *Class Action Boundaries*, 90 FORDHAM L. REV. 1611, 1637 (2022) (quoting *Sosna*, 419 U.S. at 402).

<sup>125</sup> *See, e.g., Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1409 (9th Cir. 1991) (“While the [*International Union*] Court did not explicitly rule that it would impose no requirement of unanimity on organizations seeking associational standing, its statements in [*International Union*] clearly counsel against imposition of such a standard.”).

<sup>126</sup> *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1538 (2018).

<sup>127</sup> 138 S. Ct. 1532.

concluded.<sup>128</sup> The Ninth Circuit had relied upon *Gerstein v. Pugh*,<sup>129</sup> in which the Supreme Court recognized a “narrow class of cases in which the termination of a class representative’s claim [prior to class certification] does not moot the claims of the unnamed members of the class” because the claim is capable of repetition yet evading review.<sup>130</sup> The Ninth Circuit had also cited *Oregon Advocacy Center*, noting that it had “applied *Gerstein*’s analysis to functional class actions with inherently transitory claims.”<sup>131</sup> It dismissed the argument that *Gerstein*’s holding “turn[ed] on the presence of a procedural device like Rule 23,” instead concluding that the *Gerstein* Court’s analysis focused on the “inherently transitory” nature of the claims.<sup>132</sup> The Ninth Circuit thus found *Gerstein* applicable to “class-like claims” seeking “class-like relief.”<sup>133</sup>

The Supreme Court held that the Ninth Circuit’s “reliance [on *Gerstein*] was misplaced.”<sup>134</sup> Emphasizing the special nature of the class action context, the Court asserted that “*Gerstein* belongs to a line of cases . . . turning on the particular traits of civil class actions.”<sup>135</sup> The Court further characterized *Gerstein* as “provid[ing] a limited exception to *Sosna*’s requirement that a named plaintiff with a live claim exist at the time of class certification” for those cases in which “the pace of litigation and the inherently transitory nature of the claims at issue conspire to make that requirement difficult to fulfill.”<sup>136</sup> The Court thus rejected the Ninth Circuit’s attempt to “‘recognize . . . a common-law kind of class action’ or ‘create *de facto* class actions at will,’”<sup>137</sup> emphasizing that “the ‘mere presence of . . . allegations’ that might, if resolved in respondents’ favor, benefit other similarly situated individuals cannot

<sup>128</sup> *Id.* at 1542.

<sup>129</sup> 420 U.S. 103 (1975).

<sup>130</sup> *Id.* at 110 n.11; *United States v. Sanchez-Gomez*, 859 F.3d 649, 657–59 (9th Cir. 2017) (en banc), *vacated and remanded*, 138 S. Ct. 1532 (2018). The *Gerstein* Court further noted that “[t]he individual [plaintiff] could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures,” seemingly eliding the distinction between claims that are capable of repetition yet evading review as to the plaintiff and those that are capable of repetition yet evading review generally. *Gerstein*, 420 U.S. at 110 n.11; *see also id.* at 111 n.11 (“[I]n this case the constant existence of a class of persons suffering the deprivation is certain.”). *But cf. Sanchez-Gomez*, 138 S. Ct. at 1541 (“[W]e have consistently refused to ‘conclude that the case-or-controversy requirement is satisfied by’ the possibility that a party ‘will be prosecuted for violating valid criminal laws.’” (quoting *O’Shea v. Littleton*, 414 U.S. 488, 497 (1974))).

<sup>131</sup> *Sanchez-Gomez*, 859 F.3d at 658 (citing *United States v. Howard*, 480 F.3d 1005, 1009–10 (9th Cir. 2007); *Or. Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1117–18 (9th Cir. 2003)).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 655.

<sup>134</sup> *Sanchez-Gomez*, 138 S. Ct. at 1537.

<sup>135</sup> *Id.* at 1538; *see also id.* at 1538–39.

<sup>136</sup> *Id.* at 1539 (citing *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975); *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)).

<sup>137</sup> *Id.* (omission in original) (quoting *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008)).

‘save [respondents’] suit from mootness once the[ir] individual claim[s]’ have dissipated.”<sup>138</sup>

While *Sanchez-Gomez* involved individual plaintiffs, rather than an organization asserting associational standing, its holding throws cold water on the flexible approaches. First, the Ninth Circuit relied on *Oregon Advocacy Center* for the proposition that *Gerstein* was applicable to “functional class actions with inherently transitory claims”<sup>139</sup> — a proposition directly refuted by the *Sanchez-Gomez* Court.<sup>140</sup> Second, there is little daylight between the “functional class action” that the Ninth Circuit identified in *Sanchez-Gomez*<sup>141</sup> and the Ninth Circuit’s determination that the associational-standing circumstances in *Oregon Advocacy Center* were “analogous to” the *Gerstein* class action context.<sup>142</sup> In both instances, the Ninth Circuit applied a narrow exception to mootness for certain class actions that are capable of repetition yet evading review by aggregating the claims of similarly situated individuals and emphasizing the transitory nature of those claims.<sup>143</sup> While the Supreme Court’s rejection of this approach in *Sanchez-Gomez* did not directly reject the Ninth Circuit’s use of this approach in the associational-standing context, it is difficult to see how “functional class actions”<sup>144</sup> can persist for organizations but not individual plaintiffs.

Following *Sanchez-Gomez*, then, *Oregon Advocacy Center* may remain good law in name only, not yet overruled but precarious precedent nonetheless. If that is true, it is difficult to see how the modified flexible approach to mootness in the associational-standing context survives *Sanchez-Gomez*’s reasoning. And, if the modified flexible approach is foreclosed, the flexible approach logically is as well.

### C. “Prudential” Considerations

Finally, neither the flexible approach nor the modified flexible approach can be defended on prudential grounds.

While discussing the voluntary-cessation exception to mootness in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,<sup>145</sup> the Supreme Court noted that “there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to

<sup>138</sup> *Id.* at 1540 (alterations and omission in original) (quoting *Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 73 (2013)).

<sup>139</sup> *United States v. Sanchez-Gomez*, 859 F.3d 649, 658 (9th Cir. 2017) (en banc), *vacated and remanded*, 138 S. Ct. 1532 (2018).

<sup>140</sup> *See Sanchez-Gomez*, 138 S. Ct. at 1540.

<sup>141</sup> *See Sanchez-Gomez*, 859 F.3d at 658.

<sup>142</sup> *Or. Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1117 (9th Cir. 2003).

<sup>143</sup> *See id.* at 1117–18; *Sanchez-Gomez*, 859 F.3d at 658.

<sup>144</sup> *Sanchez-Gomez*, 859 F.3d at 658.

<sup>145</sup> 528 U.S. 167 (2000).

overcome mootness.”<sup>146</sup> The Court reasoned in part from functional considerations, noting:

Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal.<sup>147</sup>

A proponent of one of the flexible approaches may similarly argue that the prospect that unidentified associational members may experience the alleged harm may be too speculative to support associational standing under *Hunt*, but not too speculative to overcome mootness. Under this reasoning, when an organization initially asserts associational standing on behalf of specifically identified members and later maintains the same suit on behalf of unidentified members, a live case or controversy continues to exist for the purposes of Article III in part because to hold otherwise would be to unnecessarily and “wasteful[ly]” “abandon the case.”<sup>148</sup>

*Laidlaw* cannot support this reading. First, although *Laidlaw* permitted a mootness inquiry that was less demanding than the standing inquiry, this diminished standard was limited to circumstances involving the voluntary-cessation exception to mootness.<sup>149</sup> While cases brought under associational standing may involve this exception at a later stage of litigation, they do not necessarily. Second, even the *Laidlaw* Court’s seemingly practical analysis was cabined. Despite acknowledging that it may, in certain circumstances, be “wasteful” to “abandon [a] case at an advanced stage,” the *Laidlaw* Court clarified that “[t]his argument from sunk costs does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest.”<sup>150</sup> In so specifying, the Court noted that practical considerations regarding “sunk costs” do not permit federal courts to hear non-class action suits in which the plaintiff’s claim has been mooted.<sup>151</sup> It would thus be difficult to fit organizations asserting associational standing within *Laidlaw*’s mootness framework.

Furthermore, there is no reason to believe that “prudential” considerations will have a resurgence in the near future. Despite academic calls to untether mootness from Article III,<sup>152</sup> the modern Court has

<sup>146</sup> *Id.* at 190.

<sup>147</sup> *Id.* at 191–92.

<sup>148</sup> *Id.* at 192.

<sup>149</sup> See *id.* at 211 (Scalia, J., dissenting) (“*Laidlaw*’s claimed compliance is squarely within the bounds of our ‘voluntary cessation’ doctrine, which is the basis for the remand.”).

<sup>150</sup> *Id.* at 192 (majority opinion).

<sup>151</sup> See *id.* at 192 & n.5.

<sup>152</sup> See, e.g., Lee, *supra* note 86, at 654 (suggesting that mootness doctrine should be “plucked of its constitutional plumage”); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 490 (1996) (“[M]ootness is, and always has been, a matter of discretion.”).

tightened its justiciability doctrines in recent years. It is difficult to imagine that a Court that has gradually made it more difficult for plaintiffs to assert and Congress to confer standing<sup>153</sup> will at the same time make more flexible its mootness review. Admittedly, the Court could conceivably heighten the requirements for a case to be brought in the first instance while also more readily finding that a live case or controversy persists. However, such an approach seems unlikely in light of the fact that the modern Court has declined to broaden exceptions to mootness when presented with the opportunity to do so.<sup>154</sup>

Finally, even if the Court were willing to afford greater weight to prudential considerations, there is no good reason to do so within the context of associational standing. If there is a reasonable probability that additional, unidentified organizational members are experiencing the alleged harm at the time that the members upon whom the organization's associational standing was originally based cease to have a live claim, the organization should be capable of identifying such members. Under the strict approach, the organization's burden is to identify such members and then bring suit on their behalf. Under the modified strict approach, the organization's burden is simply to substantiate the claim that the challenged action continues to cause organizational members harm by identifying additional members. While prudential considerations may have a role in selecting between the strict and modified strict approaches, they should not foreclose either.

### CONCLUSION

This Note has argued that when an organization asserts a claim based upon associational standing, its claim becomes moot when the members upon whom its associational standing is based cease to have a live case or controversy, unless — perhaps — the organization can identify additional harmed members. Such an approach to mootness in the associational-standing context is properly grounded in Article III. More flexible approaches are at best not supported by and at worst foreclosed by the Supreme Court's contemporary justiciability doctrine, and there is no reason to believe that the Court's mootness jurisprudence will or should accommodate them in the near future.

---

<sup>153</sup> See, e.g., *Summers v. Earth Island Inst.*, 555 U.S. 488, 493–94 (2009) (noting that a mere “generalized harm” is not sufficient to support standing, *id.* at 494); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (“Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation.”); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210–11 (2021) (“[I]n a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm — at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm.”).

<sup>154</sup> See, e.g., *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1538 (2018).