

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: FRIENDS OF THE EARTH, INCORPORATED, ET AL.,
Petitioners v. LAIDLAW ENVIRONMENTAL SERVICES
(TOC), INC.

CASE NO: 98-822 *c.2*

PLACE: Washington, D.C.

DATE: Tuesday, October 12, 1999

PAGES: 1-55

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CAPTION

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FRIENDS OF THE EARTH, :

4 INCORPORATED, ET AL., :

5 Petitioners :

6 v. : No. 98-822

7 LAIDLAW ENVIRONMENTAL SERVICES :

8 (TOC), INC. :

9 - - - - -X

10 Washington, D.C.

11 Tuesday, October 12, 1999

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:05 a.m.

15 APPEARANCES:

16 BRUCE J. TERRIS, ESQ., Washington, D.C.; on behalf of
17 the Petitioners.

18 JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of the United States, as amicus curiae,
21 supporting the Petitioners.

22 DONALD A. COCKRILL, ESQ., Greenville, South Carolina; on
23 behalf of the Respondents.

24

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1 PROCEEDINGS

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 98-822, Friends of the Earth v. Laidlaw
5 Environmental Services.

6 Mr. Terris.

7 ORAL ARGUMENT OF BRUCE J. TERRIS

8 ON BEHALF OF THE PETITIONERS

9 MR. TERRIS: Mr. Chief Justice, and may it
10 please the Court:

11 The district court in this case, after two
12 trials, found that Laidlaw had violated the Clean Water
13 Act 1,412 times. One hundred and thirty of those times
14 had come in the immediate 6 months before the complaint
15 was filed, and another 36 of the violations came after the
16 complaint was filed. The complaint alleged ongoing
17 violations and it sought injunctive relief.

18 Five years -- three -- five years later, after
19 the complaint had been filed, the district court found
20 that there was no long -- that Laidlaw was in substantial
21 compliance and therefore there was no need at that point
22 to issue injunctive relief. Instead, it imposed a penalty
23 of \$405,000, specifically to deter future violations.

24 Six years after the suit was filed, the Fourth
25 Circuit held, solely because injunctive relief was no

1 longer in the case, that the case had to be dismissed as
2 moot, and that attorney's fees would not be payable to the
3 plaintiff. We submit that Article III does not compel
4 such a perverse result.

5 The plaintiffs submit that, even though the
6 civil penalty is payable to the United States Treasury,
7 that plaintiffs benefited from the imposition of a penalty
8 because penalties deter future violations.

9 QUESTION: Well, I guess what happened, perhaps,
10 was the district court handled this at a time before we'd
11 handed down Steel Company.

12 MR. TERRIS: That's correct, Your Honor. Steel
13 Company came --

14 QUESTION: And the Fourth Circuit reviewed it
15 after that case had come down, and apparently placed some
16 reliance on that, right? That seems to be --

17 MR. TERRIS: It relied solely on Steel Company.

18 QUESTION: Yes. That seems to be what happened
19 in effect.

20 MR. TERRIS: That there --

21 QUESTION: So it boils down to what we meant in
22 Steel Company --

23 MR. TERRIS: I think that's correct, Your Honor.

24 QUESTION: -- as applied to this case.

25 MR. TERRIS: I think that's correct, and I think

1 it also involves what the relationship of Steel Company is
2 to this Court's prior decision in Gwaltney, because our
3 argument is that Gwaltney is precisely this case.

4 QUESTION: Well, except Gwaltney didn't really
5 get into the circumstances expressly, and I guess Steel
6 Co. did, so we have to reconcile that in some way.

7 MR. TERRIS: I think, Your Honor, that Gwaltney
8 did get into the circumstances. It would have been
9 extremely difficult for this Court to over -- to have
10 overlooked the fact that there was no injunctive relief in
11 Gwaltney.

12 QUESTION: This is a jurisdictional point, and
13 our cases are replete with the statements that actions by
14 this Court on jurisdictional matters that do not discuss
15 the jurisdictional matters are not precedential.

16 MR. TERRIS: That's correct, Your Honor, but --

17 QUESTION: And did Gwaltney discuss the
18 jurisdictional matter explicitly?

19 MR. TERRIS: Yes, it did, Your Honor. It
20 discussed both standing and mootness, and --

21 QUESTION: This aspect of standing?

22 MR. TERRIS: It did not go into the exact
23 aspects of Steel Company, but Your Honor found in Steel
24 Company itself that Gwaltney had -- that this Court in
25 Gwaltney had upheld standing, and presumably found that

1 that had been a reasonable determination. One has to
2 assume that the Court did not simply overlook a matter as
3 clear-cut as the fact that injunctive relief had never --
4 had not been issued in Gwaltney and was no longer in the
5 case because it had not been appealed.

6 QUESTION: Mr. Terris, do you think the Fourth
7 Circuit may have confused mootness with standing?

8 MR. TERRIS: I think it certainly confused
9 mootness with standing, because what it did is take a
10 decision of this Court in Steel Company and say that it
11 applied in and of itself, with no further reasoning, to
12 the decision, to the case before it.

13 This Court in Steel Company said explicitly that
14 the rules for mootness were not the same rules for
15 standing. The Government had argued in Steel Company that
16 the law, that this Court has repeatedly laid down that for
17 a case to be moot it must be absolutely clear that the
18 injury would not continue, that when the Solicitor General
19 made that argument, that that argument did not apply in
20 Steel Company because that was a standing case, and you
21 could not use -- you could not use that doctrine as a
22 sword instead of a shield, as this Court stated.

23 QUESTION: -- thing if I may. The Roebuck
24 facility has been closed now, as I understand it, and the
25 incinerator removed.

1 MR. TERRIS: That is true.

2 QUESTION: Does that moot the case perhaps?

3 MR. TERRIS: There is a substantial question
4 about that --

5 QUESTION: Yes.

6 MR. TERRIS: -- about that. What we have --
7 what Your Honors, of course, have done is granted
8 certiorari on a different issue.

9 QUESTION: Yes.

10 MR. TERRIS: What the respective parties have
11 presented to Your Honors is their views of the facts.
12 Those facts, of course, have not been sifted through any
13 type of hearing in the district court.

14 Part of the facilities have been taken down, and
15 part of the facilities still remain. We know that because
16 we have them examined last week, and so in addition the
17 company continues to have its permit. It fought, in fact,
18 to preserve its permit in State court even after the time
19 that the -- that it had decided to close, and it
20 negotiated a closure agreement with the State which allows
21 it to reopen an incinerator in the future.

22 QUESTION: May I ask this question, Mr. Terris.
23 Let's assume for purposes of argument that a week ago the
24 case became totally moot, and everybody would agree it.
25 Would that exonerate your opponent from paying the civil

1 penalty?

2 MR. TERRIS: We do not think so, because we
3 think that under Walling v. James Reuter and the U.S.
4 Bancorp decisions of this Court that when the voluntary
5 actions of the defendant to in effect prevent a decision
6 of a district court from being carried out, that in the
7 interests of justice this Court has the power to vacate
8 the court of appeals decision and to therefore let the
9 district court decision continue to apply.

10 QUESTION: Mr. Terris, can I ask you, the
11 premise of your argument is that it would surely be okay
12 to grant the penalty relief if injunction relief had also
13 been granted.

14 MR. TERRIS: Well --

15 QUESTION: You don't even think that's a
16 debatable problem.

17 MR. TERRIS: I don't think it is, although
18 the --

19 QUESTION: Yes.

20 MR. TERRIS: -- other side debates it.

21 QUESTION: What cases do you know that have said
22 it is a proper function of courts in private litigation to
23 impose a public penalty, that is, a penalty that does not
24 go to the plaintiff but that goes into the public
25 Treasury?

1 MR. TERRIS: I think Gwaltney clearly holds
2 that. There's no sense to Gwaltney, it is absolutely
3 nonsensical to have -- for this Court to have sent this
4 case -- that case back on remand if a contrary --

5 QUESTION: It's a major proposition to establish
6 without any discussion about it. I mean, every time you
7 alter from the traditional status quo the functions of the
8 courts you alter also the functions of the other branches
9 of Government, and the States are complaining here because
10 they think that the decision whether to impose a civil
11 penalty or not belongs to the executive branch. It's part
12 of prosecutorial discretion.

13 And by placing that within the courts there is a
14 major alteration of power between the various branches of
15 Government and, in this case, not only between the
16 executive and the judicial at the Federal level, but also
17 between the Federal and the State Governments.

18 MR. TERRIS: There are several -- I have several
19 answers, Your Honor. I do not think this is private
20 litigation. This is litigation that the Congress of the
21 United States said should be permissible to private
22 citizens in order to carry out a function that is
23 essentially a governmental function.

24 QUESTION: But Congress can't say anything.
25 Congress can't -- just because Congress has said it, it

1 doesn't mean the courts can do it. There's a proper role
2 for courts.

3 MR. TERRIS: I understand that, Your Honor, but
4 I am saying that the Congress has said this is not private
5 litigation, this is public litigation to carry out a
6 public responsibility.

7 QUESTION: I understand Congress has said it.
8 The issue is whether that's constitutional.

9 MR. TERRIS: Let me go on. The States, as far
10 as this case is concerned, have not objected. One State
11 has objected, the State of South Carolina. The other --
12 another group of States, 13 of them, have supported the
13 plaintiff's position. There is no reason to see this case
14 as a -- as raising the fundamental question which is a
15 question, I submit, on whether Congress had the power to
16 set up this kind of a mechanism at all.

17 QUESTION: Well, you didn't raise that question
18 in your petition for certiorari.

19 MR. TERRIS: That's correct. That's quite
20 correct, and it wasn't decided below, so there is no issue
21 before this Court as to whether Congress has the power to
22 create a mechanism in which private citizens can enforce
23 Federal environmental laws.

24 Now, of course, there's a considerable history
25 of private citizens enforcing laws which has been held,

1 upheld by this Court.

2 QUESTION: This discussion began when we asked
3 whether or not the pendency of an injunctive suit that's
4 live allows you to collect civil penalties which are
5 retroactive, and the respondent's brief quotes Lewis and
6 Casey for the proposition that standing is not dispensed
7 in gross. In Lyons v. City of Los Angeles -- the
8 Chokehold case is the same -- we looked to each claim to
9 see if there's standing as to each claim.

10 MR. TERRIS: That's correct.

11 QUESTION: So in light of those cases, why is it
12 that you can argue, as you do, as you seem to do, that the
13 impendancy of the injunctive action somehow confers
14 standing to collect civil penalties for the past wrong?
15 That goes against the teaching of those cases, does it --

16 MR. TERRIS: That isn't the argument, Your
17 Honor. Our argument is not that injunctive relief gives
18 us the right to sue for civil penalties. Quite the
19 opposite. Our position is that the Congress has set up a
20 scheme in which you can ask for injunctive relief, you can
21 ask for civil penalties, and each of those remedies has to
22 be analyzed independently to determine whether there was
23 redressability.

24 QUESTION: And you say that there is no standing
25 requirement for the civil penalties. They stand

1 separately. For injunction, you have to show the
2 injunction will help you, but for the civil penalties, all
3 you have to show is, Congress gave you the right to be a
4 Private Attorney General.

5 MR. TERRIS: That --

6 QUESTION: Or do you have to -- do you take the
7 position, rather, that there has to be a reliance on
8 continuing violations of the statute to get the standing?
9 What is your position?

10 MR. TERRIS: Our position is that it is not
11 enough that Congress has said we have the right to sue for
12 civil penalties, any more than it's enough to say that we
13 have the right to sue for injunctive relief. We have got
14 to show redressability under Article III.

15 Our position is that civil penalties, like
16 injunctive relief, deter when there is the possibility of
17 future violations.

18 QUESTION: So you want us to analyze this case
19 as if you asked just for civil penalties. You'll rise and
20 fall with that, on this issue. It's just as if you sued
21 for backward relief, not for future injunctive relief.

22 MR. TERRIS: I do not have to go that far, Your
23 Honor, because, of course, we asked for injunctive relief,
24 as in Gwaltney. We -- it is important to us that our case
25 is on all fours, in fact a little stronger than Gwaltney,

1 but our base -- but underneath that proposition is the
2 argument that civil penalties are sustainable under
3 Article III if they provide a benefit to the plaintiff.

4 QUESTION: But they would have to provide a
5 benefit rather specifically, would they not? I mean, you
6 couldn't sue, say in Virginia and try to get something
7 done out in California.

8 MR. TERRIS: That's correct, Your Honor. Our --

9 QUESTION: Finish. Finish your answer.

10 MR. TERRIS: Yes, let me -- the district court
11 specifically held in this case that the civil penalties
12 did deter, and we submit that that determination is
13 entitled to weight.

14 I may say also that the court of appeals assumed
15 that was true.

16 QUESTION: But the court of appeals --

17 QUESTION: Did it find that the penalties
18 deterred conduct that had an adverse impact on your
19 clients?

20 MR. TERRIS: Excuse me, Your Honor.

21 QUESTION: Did the district court find that the
22 civil penalties deter conduct that has an adverse impact
23 on your clients?

24 MR. TERRIS: It basically found there was not
25 enough likelihood of future violations to justify

1 injunctive relief, because, of course -- not a mootness
2 ground. It did not hold against us on mootness grounds as
3 far as injunctive relief is concerned. It held, as a
4 matter of using the basic discretion that a district court
5 has as to whether to issue injunctive relief, not to issue
6 it.

7 QUESTION: No, but what I want to be clear on,
8 the civil penalties clearly would deter future violations.
9 The question I'm asking is, were the violations
10 established in this case ones that had an adverse impact
11 on your clients?

12 MR. TERRIS: Oh -- the district court held that
13 there was standing, the court of appeals assumed that
14 there was standing, and we proved standing, so -- but that
15 issue, I submit to Your Honors, is not before you.

16 QUESTION: And did you prove that the violations
17 adversely affected your clients?

18 MR. TERRIS: Yes, Your Honor.

19 QUESTION: Okay.

20 MR. TERRIS: It's part of standing.

21 QUESTION: But the court of appeals didn't
22 review that, and one of the questions that I have is,
23 assuming I would agree with you that this case is not
24 moot, mustn't this Court stop there and say, whatever the
25 district court found, the court of appeals didn't review

1 it, so we would say, case not moot, court of appeals stop
2 assuming standing, decide all these questions that you
3 didn't decide.

4 What right would we have, if we agree that the
5 case isn't moot, to decide anything but that?

6 MR. TERRIS: I certainly don't think, Your
7 Honor, that you should decide standing, which is -- fact-
8 intensive does not raise an issue that's involved in
9 certiorari. The closure issue I think should be sent back
10 to the district court, because there was no record
11 whatsoever on it.

12 I do think it would be appropriate for the
13 attorney's fee issue to be decided by this Court. It is
14 a -- it has been fully briefed --

15 QUESTION: It wasn't even decided in --

16 QUESTION: But is there -- there's no final
17 judgment there, is there, on the attorney's fees?

18 MR. TERRIS: No, but there was a decision by
19 the --

20 QUESTION: So --

21 MR. TERRIS: There was a decision by the court
22 of appeals that it will not give attorney's fees if the
23 case is moot, so it's very likely -- if we go back to the
24 district court on the closure question, it's very possible
25 that that issue will continue to be lurking in the case.

1 QUESTION: I just thought there was no final
2 judgment as to the attorney's fees.

3 MR. TERRIS: Oh, I think there was. There
4 was -- they were denied.

5 QUESTION: And the court of appeals did not say,
6 as I recall, that they would not award attorney's fees if
7 it was not moot.

8 MR. TERRIS: That is true, Your Honor. I don't
9 think they could.

10 QUESTION: Mr. Terris, could I come back to
11 Justice Stevens' question? I'm not clear whether the
12 deterrence that the court referred to, which would be
13 achieved by this penalty, was deterrence against violating
14 the law at this same facility and in the same manner. I
15 mean, this company still had a permit. They presumably
16 could operate elsewhere. They operated other facilities.
17 It might have been deterrence from violations there that
18 the court had in mind. Is there any reason to believe
19 that it means deterrence from a violation at this very
20 facility?

21 MR. TERRIS: I think there is, Your Honor,
22 because no other facilities was raised in the case in the
23 district court. There was never any discussion of that.
24 There's no reason to believe that it was considering
25 anything than the case before it.

1 QUESTION: Is the permit specific to the
2 facility?

3 MR. TERRIS: Excuse me? Yes.

4 QUESTION: So that when they retain the permit,
5 it is for this location only.

6 MR. TERRIS: This and only this location.

7 QUESTION: Yes.

8 MR. TERRIS: I'd like to reserve the rest of my
9 time, Your Honor.

10 QUESTION: Very well, Mr. Terris.

11 Mr. Minear, we'll hear from you.

12 ORAL ARGUMENT OF JEFFREY P. MINEAR

13 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

14 SUPPORTING THE PETITIONERS

15 MR. MINEAR: Mr. Chief Justice, and may it
16 please the Court:

17 The court of appeals erred in holding that a
18 citizen's suit under the Clean Water Act must be dismissed
19 as moot if the district court concludes that injunctive
20 relief is unwarranted.

21 The Clean Water Act authorizes private citizens
22 to bring suit to abate ongoing violations, and it provides
23 the district courts with two types of coercive remedies to
24 compel compliance. The district court may ask for civil
25 penalties, or it may grant civil penalties, or it may

1 issue an injunction, and that choice lies with the
2 discretion, the remedial discretion, of the district
3 court.

4 The district court properly exercised its
5 discretion in this case. The citizens brought suit to
6 abate ongoing violations, and the court determined that
7 they were entitled to relief. The court declined to enter
8 an injunction in light of Laidlaw's current compliance
9 status at the time of judgment, but it nevertheless
10 concluded that civil penalties were appropriate, because
11 they would deter future violations by Laidlaw at that
12 site.

13 QUESTION: Well, is that consistent with its
14 refusal to issue an injunction, because ordinarily, if you
15 think there are going to be future activities that need to
16 be deterred, you probably would issue an injunction,
17 wouldn't you? It's only if you feel the people have
18 really changed their ways for good that you turn down an
19 injunction.

20 MR. MINEAR: No, I don't think that's the case,
21 Your Honor. I think if we look at cases involving
22 voluntary cessation, ranging from Gwaltney to City of
23 Mesquite, W. T. Grant, all of those cases recognized that
24 a case might not be moot, but nevertheless injunction
25 relief may nevertheless not be warranted. What has

1 happened in this case --

2 QUESTION: No --

3 QUESTION: That seems to me entirely backwards.
4 I mean, the more radical -- the more radical sanction, it
5 seems to me, is to impose a monetary penalty, whereas the
6 lesser one is simply say, you know, don't do this bad
7 thing again, and you're saying the -- you're saying here
8 the court found that the probability of their doing it
9 again was small enough that the court was not even willing
10 to wag a finger at them, and yet the court socks them with
11 a monetary penalty in order to prevent them from doing it
12 again.

13 MR. MINEAR: Your Honor --

14 QUESTION: I find that an extraordinary upside-
15 down approach to that.

16 MR. MINEAR: Your Honor, I do not think it's
17 extraordinary, because the court would not have simply
18 wagged its finger at Laidlaw. An injunction in this case
19 could have, most likely would have intruded the court into
20 the operations of Laidlaw. For instance, an injunctive
21 could have limited the amount of feed that goes into the
22 incinerator, it could have specified the type of equipment
23 that Laidlaw had to use, all of these things are quite
24 burdensome and intrusive.

25 QUESTION: It could have. It need not have.

1 MR. MINEAR: It need not have, but this is why
2 Congress gave courts the power to select the remedy that
3 is most appropriate to ensure compliance.

4 QUESTION: But of course the civil penalty looks
5 in both directions, doesn't it?

6 MR. MINEAR: Its --

7 QUESTION: So that the court might have said,
8 well, I'm going to award the civil penalty here in part
9 because of what we find they have done, and in part for
10 deterrent purposes. I mean, it could have -- it could
11 have had both rationales, couldn't it?

12 MR. MINEAR: That's not what the court did in
13 this case, Your Honor. I think the court made quite --

14 QUESTION: What did it say?

15 MR. MINEAR: It made quite clear its view on the
16 use of civil penalties, and this appears in the joint
17 appendix at pages 121 through 125.

18 QUESTION: What did they say?

19 MR. MINEAR: What they said, what the court said
20 was that civil penalties here are available to deter
21 future violations, and they do so by depriving --

22 QUESTION: So they construed it solely as
23 deterrent in this case.

24 MR. MINEAR: In this case, that is the approach
25 the court took, and what's more, the court said the reason

1 why it deters is because it will deprive the party of the
2 economic benefit of noncompliance and thereby take away
3 the incentive to commit future violations. Laidlaw was
4 clearly --

5 QUESTION: Of course, the penalty doesn't do
6 that. A future penalty would do that.

7 MR. MINEAR: This penalty deprived Laidlaw of
8 its -- of the benefits of its past noncompliance --

9 QUESTION: Right.

10 MR. MINEAR: -- and made clear that its future
11 violations --

12 QUESTION: That won't stop its future
13 violations. What will stop its future violations is the
14 fear that a penalty will be imposed in the future, right?
15 I mean, if it had assurance that no penalty would be
16 imposed in the future, it would keep on its bad ways,
17 wouldn't it, despite --

18 MR. MINEAR: But it's the application of the
19 penalty that provides the assurance that it will be
20 applied in the future as well. A penalty that is never
21 applied, of course, has no deterrent effect. This
22 penalty -- and one only needs to think in terms of the
23 practical aspects.

24 The plant manager is facing the prospect, we can
25 increase our profits by increasing the throughput in our

1 incinerator, but we're going to violate our permit if we
2 do that. He talks to his lawyer, asks the lawyer, what
3 would be the consequences. If he's told, well, you might
4 simply get an injunction telling you not to do again -- do
5 it again, the company will have a strong incentive to go
6 ahead and violate and make those profits.

7 On the other hand, if the counsel says, well,
8 the last time you did this you paid a penalty that took
9 away all the economic benefits of violating that permit,
10 that operates as a powerful deterrent, and that is what we
11 believe the district court was seeking to do in this
12 particular case.

13 Now, I think it's important to recognize, and
14 Laidlaw concedes, the district court had not declined to
15 provide injunctive relief on the ground that defendant's
16 compliance efforts had made this case moot. This Court's
17 decisions, including Gwaltney, made clear that voluntary
18 cessation of unlawful conduct does not moot a case unless
19 it's absolutely clear there's no reasonable prospect for
20 continuance.

21 Laidlaw did not argue or demonstrate that there
22 was mootness of that sort in this case, and so for that
23 reason the court was free to apply the remedy that it
24 thought was appropriate to abate future violations.

25 QUESTION: May I ask you the question I asked

1 your -- the other counsel: supposing the case became moot
2 today, would you still be entitled to the money?

3 MR. MINEAR: Our view is, we might very well be
4 entitled to the money, and the analysis goes as follows.
5 If the plant had closed before judgment, it's the position
6 of the United States then in that situation, if that
7 eliminates all possibility of future violations, then the
8 case is moot, and the case should just be dismissed. I'm
9 talking about the district court judgment.

10 QUESTION: Even after the district court has
11 said there should be a penalty.

12 MR. MINEAR: No, I'm talking about, in that case
13 before the district court.

14 QUESTION: Oh --

15 MR. MINEAR: If the plant is closed after --

16 QUESTION: I'm asking you -- say it becomes moot
17 after the district court makes a finding that they ought
18 to pay \$400,000 to the United States.

19 MR. MINEAR: I think one of the inquiries that
20 has to be made on remand is whether that closure was
21 prompted by the court's judgment. If the judgment
22 actually was effective --

23 QUESTION: You seem to be dodging my question.
24 I'm assuming mootness.

25 MR. MINEAR: Yes.

1 QUESTION: Assume it's moot, and everybody
2 agrees it would be moot, except for the fact there may be
3 a fight over whether or not they still have to pay the
4 money, would that prevent it from being moot?

5 MR. MINEAR: If it's clearly moot, and it was
6 not caused by the -- the closing was not caused by the
7 entry of the judgment, in that case we think the
8 appropriate course would be under Bonner Mall and the
9 Walling v. Reuter case to remand the case to the district
10 court with the reimposition of the district court's
11 judgment, and that's governed by --

12 QUESTION: To reimpose the district court's
13 judgment.

14 MR. MINEAR: Reimpose the district court's
15 judgment.

16 QUESTION: And so then, you think they'd have to
17 pay the money.

18 MR. MINEAR: They'd have to pay the money.

19 QUESTION: That's what I was trying ask you.
20 Yes, okay.

21 MR. MINEAR: And the reason for that is simply
22 as a matter of interest of justice. As this Court
23 indicated in Bonner Mall, if a defendant actually
24 precludes the other party from obtaining relief in this
25 Court, the appropriate course in the interests of justice

1 is to remand the case back to the district court.

2 QUESTION: And then that's -- I'm sorry. Were
3 you going to --

4 QUESTION: No.

5 QUESTION: And that is also true on the
6 assumption that you have pointed out we have to make in
7 this case that the penalty was purely forward-looking.
8 The penalty was purely prospective as a deterrent.

9 You see, I can understand your argument if the
10 penalty had both characters, forward-looking and backward-
11 looking, but in this case, as you've told us, the penalty
12 is entirely forward-looking. If it is moot, so that
13 beyond peradventure there can be no expectation of
14 repetition, I don't understand why the penalty would still
15 be enforceable.

16 MR. MINEAR: The reason why the penalty is still
17 enforced in that situation is to avoid the gamesmanship
18 that would otherwise result. If a party, a defendant
19 could simply string the litigation along until it becomes
20 moot and then avoid the civil penalties that are
21 imposed --

22 QUESTION: Would the injunction stand, if they
23 had issued an injunction?

24 MR. MINEAR: Yes, and in fact the Walling case
25 involved the imposition of an injunction, and the

1 injunction was on appeal to this court. It had been
2 granted in the district court, it had been overturned in
3 the court of appeals. At the time that this case was
4 pending before the court, the defendant corporation
5 dissolved, and this court said, in that situation we're
6 nevertheless going to reinstate the district court
7 judgment and allow the parties to determine in the
8 district court what remedies are available in that
9 situation.

10 QUESTION: Excuse me. They reinstated the
11 judgment but not the remedy. They didn't reinstate the
12 injunction.

13 MR. MINEAR: I believe the injunction was still
14 reinstated, and the court indicated it would be up to
15 the parties to determine what could be enforced in that
16 situation.

17 QUESTION: So it was left as a matter of
18 discretion. Mootness was no bar to the injunction, is
19 what you're saying. That was the necessary --

20 MR. MINEAR: Yes. Now, I understand Justice
21 Scalia's concern is, if the case is truly moot, why does
22 the injunction continue, but nevertheless, what the court
23 said is, when the case became moot on the way to the
24 Supreme Court, it had the discretion to determine what to
25 do with the case on remand.

1 Now, I would like to focus on the deterrent
2 value of the penalties that are at issue here, because I
3 think this is an important point for this Court to
4 understand. It has indicated in a number of its cases the
5 value of, the deterrent value of civil penalties.

6 In Gwaltney, the Court said that citizens may
7 seek penalties only in a suit brought to enjoin or
8 otherwise abate an ongoing violation. In other words,
9 Gwaltney recognized that civil penalties are available to
10 abate the violation.

11 In addition, this Court said in Tull that courts
12 can deter future violations by basing the penalty on its
13 economic impact, exactly what the district court did in
14 this case, and in Romero-Barcelo, this Court said that an
15 injunction is not the only means of ensuring compliance,
16 citing to civil penalties.

17 QUESTION: Well, what about Steel Company,
18 though?

19 MR. MINEAR: Steel Company is distinguishable,
20 because in that case -- if I may finish my answer -- it
21 involved a wholly past violation in which civil penalties
22 would have no future deterrent effect.

23 Thank you, Your Honor.

24 QUESTION: Thank you, Mr. Minear.

25 Mr. Cockrill, we'll hear from you.

1 ORAL ARGUMENT OF DONALD A. COCKRILL

2 ON BEHALF OF THE RESPONDENTS

3 MR. COCKRILL: Thank you, Mr. Chief Justice, may
4 it please the Court:

5 This case comes to this Court in somewhat of an
6 odd posture in that we are here, in the eighth year of
7 this litigation, because the petitioners want this Court
8 to send all of us back to the Fourth Circuit to litigate
9 the issue of additional civil penalties for violations,
10 some of which occurred nearly 13 years ago, none of which
11 caused any measurable environmental harm, based on the
12 petitioner's contention that such additional penalties for
13 long-past violations will somehow deter future discharges
14 at a facility in South Carolina that no longer discharges,
15 and they ask for this relief despite two very important
16 facts.

17 One, they admit that at trial they completely
18 failed to prove specific adverse effects to the
19 environment, and secondly, whatever injuries that they may
20 have had, they now concede were redressed by the district
21 court's ruling in 1997.

22 QUESTION: What ruling of the district court is
23 that?

24 MR. COCKRILL: It was the district court's 1997
25 ruling on liability. There was an earlier 1995 ruling

1 called the preclusion ruling that said the lawsuit could
2 go forward. We then tried the case, and the district
3 court ruled in 1997, found violations, and imposed the
4 penalty.

5 QUESTION: Thank you.

6 QUESTION: We've said that you have to take
7 standing issues first, and there's a barrier to the
8 standing issue. That was Steel Co., and there seems to be
9 a barrier to the standing issue, the absolute ruling that
10 if you go and ask for a future -- for the penalty, the
11 past penalty in order to deter the future, can't do it,
12 no standing, so we have to address that, don't we, despite
13 13 years, despite all the things you say.

14 MR. COCKRILL: Yes, Your Honor. I mean -- yes.
15 That's our position, that under no circumstances should a
16 private party be able to seek penalties, a remedy in which
17 that private party has no personal stake, because there's
18 just no good historical analogue in the Federal system for
19 a private party doing that.

20 QUESTION: Well, what about treble damage
21 plaintiffs in antitrust cases? What about qui tam
22 plaintiffs? What about all the instances in State law
23 where you have a person called a Private Attorney General?
24 Not perfect analogies, but why not good enough?

25 MR. COCKRILL: I think in State law --

1 obviously, the Federal system has a separation of power
2 consideration that State law doesn't. In a qui tam
3 action, obviously the plaintiff, who is suing on behalf of
4 the Government, at least gets a portion of the take.

5 QUESTION: If he gets \$13.50 he can put a
6 million into the Treasury, but if in fact what he gets is
7 some assurance that there won't be pollution again, he
8 can't put the money in the Treasury.

9 MR. COCKRILL: Well, to answer the first part of
10 it, if you got \$13.50 out of a million dollar judgment,
11 I'm not sure that's enough of a personal stake, but I
12 know --

13 QUESTION: I sometimes exaggerate.

14 (Laughter.)

15 QUESTION: Mr. Minear, it's not universally
16 agreed that qui tam actions are constitutional anyway, is
17 it?

18 MR. COCKRILL: No, it's not, Your Honor, and
19 there's a lot of --

20 QUESTION: And this Court has never faced the
21 question, has it?

22 MR. COCKRILL: It has not, and -- but my point
23 is that at least that qui tam plaintiff has some personal
24 stake by virtue of the statute, the False Claims Act,
25 giving that quit tam plaintiff a --

1 QUESTION: Quit tam squared, you might say.

2 MR. COCKRILL: I'll agree with that, although
3 I'm not sure I understand it.

4 (Laughter.)

5 QUESTION: We have learned not to do that.

6 (Laughter.)

7 QUESTION: Mr. Cockrill, the district court said
8 they were in violation, and I -- the reason I'm not giving
9 an injunction is because I think that this penalty is
10 enough of a deterrent. If the district court was wrong
11 about that, isn't the implication that it would have given
12 the injunctive relief as the only redress that this
13 plaintiff would have standing to pursue?

14 The district court didn't say, an injunction's
15 out of the question. It said, I want to deter this
16 defendant, and I think the best way to do that is through
17 a monetary penalty to take away the benefit of the
18 violation.

19 MR. COCKRILL: I don't think that's completely
20 correct, Your Honor, for this reason. The district court
21 denied the injunction for very good reasons. The
22 citizens' suit was filed in June of 1992. Two months
23 later, as the district court found, the company was in
24 substantial compliance.

25 The district court found that 5 years prior to

1 the citizens' suit there was continuous activity on the
2 part of the company, good faith compliance efforts,
3 working with the State, and that the citizens' suit
4 basically came in at the end of that process, so the
5 district court felt that because this was not an
6 indifferent company that was galvanized into action by the
7 citizens' suit, and because it came into substantial
8 compliance within 2 months of the citizens' suit by
9 finally figuring out the technology problem, there really
10 wasn't a need for an injunction.

11 The district court -- and that's just obvious
12 from the record, and --

13 QUESTION: I thought that the district court
14 suggested that the plaintiff was the galvanizing factor
15 and that the defendant itself had tried to get the State
16 into the act and, indeed, drafted the pleadings for the
17 State court suit that was filed, and that was all a nice
18 cozy deal between the defendant and the State.

19 MR. COCKRILL: The district court did not find
20 that.

21 QUESTION: Well, the district court did say, I
22 am not going to do what the statute, if everything was
23 above-board would require, that is, not take this case
24 because there is an adequate remedy going on in the State
25 court. Didn't the district court, in order to continue in

1 this case, have to say why it was not crediting the State
2 proceeding?

3 MR. COCKRILL: Yes. The district court ruled
4 that the State's prior enforcement of these same penalties
5 was not diligent, based primarily on the district court's
6 feeling that the penalty, \$100,000 that the State imposed
7 upon Laidlaw, was not sufficient because it did not
8 calculate or attempt to recover a theoretical economic
9 benefit of noncompliance.

10 Going back to your earlier question, the
11 district court did not find that this citizens' suit was
12 the catalyst for Laidlaw coming into compliance. In fact,
13 the district court found that when the State sued Laidlaw
14 and entered a consent decree on June 10, 1992, in order to
15 obey that consent decree, Laidlaw shut down for
16 substantial periods of time.

17 QUESTION: Well, why did the district court say,
18 and one of the reasons that I'm not giving injunctive
19 relief, it's not simply that I assigned a whopping
20 penalty, but down the road there will be substantial
21 counsel fees?

22 MR. COCKRILL: The district court did say that,
23 and it underscores the uncertain nature of penalties. Our
24 position is very clearly, the penalties are clearly the
25 central issue. They cannot find redress in a compensatory

1 fashion. Everybody agrees to that, because they're paid
2 to the sovereign.

3 The only way you get there is through
4 deterrence, and historically, of course, equity provides a
5 personal redress, declaratory judgments and injunctions
6 which are designed specifically for that purpose. Here, a
7 penalty is overly broad.

8 Mr. Minear mentioned the Tull case. The Tull
9 case points out multiple objectives, but in this
10 particular case, it simply, or in any case, while you may
11 easily say, and I would agree, that penalties as a general
12 matter have some general deterrent effect, any legislation
13 with some type of penalty or sanction is going to have a
14 general, nonspecific effect, but to try to predict the
15 specific effect becomes a very cumbersome and a very
16 difficult proposition, and nothing -- and that's shown in
17 this case.

18 And I think Congress recognized that when
19 they -- in the Clean Water Act citizen suit provision,
20 because they lump penalties and injunctive relief
21 together.

22 QUESTION: What do you mean when you say,
23 penalties have to have a specific effect, Mr. Cockrill?

24 MR. COCKRILL: What I mean, Your Honor, is to
25 redress an injury under Article III, it -- the burden on

1 the plaintiff is to show that the relief requested, that
2 there is a substantial likelihood that that relief will
3 redress that injury.

4 QUESTION: And do you challenge here that the
5 penalties here imposed would have that effect?

6 MR. COCKRILL: Oh, indeed I do. I think these
7 penalties imposed here had no deterrent effect.

8 QUESTION: Because, what, the conduct had
9 already ceased?

10 MR. COCKRILL: Yes, because looking at this --
11 deterrence to me implies, someone doesn't want to do
12 something that's right, and you have to goad them into it.
13 Based on this record, including the 5 years of continuous
14 effort before the citizens' suit, you cannot draw that
15 conclusion, and that's why, in fact, the district court
16 lowered the penalty below this calculated economic
17 benefit, because Laidlaw's compliance efforts had been in
18 good faith, had not caused environmental harm, and had --

19 QUESTION: Well, you --

20 QUESTION: I don't think that's -- you say the
21 district court thought that the penalties were less than
22 the economic benefit? That's not what he said. He said he
23 was removing the economic benefit.

24 MR. COCKRILL: No, he didn't, Your Honor.

25 QUESTION: Similarly, only by removing the

1 economic benefit of noncompliance can a civil penalty
2 ensure that a violator receive no economic advantage.

3 MR. COCKRILL: You read that correctly, Your
4 Honor. You're reading from the 1995 district court
5 opinion, where the district court very forcefully said, to
6 be an effective deterrent, a penalty must remove the
7 economic benefit. At that point you're at a wash, and
8 then some, to make it a true penalty.

9 In the 1997 decision, the economic benefit was
10 \$1.1 million. The penalty was \$405,000.

11 QUESTION: Well, did he agree the economic
12 benefit was 1.1, or was that what your opponent argued?

13 MR. COCKRILL: No, that's what he agreed. They
14 argued it was --

15 QUESTION: Oh, I see.

16 MR. COCKRILL: -- I think, three or four million
17 we, of course, were lower, and he -- we were, like, at
18 \$900,000. He said 1.1, but I'm going to penalize you less
19 than half of that because of these mitigating factors, and
20 that's in fact -- that was, of course, the basis of
21 Friends of the Earth's appeal in the Fourth Circuit, that
22 that penalty was not only a nonpenalty, but it had the
23 opposite effect. It encouraged and rewarded violations.

24 QUESTION: Yes, but didn't he also anticipate
25 counsel fees at the time he set the \$400,000?

1 MR. COCKRILL: He did. He did, Your Honor.

2 QUESTION: So he figured that more money was
3 going to come out of their Treasury at some point as a
4 result of the totality of their actions.

5 MR. COCKRILL: Yes. He said this \$400,000, when
6 coupled with what we might have to pay, and what they paid
7 me --

8 (Laughter.)

9 MR. COCKRILL: -- that that, all taken together,
10 would, he believed would be a deterrent.

11 But what that shows, Your Honor, is that the
12 penalty wasn't, in the district court's mind, a sufficient
13 deterrent, because he had to add other things to it.

14 QUESTION: But it doesn't follow from that that
15 the penalty was not a deterrent, and it doesn't follow
16 from that that in fact a -- and it doesn't follow from
17 historical practice, either, it seems to me, that the
18 penalty cannot be a deterrent unless it is tied more
19 specifically to specific action, because equity frequently
20 depends upon the accrual of coercive penalties.

21 And so it seems to me that the use of the
22 penalty procedure without necessarily tying it to the
23 economic value of a particular practice is in fact
24 consistent with historical equity practice, and I don't
25 see that there is any radical departure from what the

1 judge did here from what equity courts have done in the
2 past.

3 MR. COCKRILL: Well, in equity, clearly you
4 have, you know, an injunction. Clearly a court has the
5 power to enforce that injunction with coercive fines. In
6 this case, under the Clean Water Act, these penalties from
7 the district court, 90 percent, 97 percent I think of the
8 penalties were pre-complaint. These penalties were
9 completely retrospect -- retroactive, going to the -- not
10 prospective, punishing for past conduct, and that's the
11 basis --

12 QUESTION: This may get to a point that is
13 semantic, and I'm not sure of the answer. I just can't
14 remember what the court said well enough.

15 As I -- is it fair to say, in -- consistent with
16 what you just told me, that the court required the
17 particular past actions which it identified as a condition
18 of awarding the penalty, but at the same time said, the
19 reason I'm awarding the penalty is not merely, as it were,
20 based on the excuse that they did bad things that I've
21 identified, but I'm awarding them for prospective purposes
22 to see that they don't do those bad things again. Is that
23 a fair characterization of what the court did?

24 MR. COCKRILL: I don't think it's fair. It's
25 not -- for this reason. The district court said that the

1 Clean Water Act mandates that I award a penalty, and that
2 is the reason, if you look at the entire record, he felt
3 obligated to do it. Indeed, by the language that was --

4 QUESTION: And it was mandated because he found
5 they had done certain bad things.

6 MR. COCKRILL: He found violations.

7 QUESTION: Okay.

8 MR. COCKRILL: Yes.

9 QUESTION: Well, here there was an allegation of
10 continuing violations.

11 MR. COCKRILL: That's correct, Your Honor.

12 QUESTION: And suppose the plaintiffs included
13 people who lived along the river and who swam in it
14 regularly and complained of the mercury discharges, and
15 alleges violations that continued even after the filing of
16 the complaint, amends the complaint, it's going on.

17 Now, do you say, under those circumstances, if
18 the court found all of those things, it could not award a
19 civil penalty, at the same time denying an injunction, as
20 a means of deterring continuing violations?

21 MR. COCKRILL: I think that's what I'm saying,
22 Your Honor, for this reason.

23 QUESTION: Even if all those things that I've
24 said are true.

25 MR. COCKRILL: Right. Continuing violations, at

1 the time of the lawsuit, I think under Article III that
2 penalties are simply unavailable to a private party.

3 QUESTION: Okay, so you raise the constitutional
4 issue --

5 MR. COCKRILL: Yes.

6 QUESTION: -- by way of a defense.

7 MR. COCKRILL: I think as a statutory matter --

8 QUESTION: Now, did the Fourth Circuit rest on
9 some grounds of mootness as opposed to standing?

10 MR. COCKRILL: They did.

11 QUESTION: Do you think we need to send it back
12 for a review of standing?

13 MR. COCKRILL: No, I don't, unless you over --
14 of course, if you reverse the Fourth Circuit, then you can
15 obviously take up the standing issue and the statutory
16 issue raised in the briefs, or you could remand it. We
17 would prefer that this Court take it up.

18 QUESTION: I take it you agree that, as a
19 general matter, penalties deter conduct.

20 MR. COCKRILL: In a nonspecific, attenuated
21 fashion that will vary from case to case, yes, sir, I do.

22 QUESTION: Well, but this is the basis of much
23 of our criminal law and so forth.

24 MR. COCKRILL: It is. A deterrent effect --

25 QUESTION: All right. Let's assume that with

1 this violator, penalties would deter conduct.

2 MR. COCKRILL: We're going to assume --

3 QUESTION: Let's make that assumption.

4 MR. COCKRILL: That penalties deter conduct.

5 QUESTION: That an industry or business, that
6 I'm concerned about this because I may have a penalty.
7 Let's make that assumption. What difference does it make
8 if the penalty goes to the Government as opposed to a
9 private plaintiff so far as deterrence is concerned?

10 MR. COCKRILL: I think under that hypothetical,
11 if you could make the assumption, I would tend to agree
12 that there's a much stronger case for allowing a private
13 party to seek a penalty, because that private party's
14 going to see a real benefit.

15 That's not the case here, but I would agree, but
16 to me there is no way that anyone could make the statement
17 that as a general rule, penalties deter. It just is
18 too -- this Court's precedents in the Linda R.S., the
19 Simon case, even Steel Company, make that point that when
20 you --

21 QUESTION: May I ask this question,
22 Mr. Cockrill. You've referred to nonspecific deterrence.
23 I don't quite understand that. If one assumes -- and I
24 don't know if this is a fair statement or not -- that
25 there had been periodic discharges of mercury in front of,

1 say, one of the plaintiff's private property that
2 adversely affected the value of that property, or their
3 ability to fish or swim, or something like that, and if
4 the penalty is designed to prevent a repetition of what
5 had gone on before, why wouldn't that be sufficiently
6 specific? Why are you referring to nonspecific --

7 MR. COCKRILL: Well, I guess I go back to this
8 decision, to the Court's decision in Tull, where it
9 pointed out that in the congressional history of the Clean
10 Water Act the purposes of a penalty, while they include
11 deterrence, the primary purpose is retribution,
12 punishment, that there's also a restitutorial purpose,
13 whereas as I mentioned, an injunction is specifically
14 designed to proscribe or regulate future conduct, and
15 that's what I say when it's nonspecific. The deterrent
16 effect is there at some level, but --

17 QUESTION: How could it be more specific? If it
18 says don't -- it is a remedy designed to prevent that
19 which was wrongfully done in the past from being done in
20 the future, and the thing that was wrongfully done in the
21 past is specifically shown by the evidence, and therefore
22 wouldn't the deterrence be equally specific?

23 MR. COCKRILL: It may or may not, Your Honor.
24 That's what I'm saying.

25 QUESTION: All right, well, if it may or may

1 not -- if it may or may not, why can't -- why isn't
2 Congress free to make a judgment that as a general matter
3 there will be cases in which the fact that a plaintiff
4 collects money for a past injury helps to deter this
5 defendant from doing the same thing in the future? Can't
6 Congress make the judgment that there are a lot of cases
7 like that?

8 MR. COCKRILL: I think Congress can make the
9 judgment.

10 QUESTION: If Congress can make the judgment,
11 then what is it about Article III that prevents them from
12 saying that a person who's had injury in the past, and
13 might have injury in the future, can bring a lawsuit to
14 create in this case that specific deterrence?

15 MR. COCKRILL: Justice Breyer, I think Congress
16 can make the judgment, as they do in the legislative
17 history of the Clean Water Act, that penalties will have a
18 number of effects, including a general deterrent effect.
19 I do not think Congress could make the judgment that
20 penalties do deter in every instance, because --

21 QUESTION: No, they're not saying every. What
22 they're saying is, there are a number of cases in which
23 they will specifically deter, and because we think there
24 are quite a few cases like that, there may be some, maybe
25 your case, where it wouldn't be true, but we think there

1 are quite a few, and therefore we give standing to people
2 to use that enforcement mechanism.

3 MR. COCKRILL: Well, they give -- under that
4 hypothetical, of course, you're getting closer to
5 penalties deterring in the great majority of cases. I
6 don't think Congress can legislate Article III
7 requirements.

8 As far as, if Congress declares that penalties
9 deter, or that they deter in the great majority of cases,
10 I don't think that's going to supply, necessarily, the
11 redress in Article III, and clearly, here, under these
12 facts, when the district court ruled in '97 -- and
13 Mr. Chief Justice, you asked -- you brought out the point,
14 you can't sue in Virginia to get something in California.

15 My colleague agreed with that. That's exactly
16 what the argument is in the reply brief, and I'm referring
17 to page 7, where we're told, through the affidavit of a
18 paralegal, that even if we stop discharging, which we
19 have, permanently, that Laidlaw and its corporate
20 affiliates have other facilities.

21 Well, first, Laidlaw doesn't, but our affiliates
22 do in other States, and there have been recent violations
23 of those, and --

24 QUESTION: But that was an end argument. They
25 made five or six arguments, and that was --

1 MR. COCKRILL: Yes, ma'am, but I -- but my point
2 was that they have taken the position that penalties
3 imposed in South Carolina will deter facilities in
4 Kentucky and Texas that aren't really before the court to
5 benefit --

6 QUESTION: But mainly they said, we don't have
7 much of a record on this closing, we do have the permit
8 still alive, and there's nothing that this Court can
9 decide on that.

10 There's one position that you had about mootness
11 that I was not clear on, and that was, you seem to say
12 it's their fault because they didn't appeal from the
13 denial of injunctive relief. Suppose they had, would
14 there then be no mootness question?

15 MR. COCKRILL: If they had appealed the denial
16 of injunctive relief, I think the court, the Fourth
17 Circuit could have heard the -- it would not have been
18 moot for that reason, for the statutory reason --

19 QUESTION: That would have saved the case for
20 mootness, even if the Fourth Circuit agreed with the
21 district court that, all things considered, injunctive
22 relief was unnecessary.

23 MR. COCKRILL: Yes, I think that's --

24 QUESTION: Then your rule is simply going to
25 turn this into a kind of appellate pleadings game.

1 MR. COCKRILL: No. We're not suggesting that
2 someone, that a plaintiff who has been denied injunctive
3 relief take an appeal, even though the plaintiff feels
4 that the injunction was properly denied. That's not what
5 we're saying. We're saying the Fourth Circuit --

6 QUESTION: On your rule, the plaintiff is always
7 going to feel that, because the plaintiff is going to know
8 that in fact reliance on the penalties is going to get him
9 nothing, because there won't be any penalty left, and
10 he'll have to appeal the denial of the injunction, or
11 he'll get nothing.

12 MR. COCKRILL: Well, I think as a matter of
13 statutory construction under the Clean Water Act you must
14 always have -- in order to get penalties, they must be
15 coupled with a request for injunctive relief. As a matter
16 of Article III --

17 QUESTION: And in your rule, in order to keep
18 penalties, any penalty awarded must be accompanied by a
19 continuing request for injunction at the appellate stage.

20 MR. COCKRILL: Yes. Under the Clean Water Act,
21 that's correct, but we're not suggesting that people take
22 appeals in which they don't have a good faith belief. In
23 this case --

24 QUESTION: But I -- well --

25 MR. COCKRILL: -- they made the decision not to

1 do it, and that's all we're saying, is that once they made
2 the decision to continue the litigation on appeal, seeking
3 only a remedy that would not redress any injury that they
4 had, that that, in effect, mooted the case --

5 QUESTION: Well, that turns --

6 MR. COCKRILL: -- of the Steel Company.

7 QUESTION: That may leave an interesting
8 question, but it turns the case into rather a sport, I
9 suppose.

10 MR. COCKRILL: I don't think it --

11 QUESTION: Nobody's ever going to make this
12 mistake again, if you win.

13 MR. COCKRILL: Well, except if they take up the
14 injunction and the civil penalties, I think Steel
15 Company -- Justice Kennedy said under the Lyons case and
16 the Casey case, and also Ashcroft v. Mattis, you look at
17 each remedy individually and if there's not Article III
18 jurisdiction for a particular remedy, it's not going to
19 save that remedy to couple it with a remedy such as an
20 injunction that does have an Article -- that is grounded
21 in Article III.

22 QUESTION: No, but the problem is that if you
23 admit that they have standing to get an injunction,
24 because an injunction will stop repetition --

25 MR. COCKRILL: Yes.

1 QUESTION: -- and if you admit that in the long
2 run, the mind run of cases, Congress could believe that in
3 the mind run of cases, collecting these kind of penalties
4 will stop repetition, then you must think that they have
5 standing and redressability to get this kind of penalty.
6 That's the Article III argument.

7 That's why -- that's the argument that once you
8 go down the road of saying an injunction is okay, even
9 though they're somewhat strangers, and once you say that
10 this has the same effect, in many cases, as an injunction
11 in terms of specific deterrence, even if not in yours --
12 that's a matter for other places to decide -- then you
13 must say that there is standing here.

14 QUESTION: Oh, I didn't understand you to say
15 that you could waive the requirement of deterrence in a
16 particular case. What is your position there?

17 Justice Breyer believes that you've said that
18 it's enough, as I understand it --

19 QUESTION: That Congress --

20 QUESTION: -- that Congress has found in the
21 generality of cases that penalties will deter.

22 QUESTION: Right.

23 QUESTION: Now, do you agree with that?

24 MR. COCKRILL: No, sir, I don't.

25 QUESTION: Well, what is your position?

1 MR. COCKRILL: My position is that, while
2 Congress has noted a general deterrent effect, which I
3 agree with, it's reasonable to presume that any penalty or
4 sanction will have some unknown, general effect. Traffic
5 laws do. Some people speed, some people --

6 QUESTION: Specific effect.

7 MR. COCKRILL: It -- the specific effect will
8 vary from person to person, and that's our position, that
9 penalties are not specific enough, and you cannot predict
10 the effect of a penalty on a --

11 QUESTION: Well, but is your position, then,
12 that penalties can never do the job, or that it's a case-
13 by-case thing, that in some cases you can show that a
14 penalty does have specific deterrence, or that since
15 Congress has found that penalties are enough, that that
16 would be true in all cases?

17 MR. COCKRILL: Well, I think in some cases,
18 penalties will deter. I would think it would be a bad
19 thing to make -- to send it back to the Federal courts for
20 a case-by-case determination. It's a difficult
21 determination to make, Mr. Chief Justice, what the effect
22 of a penalty is going --

23 QUESTION: What is your position on it, though?

24 MR. COCKRILL: My position on --

25 QUESTION: What is -- do you agree that there

1 was sufficient deterrence for Article III purpose in this
2 particular case?

3 MR. COCKRILL: No, Your Honor, I don't. I think
4 the penalties that were imposed had no deterrent effect,
5 because Laidlaw came into compliance on its own, and was
6 basically on the verge of compliance before the citizens'
7 suit was filed.

8 I think the penalty here were exactly because --
9 what the district court said, I'm mandated to do it, and
10 he based it entirely on past violations and then said, I
11 believe this, with the other costs, will deter, but it is
12 just too uncertain in any case, and it creates a lot of
13 confusion, and that's especially shown here, where at one
14 point in the Fourth Circuit the petitioners felt that
15 these were an ineffective deterrent and now feel that
16 they're an effective deterrent, and I think --

17 QUESTION: Mr. Cockrill --

18 MR. COCKRILL: -- that shows the problem.

19 QUESTION: -- can I ask you, before you're
20 finished with this other issue about counsel fees, there
21 is a split in the circuits on the so-called catalyst
22 theory --

23 MR. COCKRILL: There is.

24 QUESTION: -- which the Fourth Circuit rejected.
25 Is it appropriate for this Court, whatever it

1 does on the mootness part, to resolve that circuit split
2 on catalyst versus no catalyst, that you've got to get
3 something positive from the judgment?

4 MR. COCKRILL: If you overrule the Fourth
5 Circuit, and remand to the Fourth Circuit these other
6 jurisdictional questions, I think it would be premature.

7 If you -- I think the Government takes that
8 position, too, that that should be handled on remand. If
9 you --

10 QUESTION: But handling it on remand, if you're
11 a district court, you already know what your circuit court
12 has said, that is, no catalyst theory, so it would leave
13 this --

14 MR. COCKRILL: What I'm saying, Justice
15 Ginsburg, is, on remand to the Fourth Circuit, to consider
16 the standing argument based on lack of harm and the
17 statutory jurisdiction argument based on the diligent
18 prosecution, subject matter defense, if you send those
19 back to the Fourth Circuit, then I think it would be
20 premature for this Court to decide the attorney's fee
21 issue. The Fourth Circuit may decide that there was no
22 initial jurisdiction, either constitutional or statutory,
23 and that will resolve it.

24 If you affirm the Fourth Circuit and say they
25 were correct, then it might be proper that the case did

1 become moot at the time they appealed. Then I concede
2 that it may be proper to take up the attorney's fees issue
3 at that time.

4 Now, I wanted -- in the few remaining minutes
5 that I have, I wanted to address a question by Justice
6 O'Connor. You asked, did the closure moot. I think it
7 clearly did. We did retain the permit. In our Rule 21
8 suggestion of mootness motion we have an affidavit that
9 says why we did that, to make it more attractive to a
10 prospective purchaser, kind of like someone who sells a
11 restaurant and keeps an ABC license. It's easier to
12 transfer.

13 The more -- perhaps the more difficult question
14 is, if we did moot it by our unilateral action, what
15 should happen, and I would ask the Court to keep in mind
16 the Bonner Mall decision that says the Court may make a
17 disposition of the whole case, as justice may require,
18 taking into account the nature and character of the
19 conditions that led to the mootness.

20 QUESTION: Thank you, Mr. Cockrill.

21 Mr. Terris, you have 3 minutes remaining.

22 REBUTTAL ARGUMENT OF BRUCE J. TERRIS

23 ON BEHALF OF THE PETITIONERS

24 MR. TERRIS: Your Honors, in both Tull and
25 Romero-Barcelo this Court said that the Clean Water Act's

1 penalties were intended to deter, as -- and of course it
2 had other purposes as well.

3 The district court specifically found, and this
4 is on the joint appendix, on page 182, that the penalty
5 that it was imposing, together with attorney's fees which
6 it contemplated the plaintiffs would receive, and the
7 attorney's fees which the defendant's counsel obviously
8 have received, would constitute deterrence, so the --
9 Laidlaw's argument before this Court that there is not
10 specific deterrence in this case is in the face --

11 QUESTION: Well --

12 MR. TERRIS: -- of the determination by the
13 district court after 10 days of trial.

14 QUESTION: Could the district court, Mr. Terris,
15 simply say to defendant, I know you've hired a very
16 expensive lawyer in this case, you're going to have to pay
17 him a lot of money, so we don't need any more deterrence
18 for your violation?

19 MR. TERRIS: Well, Your Honor -- Your Honor
20 happens to have hit on one of the central grounds of our
21 appeal to the court of appeals, which was that we take the
22 position that the economic benefit has to be stripped from
23 the violator without taking into account attorney's fees,
24 particularly since the attorney's fees could not be known
25 to the district court at the time. I think that was a

1 mistake.

2 But the point that I'm making here is, because
3 that issue is -- clearly is not before Your Honors, the
4 point that I'm making to Your Honors is that the district
5 court clearly found that the penalty it was imposing was a
6 deterrent against future violations, that is, specific
7 deterrence, and I submit that it is a concrete benefit to
8 the plaintiffs.

9 I want to come back to the question about
10 whether -- whether, if you deny injunctive relief, then
11 you can't grant civil penalties, that injunctive relief is
12 not a lesser form of relief, and I think that is very
13 clearly shown in Romero-Barcelo.

14 There, this Court said that injunctive relief
15 should not lie under the facts of that case under the
16 Clean Water Act, but it then pointed out, although it did
17 not faithfully anticipate this Court's later ruling in
18 Department of Energy v. The State of Ohio about sovereign
19 immunity, but it then pointed out that penalties were an
20 alternative to injunctive relief, and I submit to Your
21 Honors that is exactly what we have in this case.

22 What the district court found was that there
23 was -- that there was not enough likelihood of violations
24 to justify the extraordinary relief of injunctive relief.
25 It said that the defendant did not need to show no chance

1 of violations in order to defeat injunctive relief under
2 the ordinary four-part test for injunctions, but it then
3 quite clearly said, when it got to civil penalties, that
4 that was a deterrent, and it would stand in place of
5 injunctive relief.

6 Thank you.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Terris.
8 The case is submitted.

9 (Whereupon, at 12:05 p.m., the case in the
10 above-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:

FRIENDS OF THE EARTH, INCORPORATED, ET AL., Petitioners v. LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.

CASE NO: 98-822

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