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STATE CITIZEN SUITS, STANDING, AND THE UNDERUTILIZATION OF STATE ENVIRONMENTAL LAW

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SUMMARY

This Article explores the relationship between state environmental citizen suit provisions and judicial standing requirements, and analyzes whether the introduction of citizen suits into state statutory law inspired increasingly strict state standing requirements, as occurred at the federal level. Specifically, it identifies how state judiciaries have interpreted standing and aggrievement in response to general, non-media-specific citizen suit provisions, both in the common law and in administrative law. It aims to determine whether judicial tightening of standing rules has made it harder for plaintiffs to gain access to state courts, and whether standing requirements are the reason state citizen suits have been underutilized and alternative legal channels have proven more useful. It concludes that state legislatures and administrative agencies actually are the source of many of the barriers to citizen suits.

In 1974, Patricia A. Renovitch published *The Florida Environmental Protection Act of 1971: The Citizen's Role in Environmental Management*, a predictive article about how future courts' broad or narrow interpretations of standing would affect citizens' ability to sue under the then-new environmental citizen suit statutes.[1] Renovitch explained that if courts construed states' novel citizen suit provisions liberally, then citizens would not need to promote alternative legal doctrines (e.g., expanding the public trust doctrine or granting standing to natural objects)[2] to strengthen the judiciary's role in protecting the environment.[3] Conversely, Renovitch explained that if courts construed these provisions narrowly, then citizens would need to promote alternative legal doctrines.[4]

Nearly half a century later, it is clear that Renovitch was right to identify these risks, and correctly predicted the growth of the public trust doctrine.[5] Renovitch also predicted that standing would be the primary barrier to access to courts, which we conclude is partly true. Over the past five decades, state courts and legislatures have actually relaxed standing requirements, although many requirements are still too strict, and have also constructed other procedural and financial barriers that deter citizen action.

1. Patricia A. Renovitch, *The Florida Environmental Protection Act of 1971: The Citizen's Role in Environmental Management*, 2 Fla. St. U. L. Rev. 736, 741-42 (1974).
2. *Id.* at 740-42. Renovitch correctly predicted that state legislatures have created more public trust statutes than citizen suit statutes, but was incorrect about natural standing, which Florida legislated against in 2019.
3. *Id.* at 737, 741-42, 752.
4. *Id.*
5. The expanded use of the public trust doctrine is a phenomenon beyond the scope of this Article. *See generally* Michael C. Blumm et al., The Public Trust Doctrine in 45 States (2014) (Lewis & Clark Law School Legal Studies Research Paper). As of 2014, 45 states had enacted some version of the public trust doctrine, far more than those who had enacted general or media-specific citizen suit statutes.

   However, like citizen suit plaintiffs, public trust doctrine plaintiffs also face standing issues. As of 2014, citizens have common-law standing to sue under the doctrine in Alabama, Alaska, Arkansas, California, Florida, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Texas, Utah, Vermont, Washington, and Wyoming. Citizens have statutory standing to sue under the doctrine in Alaska, Arizona, California, Connecticut, Delaware, Michigan, Minnesota, Montana, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Virginia, Wisconsin, and Wyoming. Citizens have administrative aggrievement to sue under the doctrine in Hawaii, Idaho, Maryland, and Rhode Island. Finally, citizens have constitutional standing to sue under the doctrine in Alaska, California, Hawaii, Illinois, Louisiana, Montana, New York, and Pennsylvania.

However, somewhat surprisingly, it is state legislatures (rather than state judiciaries) and administrative agencies that are the source of many of the would-be citizen suit plaintiff's barriers.

In other words, the same legislatures that "gave" citizens additional rights through new environmental statutes on the one hand, also "took away" the ability of plaintiffs to enforce those rights. This has meant that alternative enforcement mechanisms have become correspondingly more important, and this Article explores several such mechanisms that citizens have found since the time Renovitch's article was published.

I. Background

In the 1960s, the U.S. Congress began to enact environmental protection statutes that required certain kinds of federal agency action.[6] However, legislators quickly realized that these statutes lacked sufficient enforcement mechanisms to guarantee that federal agencies would actually address pollution on a national scale, as the executive branch and the administrative bureaucracy could not keep up with violations.[7] As a result, Congress passed additional environmental acts with citizen suit provisions in the 1970s to enable citizens to enforce environmental laws themselves. By turning citizens into private attorneys general who could sue both violators and the agencies who failed to regulate those violators, Congress created a safeguard to ensure that the executive branch and the bureaucracy would not fall behind.[8] Under these novel provisions, citizens were able not only to sue those who violated federal environmental statutes, but also to sue those agencies that failed to enforce the law.[9]

However, it soon became clear that citizen suit provisions alone could not guarantee court access for potential plaintiffs. Faced with a surge of citizen suits brought by private persons seeking to enforce federal law, either in their own interest or in the public interest, the U.S. Supreme Court began to impose other restrictions to make it more difficult for citizens to reach federal courts. The most important such restriction has been the doctrine of standing. This doctrine derives from Article III of the U.S. Constitution, which only allows the federal judiciary to adjudicate "cases and controversies."[10] In other words, even if Congress enacts a citizen suit provision allowing an individual to sue, that individual may not avail himself or herself of federal court if that individual lacks standing to bring a case.[11]

This has become problematic for plaintiffs, because the Supreme Court has a well-documented history of narrowing standing requirements in response to federal environmental legislation.[12] While the doctrine has gone through an evolution over the past 50 years, by 1992, the Supreme Court established a narrow, three-part test for standing.[13] First, all plaintiffs must suffer an injury-in-fact, meaning an injury of a legally protected interest that is both concrete and particularized and also either actual or imminent.[14] Second, there must be a causal connection between the injury and the conduct brought before the court.[15] Third, it must be likely, not just speculative, that a favorable decision by the court will redress the injury.[16] Notably, even though federal citizen suits generally vindicate the public's interest rather than an individual's interests, the Supreme Court has declined to recognize an Article III case or controversy where the federal plaintiffs themselves failed to show that there was a particularized, actual, or imminent injury to them.[17]

Therefore, while Congress enacted a multitude of federal citizen suit provisions creating opportunities for citizen enforcement of federal environmental law, the Supreme Court reacted by pronouncing that citizens do not have standing to sue for legal or regulatory violations that do not directly impact them. In this way, access to courts is not just a question of having a statute that enables citizen enforcement, it is also a question of the judiciary's interpretations of that statute. While scholars have evaluated judicial standing requirements extensively at the federal level, these questions have not been answered in a comprehensive way at the state level.

This Article conducts a parallel review of state citizen suit provisions and evaluates whether state judiciaries reacted to state citizen suit statutes in a similar way. This research will identify whether, when state legislatures have given citizens opportunities to sue, state judiciaries have

6. Robin Kundis Craig, Standing and Environmental Law: An Overview (FSU College of Law, Public Law Research Paper No. 425, 2009).
7. Peter A. Alpert, *Citizen Suits Under the Clean Air Act: Universal Standing for the Uninjured Private Attorney General?*, 16 B.C. Env't Affs. L. Rev. 283, 310 (1988).
8. Jonathan H. Adler, *Stand or Deliver: Citizen Suits Standing and Environmental Protection*, 12 Duke Env't L. & Pol'y F. 39, 52 (2001/2002).
9. Craig, *supra* note 6, at 1.
10. U.S. Const. art. 3, §2, cl. 1.
11. *See* Adler, *supra* note 8, at 51-52; Lujan v. Defenders of Wildlife, 504 U.S. 555, 22 ELR 20913 (1992). The Supreme Court explicitly defined federal standing in the context of the environmental citizen suit in *Lujan*.
12. *See* Adler, *supra* note 8, at 51-57 (Part III examines the Supreme Court's competing approaches to standing, as typified by *Lujan* and *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 30 ELR 20246 (2000).).
13. *Lujan*, 504 U.S. at 560.
14. *Id.*; Conservation L. Found., Inc. v. Jackson, 964 F. Supp. 2d 152 (D. Mass. 2013) ("[F]or an injury to be 'particularized,' it must affect the plaintiff in a personal and individual way," meaning that it must be a *special* injury.). At the state level, "injury-in-fact" does not necessarily mean that the plaintiff experienced a *special* injury. In Part II, many states discussed require an "injury-in-fact" but not a *special* injury.
15. *Lujan*, 504 U.S. at 560.
16. *Id.*
17. *Id.* (Justice Antonin Scalia wrote that, "to allow that interest to be converted into an individual right by a statute . . . would authorize Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" (citing U.S. Const. art. 2, §3)). Note that in 2000, the Supreme Court did broaden somewhat the definitions of "injury-in-fact" and "redressability," holding that the deterrence afforded by civil penalties sufficiently redressed an environmental injury-in-fact even though such penalties would be paid to the government, not to plaintiffs themselves. Michael P. Healy, *Standing in Environmental Citizen Suits:* Laidlaw*'s Clarification of the Injury-in-Fact and Redressability Requirements*, 30 ELR 10455 (June 2000) ("[T]he deterrence afforded by civil penalties was sufficient redress for environmental injury-in-fact."); *see also* Sierra Club v. Morton, 405 U.S. 727, 2 ELR 20469 (1972) (the lessening of aesthetic and recreational values are forms of harm); Adler, *supra* note 8, at 56 (citing *Friends of the Earth*, 528 U.S. 167).

responded by restricting standing as the Supreme Court did, or whether the state legislatures and judiciaries have a pattern of their own.

II. Standing and Aggrievement

General, non-media-specific citizen suit provisions allow individuals to sue for any environmental violations prohibited by state law. They are distinct from media-specific provisions, which allow individuals to sue for environmental violations prohibited by the section or chapter to which the citizen suit specifically applies (e.g., only to clean air violations).[18] Both general and media-specific provisions can come from either constitutional law or statutory law. General provisions are present in Alaska, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, North Dakota, South Dakota, and Wyoming.[19]

More than one-half of these 17 states' legislatures enacted their general citizen suit protections during the environmental movement of the 1970s.[20] Two of the 17 states, Illinois and Hawaii, enacted general constitutional citizen suit provisions by inserting self-executing environmental protections into their bills of rights.[21] Some of these states' general statutory citizen suit provisions require plaintiffs to experience actual or potential adverse effects,[22] or limit access to courts through notice requirements,[23] minimum plaintiff requirements,[24] citizenship requirements,[25] conditional prohibitions,[26] limitations on damages,[27] and "reasonable" but undefined restrictions.[28]

State constitutional provisions tend to be much shorter than state statutory provisions. For example, the state of Illinois has enacted both constitutional and statutory provisions: Illinois' constitutional provision is two sentences long,[29] while the statutory provisions for the state are each several paragraphs long.[30] Article XI, §2 of the Illinois Constitution states, "Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law."[31]

Therefore, while Article XI, §2 enumerates Illinoisans' general right to sue to protect the environment, plaintiffs generally cannot rely on this provision alone to get into court. Instead, plaintiffs must turn to the "Injunctive and other relief" section of the Illinois Environmental Act.[32] This statute states in relevant part:

> Any person adversely affected in fact by a violation of [Illinois' Environmental Protection Act], any rule or regulation adopted under [Illinois' Environmental Protection Act], any permit or term or condition of a permit, or any [Illinois Pollution Control] Board order may sue for injunctive relief against such violation. However, except as provided in subsections (d) and (e), no action shall be brought under this Section until 30 days after the plaintiff has been denied relief by the [Illinois Pollution Control] Board in a proceeding brought under subdivision (d)(1) of Section 31 of this Act [Illinois Compiled Statutes Annotated ch. 415, 5/31, "Notice; complaint; hearing"].[33]

The legal pathway in Illinois, then, is for citizens to gain the right to sue from Article XI, §2 of the Illinois Constitution, to follow any applicable administrative procedures described in the Illinois Environmental Act's "Notice; complaint; hearing" section,[34] and finally, if the administra-

18. *See infra* Section IV.B.
19. 15 David F. Sherwood & Janet P. Brooks, Connecticut Practice Series, Connecticut Environmental Protection Act §1:7 (2020); Conn. Gen. Stat. Ann. §§22a-14 to 22a-20 (2020); Fla. Stat. Ann. §403.412 (2021); Ind. Code Ann. §§13-30-1-1 to 13-30-1-12 (2021); Minn. Stat. Ann. §§116B.01 to 116B.13 (2021); S.D. Codified Laws §§34A-10-1 to 34A-10-17 (2021); N.J. Stat. Ann. §§2A:35A-1 to 2A:35A-14 (2021); Mich. Comp. Laws §324.20135 (2021); Mich. Comp. Laws §324.1701 (2021) (Connecticut, Florida, Indiana, Minnesota, New Jersey, and South Dakota modeled their citizen suit statutes on Michigan's citizen suit statutes.).
20. *See* Art English & John J. Carroll, *State Constitutions and Environmental Bills of Rights*, *in* The Book of the States 18 (Audrey S. Wall et al. eds., Council of State Governments 2015); Delaware Riverkeeper Network v. Secretary of the Pa. Dep't of Env't Prot., 903 F.3d 65, 48 ELR 20157 (3d Cir. 2018) (interpreting Pa. Const. art. I, §27 (1971)). An 18th general citizen suit statute is arguably present in Pennsylvania. However, this Article does not consider Pennsylvania's constitutional provision to be a citizen suit statute because it is not self-executing.
21. English & Carroll, *supra* note 20, at 18-22; Pa. Const. art. I, §27 (1971); Mass. Const. amend. 49 (1972); Mont. Const. art. II, §3 (1889); R.I. Const. art. I, §17 (1970); Ill. Const. art. XI, §§1, 2 (1971/1972); Haw. Const. art. XI, §§1, 9 (1978). There are six state constitutional environmental bill of rights provisions. These provisions are in Pennsylvania, Massachusetts, Montana, Rhode Island, Illinois and Hawaii. However, only Illinois' and Hawaii's citizen suit provisions are self-executing.
22. Wyo. Stat. Ann. §35-11-904 (2021) (Wyoming requires a potentially adverse effect on plaintiffs); La. Stat. Ann. §30:2026 (2021) (Louisiana requires a potentially adverse effect on plaintiffs); N.D. Cent. Code §32-40-06 (2021) (North Dakota requires an adverse effect on plaintiffs).
23. Alaska Stat. §46.03.481 (2020) (Alaska requires 45 days' notice); La. Stat. Ann. §30:2026 (2021) (Louisiana requires 30 days' notice); Mass. Gen. Laws ch. 214, §7A (2020) (Massachusetts requires 21 days' notice); Nev. Rev. Stat. Ann. §41.540 (2021) (Nevada requires 30 days' notice); Wyo. Stat. Ann. §35-11-904 (2021) (Wyoming requires 60 days' notice).
24. Mass. Gen. Laws ch. 214, §7A (2020) (no fewer than 10 residents joined as plaintiffs can sue in Massachusetts).
25. Alaska Stat. §46.03.481 (2020); Fla. Stat. Ann. §403.412 (2021); Mass. Gen. Laws ch. 214, §7A (2020); Md. Code Ann., Nat. Res. §1-503 (2020); Nev. Rev. Stat. Ann. §41.540 (2021). The Alaska, Florida, Maryland, Massachusetts, and Nevada statutes impose a citizenship or residency requirement on plaintiffs.
26. La. Stat. Ann. §30:2026 (2021); Mass. Gen. Laws ch. 214, §7A (2020); S.D. Codified Laws §34A-10-1 (2021); Wyo. Stat. Ann. §35-11-904 (2021) (Louisiana, Massachusetts, South Dakota, and Wyoming generally will not permit citizen suits where the state has already commenced some form of legal action addressing the issue).
27. Mass. Gen. Laws ch. 214, §7A (2020) (plaintiffs cannot recover damages in Massachusetts); N.D. Cent. Code §32-40-06 (2021) (plaintiffs cannot recover damages from state agencies in North Dakota).
28. Ill. Const. art. XI, §2; Haw. Const. art. XI, §9.
29. Ill. Const. art. XI, §2.
30. 415 Ill. Comp. Stat. Ann. 5/31, 5/45 (2021).
31. Ill. Const. art. XI, §2.
32. 415 Ill. Comp. Stat. Ann. 5/45 (2021).
33. *Id.*
34. *Id.* 5/31.

tive procedures fail, to sue in state court under the Illinois Environmental Act's "Injunctive and other relief" section.[35]

However, a problem arises for plaintiffs if a federal law preempts a state law. If this occurs, then plaintiffs cannot rely on the preempted state law for relief. Instead, federal law supersedes the state law in question, the plaintiffs will be forced to bring a federal cause of action, and federal Article III standing will apply.[36] This generally occurs under federally delegated or approved environmental programs. In those programs, the federal U.S. Environmental Protection Agency (EPA) promulgates regulations and the states seek authorization to administer and enforce their own standards within the bounds of federal oversight.[37]

In this situation, state governments are acting almost as junior partners of the federal government, and some states have explicitly acknowledged this in their citizen suit statutes.[38] For example, Florida's Environmental Protection Act states in part, "In a matter pertaining to a federally delegated or approved program, a citizen of the state may initiate an administrative proceeding under this subsection if the citizen meets the standing requirements for judicial review of a case or controversy pursuant to Article III of the United States Constitution."[39]

With this in mind, the constitutional and statutory provisions discussed here in Part II are separate from the state programs that enforce federal clean air, clean water, and hazardous waste standards at a state level. Again, for violations under federal programs, Article III standing applies.[40]

Even when a state's constitutional or statutory provision is not federally preempted, plaintiffs still need to examine whether they must meet extra standing requirements over and above those described in the statute to have standing to bring a citizen suit. In other words, even if there is no federally mandated standing requirement under Article III, the state itself may impose a standing requirement as a matter of state law. Such state standing requirements can be either "statutory" or "classical." Statutory standing is created by the legislature and requires that a plaintiff show injury to a legislatively protected interest,[41] while classical standing is created by judicial analysis and requires that a plaintiff show that he or she will be genuinely and directly affected by the outcome of the judicial decision.[42] In most situations, state classical standing doctrines involve a showing of special injury to the plaintiff, different from the injury that the general public will suffer.

A heightened standing requirement is present either when classical standing is more rigorous than statutory standing and the judiciary does not reduce the classical standing requirements to reflect the statutory standing requirements, or when a court or judiciary makes the standing doctrine more rigorous in the context of environmental law.[43] Therefore, if a court determines that classical standing requires a greater showing than statutory standing, the plaintiff must meet additional standing requirements over and above those described in the statute to access court. This arises most frequently with regard to the classical special injury standing requirement, with some state courts reading the special injury requirement into citizen suit provisions even when it is not expressly included in the statute.[44]

Conversely, because state-level classical standing is not mandated by Article III, there may be situations when a state provides *greater* access to courts than state common-law standing requirements would allow. Such situations include (1) when the legislature explicitly states that statutory standing reduces a plaintiff's classical burden; (2) when a court reads in a legislative intent to reduce a plaintiff's classical burden; or (3) when a court creates exceptions to classical requirements.[45] These situations create a relaxed standing requirement, and are possible as long as there is no case-or-controversy requirement in the state's constitution.[46] Nevertheless, state courts are often strongly influenced by the federal standing doctrine, which tends to be narrower than states' actual constitutional limitations.[47]

Finally, although there are many more state citizen suit statutes than are discussed in this Article,[48] the majority of

35. *Id.* 5/45.
36. John P. Dwyer, *The Role of State Law in an Era of Federal Preemption: Lessons From Environmental Regulation*, 60 Law & Contemp. Probs. 203, 214-15 (1997).
37. *See*, *e.g.*, 84 Fed. Reg. 50882, 50883 (Sept. 26, 2019) ("At the federal level, EPA, under authority granted by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 321 *et seq.*, has promulgated regulations to control hazardous waste. This includes the generation, transportation, treatment, storage, and disposal of hazardous waste.").
38. Dwyer, *supra* note 36, at 216, n.73. *See*, *e.g.*, 49 Fed. Reg. 28245 (July 11, 1984) (in Montana, hazardous waste is regulated by the Montana Department of Environmental Quality).
39. Fla. Stat. Ann. §403.412 (2021).
40. *See* Daniel P. Selmi, *Themes in the Evolution of the State Environmental Policy Acts*, 38 Urb. Law. 949, 950 (2006). *See generally* Adam Babich, *Is RCRA Enforceable by Citizen Suit in States With Authorized Hazardous Waste Programs?*, 23 ELR 10536 (Sept. 1993).
41. *See, e.g.,* Fort Trumbull Conservancy, LLC v. Alves, 815 A.2d 1188, 1194 (Conn. 2003) ("Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation") (citation and quotations omitted).
42. *Id.* ("Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the decision, as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the agency's decision has specially and injuriously affected that specific personal or legal interest. . . . Aggrievement does not demand certainty, only the possibility of an adverse effect on a legally protected interest. . . .") (citation and quotations omitted).
43. *See* Sherwood & Brooks, *supra* note 19, §1:4.
44. *See infra* notes 110, 113-14.
45. *See infra* notes 58-59, 67-68, 74-75, 79-80, 104, 121, 123-24, 129-30.
46. ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989):
    > [T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute. . . . Although the state courts are not bound to adhere to federal standing requirements, they possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law.
47. *See* Jack L. Landau, *State Constitutionalism and the Limits of Judicial Power*, 69 Rutgers U. L. Rev. 1309, 1314-15 (2016/2017). *See generally* Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 Ky. J. Equine Agric. & Nat. Res. L. 349 (2015/2016).
48. The statutes excluded from this Article are media-specific.

states do not have any citizen suit provisions in place at all. Some academics believe that the practical effect of most states' refusals to authorize citizen suits is not significant, but this is not necessarily true.[49] While many state environmental laws track federal environmental laws, and while private citizens can sometimes use federal citizen suit provisions to achieve enforcement, there are instances when either the lack of a citizen suit provision or the presence of a restrictive citizen suit provision means that there is no remedy for the plaintiff.[50]

Consider hypothetical plaintiff Jane Doe, an auto dealer living in rural Illinois.[51] Jane holds auctions twice a week for auto dealers throughout Illinois. Jane's dealership is adjacent to a plot of land that is sometimes licensed as an open dirt horse racetrack. When the track is in use, dirt ("airborne particulate matter") blows onto Jane's vehicles and makes them harder to sell. Additionally, the more the track is used, the less willing Illinois dealers have been to participate in Jane's auctions. This has a significant economic impact on Jane. Jane would like the owner of the racetrack to treat the track with the appropriate chemicals and solve the problem, but the landowner is unwilling to do so.

Frustrated, plaintiff Jane Doe decides to see if the dirt is a type of air pollution. She contacts the Illinois Environmental Protection Agency (IEPA) about the dirt the horse racetrack is blowing onto her auto dealership and explains the economic harm she is suffering. An IEPA employee dutifully investigates the condition of the racetrack at Jane's request and concludes that regulatory violations are present. Jane contacts Illinois' attorney general to share the IEPA employee's findings, and the attorney general's office tells Jane that it is too busy to help. The attorney general's office advises Jane that she should hire an attorney and bring a civil action herself. However, it turns out that under state law, if Jane wants to bring a citizen suit for the track's violation of air quality standards,[52] she will have to bring both an administrative-law action[53] and a common-law action.[54]

We delve into the particular dynamics of Jane's case in later portions of this Article. In the meantime, however, we review how common-law plaintiffs in other states show standing, because the dilemmas that Jane faces are quite common for state-level citizen plaintiffs.

A. *How Do Common-Law Plaintiffs Show Standing?*

We turn first to a discussion of how state courts have addressed the threshold jurisdictional issue of standing in the context of general, non-media-specific environmental citizen suits.[55] Of all the state judiciaries analyzed in this Article, only Iowa's read a heightened statutory standing requirement into the state's citizen suit statute, thereby increasing the burden citizen-plaintiffs already faced under the classical standing doctrine.

In most of the states discussed (Massachusetts, Michigan, New Jersey, and North Dakota), either the legislature explicitly created a lower statutory standing doctrine in the citizen suit statute and the judiciary rejected the classical standing doctrine in favor of the new doctrine, or the judiciary looked to the legislature's intent in creating the citizen suit provision and reduced the classical standing doctrine accordingly. In Hawaii, moreover, the legislature did not set any standing requirements in its constitutional provision and the judiciary nonetheless relaxed its classical standing doctrine without substantial legislative involvement.

The result in every state except Iowa is that plaintiffs faced relaxed standing burdens when filing common-law citizen suits. Further, among the eight states whose judiciaries have not fully articulated the standing requirements for citizen suit provisions (Alaska, Indiana, Louisiana, Minnesota, Nevada, South Dakota, and Wyoming), two states' judiciaries (Minnesota's[56] and Wyoming's[57]) have

49. Kenneth A. Manaster & Daniel P. Selmi, State Environmental Law §16:52 (2020).

50. Limited opportunities to obtain damages can be a significant limiting factor.

51. Jane Doe's conflict was inspired by *Decatur Auto Auction, Inc. v. Macon County Farm Bureau, Inc.*, 627 N.E.2d 1129 (Ill. App. Ct. 1993); *Wells Manufacturing Co. v. Pollution Control Board*, 363 N.E.2d 26 (Ind. App. Ct. 1977), *aff'd*, 383 N.E.2d 148 (Ill. 1978) (explaining that standards for "unreasonable interference with the enjoyment of life or property" within the statutory definition of "air pollution" require consideration of (1) the character and degree of injury to, or interference with the protection of, the health, general welfare, and physical property of the people; (2) the social and economic value of the pollution source; (3) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority; and (4) the technical practicability and economic reasonableness of reducing or eliminating the emissions); *Processing & Books, Inc. v. Pollution Control Board*, 351 N.E.2d 865 (Ill. 1976) (discussing air pollution violation from odors emitted from egg and poultry farm); and *Cobin v. Pollution Control Board*, 307 N.E.2d 191 (Ill. App. Ct.), *aff'd*, 401 N.E.2d 1390 (Ill. 1974) (discussing air pollution violation from open burning).

52. 415 Ill. Comp. Stat. Ann. 5/3.115 (2021). *See also* 55 Ill. Comp. Stat. Ann. 5/5-1061 (2021) ("'[A]ir contaminant' means and includes but is not limited to the following: dust, soot, mist, smoke, fumes, fly ash, vapor, corrosive gas or other discharge and any other air borne material or substance that is offensive, nauseous, irritating or noxious to humans or other animal life.").

53. 415 Ill. Comp. Stat. Ann. 5/31 (2021).

54. *Id.* 5/45.

55. *See*, *e.g.*, Michael D. Harbour, *The Exact Nature of California's Standing Doctrine*, Daily J. Corp. (Dec. 31, 2018), https://www.dailyjournal.com/mcle/374-the-exact-nature-of-california-s-standing-doctrine (explaining that not every state makes standing a "jurisdictional prerequisite" because not every state has a constitutional provision that establishes a case-or-controversy requirement).

56. When the judiciary is asked to answer this question, it is possible that it will follow Michigan's interpretation, because Minnesota's Legislature modeled the Minnesota Environmental Rights Act after the Michigan Environmental Protection Act (MEPA), Minnesota's courts borrowed the *Wacouta* test from Michigan's courts, and Minnesota's courts have repeatedly followed the Michigan courts' decisions. *See* State by Schaller v. County of Blue Earth, 563 N.W.2d 260, 265 (Minn. 1997). *See generally* County of Freeborn by Tuveson v. Bryson, 210 N.W.2d 290, 4 ELR 20215 (Minn. 1973).

57. William F. West Ranch, LLC v. Tyrrell, 206 P.3d 722, 727 (Wyo. 2009) (Wyoming's judiciary has expressed a willingness to apply "a more expansive or relaxed definition of standing" if a case is brought in the future in which the plaintiff has a traceable injury and if "a matter of great public interest or importance is at stake"); Director of State Lands & Invs. v. Merbanco, Inc., 70 P.3d 241 (Wyo. 2003) ("While this Court has recognized a more lenient definition of justiciab[i]lity in matters of great public importance, the facts

suggested that they would relax, rather than heighten, standing requirements if the opportunity arose.

For example, Michigan's judiciary has rejected the classical special injury standing requirement in the context of environmental citizen suits. Instead, Michigan's judiciary has held that statutes[58] granting standing should be applied as written.[59] Michigan's judiciary did not follow a linear path to reach this conclusion. Instead, it relaxed the classical doctrine,[60] heightened the classical doctrine,[61] then relaxed the classical doctrine again.[62] The judiciary heightened the classical standing doctrine to better reflect the federal classical standing doctrine. Later, it reversed and held that the federal classical standing doctrine did not reflect Michigan's legal history or constitutional requirements, and Michigan returned to its own relaxed classical standing doctrine.[63]

Because the Michigan Legislature intended to give injured plaintiffs the right to sue defendants to redress their injuries, plaintiffs do not need to show special injury to sue.[64] To bring a citizen suit in Michigan, citizen-plaintiffs must show that their health or enjoyment of the environment is or may be adversely affected by a prohibited release of pollution.[65] The result is a statutory citizen suit standing doctrine that is somewhat relaxed compared to Michigan's classical standing doctrine. Relaxing the doctrine is possible because there is no restrictive case-or-controversy requirement in Michigan's Constitution.[66]

Similarly, New Jersey's judiciary does not require plaintiffs to satisfy the classical special injury standing requirement[67] in environmental citizen suits, and instead requires them to meet the New Jersey Environmental Rights Act's[68] relaxed statutory standing doctrine. To bring a citizen suit in New Jersey, a plaintiff only needs to be interested in abating environmental damage[69] to have standing to sue a polluter for declaratory and equitable relief.[70] By establishing a more relaxed statutory environmental standing doctrine,[71] New Jersey's Legislature set a lower bar for plaintiffs to initiate environmental citizen suits.[72] New Jersey's judiciary can oversee these cases because it is not limited by a restrictive state constitutional case-or-controversy requirement.[73]

Like the New Jersey Legislature, the Massachusetts Legislature has also done away with the classical special injury standing requirement[74] in environmental law and created a statutory doctrine that is only concerned with whether the environment is injured, as opposed to whether a legal

alleged in these cases demonstrate that public importance alone is not sufficient to establish justiciability.").

58. *See* Sherwood & Brooks, *supra* note 19. *See also* Mich. Const. art. IV, §52 (Michigan's Constitution was amended in 2000 to reflect the legislature's concern for citizens' welfare. The constitutional provision supports MEPA, but is neither a citizen suit provision nor part of the state's bill of rights.); Cipri v. Bellingham Frozen Foods, Inc., 596 N.W.2d 620, 623 (Mich. Ct. App. 1999):

> The Natural Resources and Environmental Protection Act (NREPA), M.C.L. §324.101 *et. seq.*; MSA 13A.101 *et seq*., became effective on March 30, 1995. 1994 PA 451. It repealed several statutes, including the prior Environmental Protection Act (MEPA) and the Environmental Response Act (MERA), both of which are involved in this case. These are now the Michigan Environmental Protection Act (MEPA), M.C.L. §324.1701 *et seq*.; MSA 13A.1701 *et seq*., and the remediation act, M.C.L. §324.20101 *et seq*.; MSA 13A.20101 *et seq*.

59. Anglers of the AuSable, Inc. v. Department of Env't Quality, 793 N.W.2d 596, 41 ELR 20056 (Mich. 2010).
60. First interpretation: Prior to 2001, Michigan's judiciary interpreted MEPA's standing provision broadly, explaining that plaintiffs could bring cases under MEPA if they could show that there was actual or probable damage to the environment. Damage was actual or probable depending on whether the natural resource involved was rare, unique, endangered, or easily replaceable, whether the proposed action would have any significant consequential effect on other resources, and whether the impact on animals or vegetation would affect a critical number of those resources. *See* Nemeth v. Abonmarche Dev., 576 N.W.2d 641, 646 (Mich. 1998); City of Portage v. Kalamazoo Cnty. Rd. Comm'n, 355 N.W.2d 913 (Mich. Ct. App. 1984); People for Env't Enlightenment & Responsibility, Inc. v. Minnesota Env't Quality Council, 266 N.W.2d 858, 866, 8 ELR 20630 (Minn. 1978).
61. Second interpretation: In 2001, Michigan's courts adopted the same standing requirements as U.S. federal courts. After 2001, standing under MEPA required (1) that plaintiffs suffer an injury-in-fact; (2) that there is a causal connection between the injury and the conduct; and (3) that it is likely, not speculative, that a favorable decision by the court will redress the injury. *See* Michigan Citizens for Water Conservation v. Nestlé Waters N. Am., Inc., 479 Mich. 280, 295, 37 ELR 20193 (Mich. 2007) (quoting Lee v. Macomb Co. Bd. of Comm'rs, 464 Mich. 726, 739 (Mich. 2001)); American Family Ass'n v. Michigan State Univ. Bd. of Trs., 739 N.W.2d 908, 915 (Mich. 2007).
62. Third interpretation: In 2010, Michigan's judiciary returned to its original, pre-2001 classical standing doctrine, holding that jurisprudence should be restored to a limited, prudential approach that is consistent with Michigan's long-standing historical approach to standing. *See* Lansing Schs. Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686, 703 (Mich. 2010) (The concurrence stated, "The *Lee* [464 Mich. 726] standing doctrine represented an unprecedented and unrestrained expansion of judicial power that dishonored our Michigan Constitution and decimated the rule of law and therefore it must be reversed.").
63. *Id*.
64. *Id*. at 691-92 (to bring a citizen suit in Michigan, a plaintiff must have a special injury or right, or a substantial interest, that will be detrimentally affected in a manner different from the citizenry at large, or the legislature must have intended to give the injured plaintiff the right to sue the defendant to redress his or her injury).
65. Mich. Comp. Laws. §324.20135 (2021).
66. Mich. Const. art. VI, §10; *Lansing*, 792 N.W.2d at 696 ("[T]he Michigan Constitution's reference to the judicial power does not inherently incorporate the federal case-or-controversy requirement, and, in fact, importing this requirement is inconsistent with this Court's historical view of its own powers and the scope of the standing doctrine. . . .").
67. Superior Air Prods. Co. v. NL Indus., Inc., 216 N.J. Super. 46, 58 (N.J. Super. Ct. App. Div. 1987); Ironbound Health Rts. Advisory Comm'n v. Diamond Shamrock Chem. Co., 216 N.J. Super. 166, 174, 17 ELR 20887 (N.J. Super. Ct. App. Div. 1987) (eliminating the special injury requirement "would thus remedy . . . an unnecessary and obsolete impediment to enforcement of anti-pollution laws").
68. N.J. Stat. Ann. §2A:35A-4 (2021). The New Jersey Environmental Rights Act (NJERA) became effective in 1974. NJERA gives any person the right to sue anyone who is continuously or intermittently in violation of any statute, regulation, or ordinance that is designed to prevent or minimize pollution, impairment, or destruction of the environment if the violation is likely to recur.
69. *Superior Air Prods. Co.*, 216 N.J. Super. at 59.
70. *Ironbound*, 216 N.J. Super. at 173.
71. State v. A.L., 440 N.J. Super. 400, 418 (N.J. Super. Ct. App. Div. 2015); New Jersey Dep't of Env't Prot. v. Exxon Mobil Corp., 181 A.3d 257, 267 (N.J. Super. Ct. App. Div. 2018) (the judiciary grants standing to any person who (1) has a sufficient stake in the outcome of the litigation, meaning a personal or pecuniary interest or property right adversely affected; (2) has a real adverseness with respect to the subject matter; and (3) is substantially likely to suffer harm in the event of an unfavorable decision).
72. *See infra* Appendix A. Courts have decided 50 cases under NJERA.
73. N.J. Const. art. VI, §V, para. 3. *See generally Exxon Mobil Corp*., 181 A.3d 257.
74. Town of Canton v. Commissioner of the Mass. Highway Dep't, 919 N.E.2d 1278 (Mass. 2010).

person is specifically injured.[75] Massachusetts' judiciary has not applied the classical standing doctrine to citizen suits. To bring a citizen suit in Massachusetts, a group of at least 10 plaintiffs must show that there has been, or could be, imminent,[76] not-insignificant damage to the environment in violation of Massachusetts' law.[77] The result is a statutory citizen suit standing doctrine that is relaxed compared to Massachusetts' classical standing doctrine. This is possible because Massachusetts' judiciary is not limited by a restrictive state constitutional case-or-controversy requirement.[78]

Finally, Hawaii has the most relaxed judicial environmental standing doctrine of all the states discussed in this Article. Hawaii's judiciary has relaxed the classical standing doctrine by eliminating the special injury requirement[79] when plaintiffs sue under the constitutional citizen suit provision.[80] A plaintiff meets Hawaii's classical standing doctrine when he or she suffers an actual or threatened injury-in-fact,[81] there is a causal connection between the injury and the conduct, and it is likely, not speculative, that a favorable decision by the court will redress the injury.[82] A plaintiff meets the judiciary's relaxed environmental classical standing requirement when the lawsuit involves public interest environmental concerns.[83]

If public interest environmental concerns are present, the judiciary will look for an "injury-in-fact" rather than a "legal right,"[84] and will consider "[a]esthetic and environmental well-being" to be forms of harm.[85] Hawaii's judiciary has therefore broadened standing more than other states' judiciaries have.[86] Relaxing the standing doctrine is possible because Hawaii's judiciary is not limited by a restrictive state constitutional case-or-controversy requirement.[87]

It appears that, unlike the federal judiciary, state judiciaries have tended to actually relax standing requirements in the context of environmental citizen suits. In other words, when state legislatures attempt to relax the standing doctrine for environmental plaintiffs, state judiciaries overwhelmingly respect those legislative decisions. This does not mean, however, that state judiciaries are granting plaintiffs the broadest possible citizen suit standing available under each state's constitution. While state legislatures tend to relax the standing doctrine, those same legislatures put other roadblocks in plaintiffs' paths, which are discussed in Parts III and IV.

Iowa stands out as the most obvious exception to the general relaxation of states' environmental standing doctrines, given that Iowa's judiciary has read a heightened standing requirement into the state's citizen suit provision.[88] The court has stated that, because the statute requires plaintiffs to experience an adverse effect to have standing, plaintiffs must show both factual and legal causation.[89] Therefore, to bring a citizen suit in Iowa, a plaintiff must be adversely affected by an alleged violation[90] and must also show that the defendant's conduct in fact caused the plaintiff's damages and that the defendant was legally responsible for the plaintiff's injury.[91] The result is a statutory citizen suit standing doctrine even more stringent than Iowa's classical standing doctrine,[92] which was already strict.[93] This

75. Mass. Gen. Laws ch. 214, §7A (2020). Massachusetts' original citizen suit provision was enacted in 1973. The law gives resident groups of 10 or more people the right to bring actions against any person who is damaging the environment after providing the adversarial party with 21 days' notice. Under the statute, damage to the environment does not mean insignificant destruction, damage, or impairment to such natural resources, and damage is restricted to violations of statutes, ordinances, bylaws, or regulations, the major purpose of which is to prevent or minimize damage to the environment. This law followed the 1972 Massachusetts Environmental Policy Act (Mass. Gen. Laws ch. 30, §61 (2020)), which also prioritized damage to the environment, but which did not include a citizen suit provision.
76. Ten Taxpayer Citizens Grp. v. Secretary Office of Env't Affs., 24 Mass. L. Rep. 539 (Mass. 2008).
77. Boston v. Massachusetts Port Auth., 364 Mass. 639, 645, 4 ELR 20314 (Mass. 1974); Cummings v. Secretary of Exec. Off. of Env't Affs., 402 Mass. 611, 614, 18 ELR 21333 (Mass. 1988). *See also* Knowles v. Codex Corp., 426 N.E.2d 734, 738 (Mass. App. Ct. 1981) (plaintiffs cannot show standing if a conservation commission is already responsible for protecting the public's interest in the relevant land).
78. Mass. Const. pt. 2, ch. III, art. II.
79. Akau v. Olohana Corp., 652 P.2d 1130, 1134 (Haw. 1982).
80. Haw. Const. art. XI, §9. In 1978, Hawaii amended its constitution to protect Hawaiians' environmental rights. Any person has a constitutional right to a clean and healthful environment that he or she may enforce against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law. The amendment removed barriers to standing. *See also* Fiedler v. Clark, 714 F.2d 77, 80 (9th Cir. 1983); Kahana Sunset Owners Ass'n v. Maui Cnty. Council, 948 P.2d 122, 134 (Haw. 1997); Haw. Const. art. XI, §1; Haw. Rev. Stat. §§340E, 342B, 342D, 6D, 6E, 174, 183, 183B, 183D, 188, 189, 195D, 199, 343, 343-7 (2021).
81. *See supra* note 14 (explaining that federal "injury-in-fact" is special, but state "injury-in-fact" does not have to be special); Sierra Club v. Department of Transp., 167 P.3d 292, 313 (Haw. 2007) (quoting Akau v. Olohana Corp., 652 P.2d 1130, 1134 (Haw. 1982) ("a member of the public has standing to . . . enforce the rights of the public even though his [or her] injury is not different in kind from the public's generally, if he [or she] can show that he [or she] has suffered an injury in fact").
82. *Sierra Club*, 167 P.3d at 318; Bush v. Watson, 918 P.2d 1130, 1135 (Haw. 1996); Pele Def. Fund v. Paty, 73 Haw. 578, 594 (Haw. 1992); Hawaii's Thousand Friends v. Anderson, 768 P.2d 1293, 1299 (Haw. 1989); *Akau*, 652 P.2d at 1134-35.
83. *Bush*, 918 P.2d at 1135.
84. *Sierra Club*, 167 P.3d at 320.
85. *Id.*
86. The Hawaiian judiciary's relaxed approach to standing is consistent with its progressive environmental scheme, and Hawaii is only the second state after Vermont to establish an environmental court system. *See* Hawaii State Judiciary, *Environmental Court*, https://www.courts.state.hi.us/special_projects/environmental_court (last visited Apr. 22, 2022).
87. Haw. Const. art. VI, §§1, 7.
88. Iowa Code §455B.111 (2021); 1986 Iowa Acts 658-59. Adversely affected people have standing to sue anyone for environmental violations or a failure to perform a non-discretionary duty.
89. Gerst v. Marshall, 549 N.W.2d 810, 813-14 (Iowa 1996).
90. Iowa Code §455B.111(3) (2021).
91. *Gerst*, 549 N.W.2d at 815.
92. *Id.* at 813-14.
93. Godfrey v. State, 752 N.W.2d 413, 419-22 (Iowa 2008):
> While both Iowa and federal case law on the application of standing to public-interest litigation has largely focused on the type of factual injury required to support standing, federal law has also developed additional elements that are particularly applicable when the "asserted injury arises from government's allegedly unlawful regulation (or lack of regulation) of someone else," as opposed to cases in which the "plaintiff is himself an object of the action (or foregone action) at issue." Under such a circumstance, the plaintiff must establish "a causal connection between the injury and the conduct complained of" and that the injury is "'likely,' as opposed to merely 'speculative,' to be 'redressed by a favorable decision.'" . . . These two additional considerations largely relate to the prudential concerns we have recognized, and we too have relied on them to resolve standing claims in the past.

occurred despite the absence of a restrictive case-or-controversy requirement in Iowa's Constitution.[94]

If plaintiffs could pick their standing doctrines, our plaintiff Jane Doe would certainly choose Hawaii's. Unfortunately for Jane, this is impossible. She is still an auto dealer living in rural Illinois. Instead, Jane's attorney will have to review Illinois' doctrine to understand not only the likelihood that Jane will have standing to bring a citizen suit, but also the likelihood that Jane will ever reach a court. Section II.B will deal with the interaction between administrative law and common law, and will shed light on Jane's legal options.

B. *How Do Administrative Law Parties and Intervenors Show Aggrievement?*

As seen above, state courts (other than in Iowa) are not heightening formal standing requirements. However, this does not necessarily mean that plaintiffs have easier access to state courts. In state systems, common-law standing requirements are often less relevant to plaintiffs than so-called aggrievement requirements, which are essentially standing requirements in administrative proceedings, because many plaintiffs never reach state courts.

Instead, before bringing a citizen suit in state court, the exhaustion doctrine[95] discussed in Part III requires state plaintiffs to bring their citizen suits before administrative tribunals. If a plaintiff attempts to circumvent administrative procedures and bring a citizen suit directly in state court, the court will tell the plaintiff that it cannot hear his or her case. In every state discussed except Connecticut, if an administrative agency has authority over the type of violation the plaintiff alleges, the plaintiff must either join an existing administrative procedure dealing with this problem or initiate an administrative proceeding to seek enforcement.

This Article will now take a critical look at the administrative proceedings to which citizen suit provisions direct plaintiffs, and the aggrievement doctrines plaintiffs face when initiating these proceedings, or when joining existing proceedings as a party or intervenor. In other words, while Section II.A discussed standing as the threshold jurisdictional issue in common law, Section II.B will discuss aggrievement as the threshold issue in administrative proceedings.[96]

Just like standing, aggrievement can be either "statutory" or "classical." Statutory aggrievement is created by the legislature and requires that a party show injury to a legislatively protected interest,[97] while classical aggrievement is created by judicial analysis and requires that a party show that he or she will be genuinely and directly affected by the outcome of the judicial decision.[98]

Further, among those plaintiffs sent to administrative law tribunals, many will find that there is already an administrative action on the issue. Those plaintiffs will join existing administrative procedures, ideally as parties, but sometimes only as intervenors.[99] These realities mean that administrative proceedings can be either a hurdle for plaintiffs to overcome in order to reach state courts or an opportunity for plaintiffs to seek enforcement.

Consider the hypothetical plaintiff Jane Doe, who the attorney general's office declined to help due to time constraints. Jane takes the attorney general's advice to take legal action on her own and contacts an attorney in the hopes of filing a citizen suit to get an injunction against the racetrack. At this stage, Jane's first priority is getting the track to stop polluting the air, and she is less concerned about the financial damage to her business. Jane discusses the IEPA employee's findings with her attorney (that violations are present), and Jane's attorney looks into the Illinois citizen suit statute.[100] The attorney explains that, although there is a violation,[101] Jane has some administrative remedies and cannot file a citizen suit until she exhausts those administrative remedies.[102] Jane agrees to follow the proper legal procedure, and she starts to prepare the complaint she will need to file for an administrative action.

When she eventually files, what must Jane Doe do to establish administrative aggrievement? Will she have standing to appeal an unfavorable final administrative decision? If Jane cannot at least get aggrievement, it is not worth her effort to prepare a complaint. If Jane can get aggrievement but cannot get standing to appeal an unfavorable decision, Jane and her attorney might consider alternatives in case the administrative board denies the relief Jane plans to request.

Instead of studying how standing compares to aggrievement in every state, Section II.B will only survey the doctrines in Maryland, Florida, Connecticut, and Illinois.[103]

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94. Iowa Const. art. V, §§4, 6. *See also* Dickey v. Iowa Ethics & Campaign Disclosure Bd., 943 N.W.2d 34, 42-47 (Iowa 2020).

95. *Infra* Part III; Decatur Auto Auction, Inc. v. Macon Cnty. Farm Bureau, Inc., 627 N.E.2d 1129, 1132 (Ill. App. Ct. 1993) (explaining that exhaustion doctrine applies both to the exhaustion of remedies within an administrative agency before seeking judicial review of the ruling of that agency, and to the exhaustion of remedies before filing a separate suit for relief from a court). *See also* Rep. John Dingell (D-Mich.) explaining, "I'll let you write the substance . . . you let me write the procedure, and I'll screw you every time."

96. *See* Sherwood & Brooks, *supra* note 19, §1:4.

97. *Id.*

98. *Id.*

99. Some of those plaintiffs will enter administrative proceedings only as intervenors rather than parties.

100. 415 Ill. Comp. Stat. Ann. 5/31, 5/45 (2021).

101. *Id.* 5/3.115 (Air Pollution).

102. *See infra* Part III; Decatur Auto Auction, Inc. v. Macon Cnty. Farm Bureau, Inc., 627 N.E.2d 1129, 1132 (Ill. App. Ct. 1993):

> [O]rdinarily persons seeking judicial review of decisions of administrative agencies cannot do so without first exhausting remedies within the administrative agency from which review is sought, but certain exceptions existed. Those exceptions included situations where (1) the agency could not provide an adequate remedy, (2) seeking ruling was "patently futile," and (3) irreparable harm would "result from further pursuit of administrative remedies.").

103. Section II.B of this Article asks how judicial interpretations of standing doctrines compare to judicial interpretations of aggrievement requirements in the context of general, non-media-specific statutes. Although the states in Section II.A could arguably have been a part of this discussion, Section II.B only analyzes the standing and aggrievement requirements in Maryland, Florida, Connecticut, and Illinois because comparing the standing

These states were selected because, while every state wrestled with the question of administrative citizen suit aggrievement, the legislatures and judiciaries of Maryland, Florida, Connecticut, and Illinois addressed aggrievement in unique ways. Therefore, the following discussion tracks and compares how state courts have addressed the threshold issues of standing and aggrievement in the context of general, non-media-specific environmental citizen suits in those states alone.

Like the majority of the state legislatures discussed in Section II.A, Maryland's Legislature explicitly eliminated the classical special injury standing requirement in the Environmental Standing Act.[104] This is possible because Maryland's judiciary is not limited by a restrictive state constitutional case-or-controversy requirement.[105] If a Maryland plaintiff brings a citizen suit for mandamus or equitable relief against the state, he or she must show that the state is failing to uphold a non-discretionary duty to enforce some environmental standard that is being violated and that he or she has been affected.[106]

If a Maryland petitioner is instead seeking enforcement against the violator through administrative law, he or she must meet only a relaxed classical aggrievement doctrine designed to encourage citizen participation.[107] When either initiating an administrative action or joining one as a party, a petitioner must only show an interest in the outcome of the matter (unless there is a reasonable regulation that specifies aggrievement criteria).[108] If a petitioner is unsatisfied with the administrative decision and seeks judicial review, the petitioner must meet the traditional classical standing doctrine and show that he or she is an aggrieved party with a special injury.[109]

In summary, Maryland's Legislature relaxed the classical standing doctrine to bring citizen suits against the government and its agents, and relaxed the administrative aggrievement doctrine to allow citizen action against violators, but left the special injury requirement in place for judicial review of those administrative actions.[110] This means that a petitioner who easily joins an administrative proceeding may face significant challenges when seeking standing to review an unfavorable administrative decision, and may be better off bringing an action for mandamus instead.

The same is not true in Florida. In this state, the legislature intended to relax the classical standing requirement and the classical aggrievement requirement[111] in the Environmental Protection Act, although the requirements are not the same. However, when the judiciary relaxed the aggrievement requirement too much, the legislature set a heightened statutory aggrievement requirement.[112] Florida's judiciary read the classical special injury standing requirement into early citizen suit cases,[113] but changed its perspective in 1980, holding that the legislature intended to relax the classical requirement.[114] This is possible because Florida's judiciary is not limited by a restrictive state constitutional case-or-controversy requirement.[115]

At present, if a Florida plaintiff seeks standing to enjoin a violator, he or she must show an irreparable injury that is real and not theoretical, and must have a bona fide and direct interest in the result.[116] If a Florida petitioner seeks aggrievement to initiate an administrative proceeding, he or she must pass a "substantial interest test" by alleging an injury-in-fact[117] that is of sufficient immediacy and is of the

and aggrievement doctrines in these states shows a diversity of relationships between the doctrines.

104. Md. Code Ann., Nat. Res. §1-503 (2020). In 1978, Maryland passed the Environmental Standing Act. Any resident can sue any officer or agency of the state or political subdivision for mandamus or equitable relief, including declaratory relief for failure to perform a non-discretionary duty or to enforce a standard.

105. Md. Const. art. 4.

106. Md. Code Ann., Nat. Res. §1-503 (2020).

107. Md. Code Ann., Env't §9-340 (2020). *See* Chesapeake Bay Found., Inc. v. DCW Dutchship Island, LLC, 97 A.3d 135, 141 (Md. 2014); Greater Towson Council of Cmty. Ass'ns v. DMS Dev., LLC, 172 A.3d 939, 950 (Md. Ct. Spec. App. 2017).

108. *Greater Towson Council*, 172 A.3d at 943, 950.

109. *Id*. at 952; Environmental Integrity Project v. Mirant Ash Mgmt., LLC, 13 A.3d 34 (Md. Ct. Spec. App. 2010); Friends of Mount Aventine v. Carroll, 652 A.2d 1197, 1199 (Md. Ct. Spec. App. 1995) (explaining that organizations generally cannot appeal administrative decisions).

110. In some cases, judicial review requires Maryland plaintiffs to meet federal Article III standing for state administrative claims. This is because Annotated Code of Maryland, Natural Resources §1-503, only applies to government agents, and there is no general citizen suit at the administrative level. *See generally* Patuxent Riverkeeper v. Maryland Dep't of Env't, 29 A.3d 584, 41 ELR 20312 (Md. 2011) (explaining the development of the Maryland judicial review standing doctrine in a slightly different citizen suit context and showing Maryland legislators' thinking on judicial review).

111. Fla. Stat. Ann. §403.412(5) (2021) (discussing intervention in proceedings); *id*. §403.569 (discussing initiation of proceedings). *See* Lawrence E. Sellers, *Legislature Revises Citizen Standing Under Section 403.412(5): The "Devil's Deal" or Much Ado About Nothing?*, Holland & Knight (May 15, 2002), https://www.hklaw.com/en/insights/publications/2002/05/legislature-revises-citizen-standing-under-section (In 1982, Florida's judiciary relied on the plain language of the aggrievement requirements to require that citizens must be substantially interested to initiate administrative proceedings. In 1986, the judiciary broadened the aggrievement doctrine to challenge administrative decisions without demonstrating substantial interests, essentially giving "automatic standing" to citizens to initiate administrative proceedings.).

112. In 1971, Florida enacted the Florida Environmental Protection Act (FEPA), partially due to the legislature's desire to abolish the judicial requirement of special injury for standing in environmental suits. Under Florida Statutes Annotated §403.412(2), any Florida citizen can sue any person for violating environmental laws or any governmental agency for failing to enforce those laws after 30 days' notice. Under Florida Statutes Annotated §120.69, any substantially interested Florida resident can sue any governmental agency for failing to enforce environmental laws after 60 days' notice.

113. In the 1970s, Florida's judiciary evaluated citizens' standing under the FEPA using the special injury test. *See* Town of Surfside v. County Line Land Co., 340 So. 2d 1287 (Fla. Dist. Ct. App. 1977) ("The interference with the enjoyment and value of private property rights is a special injury justifying a suit by a private individual to enjoin the nuisance."); Florida Wildlife Fed'n v. State Dep't of Env't Regul., 390 So. 2d 64, 66, 11 ELR 20169 (Fla. 1980) (In 1980, Florida's judiciary held that FEPA gave Florida's citizens new substantive rights and a new cause of action that eliminated the special injury requirement. This broadened standing.).

114. *Florida Wildlife Fed'n*, 390 So. 2d at 67.

115. Fla. Const. art. 5, §5.

116. *Florida Wildlife Fed'n*, 390 So. 2d at 67.

117. *See supra* note 14; South Broward Hosp. Dist. v. State Agency for Health Care Admin., 141 So. 3d 678, 681 (Fla. Dist. Ct. App. 2014) (Injury-in-fact in Florida is different from injury-in-fact federally, as federal injury-in-fact requires a particularized injury, while injury-in-fact in Florida "is met by a showing that the petitioner has sustained actual or immediate threatened injury at the time the petition was filed, and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical.").

type and nature intended to be protected.[118] Between 1985 and 2002, Florida's judiciary often permitted petitioners who failed the "substantial interest test" to initiate administrative proceedings anyway, creating a relaxed aggrievement doctrine.[119]

However, the Florida Legislature codified the "substantial interest test" in 2002, in response to feedback from the business community.[120] The amendment also codified the judiciary's position that aggrievement does not require a special injury, and added a new provision that gives select advocacy organizations automatic standing to initiate administrative proceedings.[121] Finally, if a petitioner is unsatisfied with the administrative decision and seeks judicial review, the petitioner must show that his or her substantial interests are within the zone of interest of the permit or order and are affected by the decision.[122] In summary, Florida's Legislature implicitly relaxed the classical standing doctrine and explicitly heightened the judiciary's classical aggrievement doctrine, but even Florida's heightened doctrines do not require any showing of special injury.

More explicit than Florida's Legislature, Connecticut's Legislature eliminated the classical special injury standing[123] and aggrievement doctrines in the Environmental Protection Act.[124] If a Connecticut plaintiff brings a citizen suit for mandamus or equitable relief, he or she must set forth facts to support an inference that unreasonable pollution, impairment, or destruction of a natural resource will probably result from the challenged activities unless remedial measures are taken.[125] The same is required of petitioners seeking enforcement through administrative law, whether they are initiating a proceeding, intervening, or seeking judicial review.[126] In every situation, a petitioner who fails the classical aggrievement requirement but who passes the statutory aggrievement requirement can raise only limited environmental issues on appeal.[127] Therefore, unlike Maryland petitioners, Connecticut petitioners can just as easily bring civil citizen suit action as they can initiate administrative proceedings.[128]

Finally, taking a constitutional approach as well as a statutory one, Illinois' Legislature broadened environmental standing by amending its constitution to eliminate the classical special injury requirement in environmental actions,[129] and by codifying a relaxed statutory aggrievement doctrine in the Illinois Environmental Protection Act.[130] This is possible because Illinois' judiciary is not limited by a restrictive state constitutional case-or-controversy requirement.[131] If a plaintiff sues to protect his or her state constitutional right to a healthy environment, he or she must also bring a separate, cognizable cause of action, because while the constitutional amendment eliminated the special injury requirement, it did not create a cause of action in itself.[132]

For example, an Illinois plaintiff can file a tort action against a polluter, which requires a showing of injury-in-fact, and also claim a state constitutional violation along with the tort. The Illinois Constitution also allows the state legislature to enact statutes that enforce Illinois' constitutional right to a healthful environment, and Illinois has done this by enacting a citizen suit provision.[133] A plaintiff has standing to bring a lawsuit under this citizen suit pro-

118. *South Broward Hosp. Dist.*, 141 So. 3d at 681; Mid-Chattahoochee River Users v. Florida Dep't of Env't Prot., 948 So. 2d 794, 796-97 (Fla. Dist. Ct. App. 2006) ("The first element pertains to the degree of injury whereas the second deals with the nature of the injury."); Fla. Stat. Ann. §120.57 (2021).
119. Sellers, *supra* note 111.
120. *Id.*
121. *Id.*; Friends of the Everglades v. Board of Trs., 595 So. 2d 186 (Fla. Dist. Ct. App. 1992) (explaining that a proposed activity will affect one's use and enjoyment of natural resources protected under the specific statute at issue and is sufficient to demonstrate substantial interest).
122. Village of Key Biscayne v. Department of Env't Prot., 206 So. 3d 788, 790 (Fla. Dist. Ct. App. 2016).
123. Lawrence v. Department of Energy & Env't Prot., 176 A.3d 608, 623-24 (Conn. App. Ct. 2017). Under the classical test, Connecticut's judiciary asks (1) whether the party has a specific personal and legal interest in the subject matter of the decision, rather than just a general interest that represents the concerns of a community as a whole; and (2) whether the party's specific personal and legal interest has been specially and injuriously affected by the decision.
124. Conn. Gen. Stat. §22a-16 (2020); *id.* §22a-19. In 1971, Connecticut enacted the Connecticut Environmental Protection Act (CEPA). CEPA gave any person standing to sue to protect the environment, as well as aggrievement to appeal decisions that adversely affected the environment. Under the declaratory and equitable relief section (22a-16), any person can sue any person or the state for declaratory and equitable relief for the protection of the public trust in the air, water, and other natural resources of the state from unreasonable pollution, impairment, or destruction. Under the administrative section (22a-19), any person can intervene as a party on the filing of a verified pleading in any administrative, licensing, or other proceeding for the protection of the public trust in the air, water, and other natural resources of the state from unreasonable pollution, impairment, or destruction. *See also* Conn. Gen. Stat. §22a-13 (2020); Mystic Marinelife Aquarium, Inc. v. Gill, 400 A.2d 726, 732-34 (Conn. 1978) (explaining standing under CEPA).
125. Burton v. Dominion Nuclear Conn., Inc., 23 A.3d 1176, 1179 (Conn. 2011); Fort Trumbull Conservancy, LLC v. Alves, 943 A.2d 420, 425-26 (Conn. 2008) (discussing Conn. Gen. Stat. §22a-16 (2020)).
126. Committee to Save Guilford Shoreline, Inc. v. Guilford Plan. & Zoning Comm'n, 853 A.2d 654, 657 (Conn. Super. Ct. 2004); *Mystic*, 400 A.2d at 732; Conn. Gen. Stat. §22a-19 (2020).
127. *Mystic*, 400 A.2d at 729, 732-34 ("[O]ne of the basic purposes of the EPA is to give persons standing to bring actions to protect the environment and standing is conferred only to protect the natural resources of the state from pollution or destruction.").
128. *See* Fort Trumbull Conservancy, LLC v. Alves, 815 A.2d 1188, 1197-99 (Conn. 2003) (Although General Statutes of Connecticut §22a-16 abrogates the aggrievement requirement for bringing an action directly in the Superior Court, the plaintiffs must pursue their claim by intervening in an administrative hearing before the department pursuant to General Statutes of Connecticut §22a-19. Only in the absence of an appropriate administrative body may an independent action pursuant to General Statutes of Connecticut §22a-16 be brought.).
129. Ill. Const. art. XI, §2; Alliance for the Great Lakes v. Illinois Dep't of Nat. Res., 161 N.E.3d 293 (Ill. App. Ct. 2020); Glisson v. City of Marion, 720 N.E.2d 1034, 1040 (Ill. 1999); Illinois Pure Water Comm., Inc. v. Director of Pub. Health, 470 N.E.2d 988, 992 (Ill. 1984). Illinois' Constitution gives any citizen or noncitizen the right to access appropriate legal proceedings to protect the environment.
130. 415 Ill. Comp. Stat. Ann. 5/31 (2021).
131. Greer v. Illinois Hous. Dev. Auth., 524 N.E.2d 561, 574-75 (Ill. 1988) (In 1988, Illinois developed a three-part standing test that mirrors federal Article III standing, although Illinois' test predates the Supreme Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 22 ELR 20913 (1992).).
132. Citizens Opposing Pollution v. ExxonMobil Coal U.S.A., 962 N.E.2d 956, 958, 967 (Ill. 2012); City of Elgin v. County of Cook, 660 N.E.2d 875 (Ill. 1995).
133. *See* English & Carroll, *supra* note 20, at 19 ("[W]hile Article 1 appears to be completely self-executing, i.e. enforceable by the courts without legislative implementation, nonetheless, Article 2 grants the Illinois General Assembly power to implement the provision.").

vision if the plaintiff can show he or she has suffered an actual or threatened injury-in-fact.[134]

If there is an administrative remedy available for the petitioner to exhaust and he or she initiates an administrative action as required under the citizen suit statute,[135] he or she need only file a complaint against the violator with the Illinois Pollution Control Board (IPCB) to show statutory aggrievement.[136] If there is an existing administrative action and the petitioner wants to intervene, he or she must show an interest that may not be adequately represented by the parties to the proceedings or that may be adversely affected by the final administrative decision.[137] If an administrative intervenor becomes a party, that intervenor will generally have standing to initiate or join an appeal for judicial review.[138]

Notably, Illinois' statute is the only citizen suit statute discussed in this Article that explicitly requires that plaintiffs exhaust their administrative remedies and wait 30 days after a denial of administrative relief before bringing a common-law action.[139] The extent to which plaintiffs in other states are subject to a similar uncodified requirement (broadly speaking, this includes all states except Connecticut[140]) is discussed in Part III.

In sum, only Florida's Legislature heightened the aggrievement requirement for intervenors. In all of the other states discussed, the legislature explicitly created lower statutory standing and aggrievement doctrines and the judiciary went along. The result in every state (except for intervenors in Florida) is that plaintiffs face relaxed standing burdens when seeking administrative aggrievement. However, there is still a good deal of nonuniformity among the states, with plaintiffs in different states facing different standards depending on whether they are suing directly under a citizen suit statute for a violation not regulated by any state agency, intervening in an existing administrative action, joining an existing action as a party, initiating a new action, or seeking judicial review of an administrative decision.

Assume that plaintiff Jane Doe's attorney advises her that she is likely to get both aggrievement and standing. Jane decides it is worth it to finish her complaint, and she is now ready to file that complaint with the IPCB. Jane is aware of all the possible outcomes, and she is cautiously optimistic. Jane's best-case scenario is to have the IPCB grant her relief and require that the horse racetrack give the proper treatment to the dirt so it will not fly onto Jane's auto dealership and harm her vehicles and business.

Jane's second-best-case scenario is that the IPCB accepts her complaint but denies her relief, and that a court reviews her case 30 days later and reverses the IPCB's decision. Jane's third-best-case scenario is that the IPCB denies her a hearing, Jane files for judicial review of the denial within 35 days, the court finds in Doe's favor, and Jane restarts the administrative review process. Jane's worst-case scenario is that both the IPCB and a court deny her relief. Jane knows that the attorney general will not help her if she is unable to convince the IPCB or the appellate court to grant her relief. Jane knows she does not have an easy path to court, but she files her complaint because of the ongoing economic harm to her auto dealership.

Now that Jane has taken action, she can start to see the true logistical barriers to her success. While state legislatures have generally relaxed standing and aggrievement doctrines, as described above, they have also placed additional roadblocks in plaintiffs' paths. These roadblocks are discussed below in Parts III and IV.

III. Logistical Barriers

In Part II, the majority of states' judiciaries were shown to be unwilling to heighten classical standing and aggrievement doctrines to keep environmental citizen suit plaintiffs out of court. Unlike the federal judiciary, state judiciaries tend to apply statutory standing and aggrievement doctrines (which are created by the legislature and require that

134. 415 Ill. Comp. Stat. Ann. 5/45 (2021). *See supra* notes 14, 117; *Alliance for the Great Lakes*, 161 N.E.3d at 304 (Just like Florida's injury-in-fact, Illinois' injury-in-fact is different from federal injury-in-fact. In Illinois, injury-in-fact means an injury that is distinct and palpable, fairly traceable to the defendant's actions, and substantially likely to be prevented or redressed by the grant of the requested relief.).

135. 415 Ill. Comp. Stat. Ann. 5/31(d) (2021). The complaint cannot be either frivolous or duplicative.

136. IPCB, *Complaint Forms*, https://pcb.illinois.gov/Resources/Complaint-forms (last visited Apr. 22, 2022):

> A formal complaint filed by a citizen (complainant) starts an enforcement action against an alleged polluter (respondent). If the Board accepts the formal complaint for hearing, the complainant has the burden to prove that the respondent committed the alleged violations. Requesting an informal investigation is not a prerequisite to filing a formal complaint.

137. Ill. Admin. Code tit. 35, §168.230(b) (2021):

> Intervention shall be allowed when: 1) The petitioner can show an interest which may not be adequately represented by the parties to the proceedings; or 2) The petitioner may be adversely affected by the Agency's final administrative decision; or 3) The petitioner is another agency or department of the United States or the State of Illinois which has an interest in the subject of the hearing before the Agency.

138. *Alliance for the Great Lakes*, 161 N.E.3d 293.

139. Illinois Compiled Statutes Annotated ch. 415, 5/45 provides:

> Any person adversely affected in fact by a violation of the Act or of regulations adopted thereunder may sue for injunctive relief against such violation. However . . . no action shall be brought under this Section until 30 days after the plaintiff has been denied relief by the Board in a [415 Ill. Comp. Stat. Ann. 5/31] proceeding.

Illinois Compiled Statutes Annotated ch. 415, 5/45(a) provides:

> Any person who filed a complaint on which a hearing was denied, any person who has been denied a variance or permit under this Act, any party adversely affected by a final order or determination of the Board, and any person who participated in the public comment process . . . may obtain judicial review, by filing a petition for review within 35 days from the date that a copy of the order or other final action sought to be reviewed was served upon the party affected by the order . . . .

See also Karlock v. Waste Mgmt. of Ill., 839 N.E.2d 128, 130 (Ill. App. Ct. 2005) ("An order is final only if it terminates the litigation between the parties on the merits or disposes of the rights of the parties, either upon the entire controversy, or upon some definite and separate part thereof.").

140. City of Waterbury v. Town of Washington, 800 A.2d 1102 (Conn. 2002) ("[The] doctrine of exhaustion of administrative remedies does not apply to an independent action under CEPA [brought under General Statutes of Connecticut §22a-16].").

a party show injury to a legislatively protected interest) as written, even when those doctrines relax plaintiffs' burdens below those required by classical standing and aggrievement doctrines (which are created by judicial analysis and require that a party show that he or she will be genuinely and directly affected by the outcome of the judicial decision). This is possible because state judiciaries, unlike the federal judiciary, are not bound by the restrictive case-or-controversy requirement of the Constitution.[141]

Therefore, while state judiciaries generally do not interpret citizen suit provisions in the broadest possible terms, they overwhelmingly relax standing doctrines in the context of environmental law. Some states' judicial relaxing is either legislatively directed or comes from interpreting legislative history and statutory construction, but other state judiciaries seem to interpret statutes broadly simply because they can, without any direction from the legislature.

Despite a strong trend toward relaxed statutory or classical standing for environmental citizen suit plaintiffs, however, state citizen suits are underutilized. In fact, they have been underutilized for half a century, and there is no clear, substantial increase in the number of plaintiffs bringing citizen suits in the wake of judicial broadening of state standing doctrines.[142] In Hawaii, for example, the state with an environmental court and the broadest standing doctrine in the nation, courts have only decided 24 Article XI, §9 cases since 1982, fewer than two cases per year.[143] In Michigan, broadening standing in 2010 correlates with a decrease in citizen suits.[144] Thus, even though judiciaries interpret citizen suit standing more broadly at the state level than the federal level, this does not mean that more citizens are accessing state courts. Clearly, something other than standing is deterring citizens from seeking or gaining access to courts.

This part will analyze three logistical reasons that some citizens never make it to court under states' general, non-media-specific environmental citizen suit provisions. First, some states require plaintiffs to exhaust their administrative remedies before bringing a citizen suit, funneling would-be citizen suit plaintiffs into administrative law tribunals and increasing the time, energy, and expenses necessary to hold violators accountable, which effectively decreases the likelihood that plaintiffs will eventually bring citizen suits in court. Second, many states limit awards of damages, attorney fees, expert fees, and court costs in environmental cases, which may make it logistically impossible for plaintiffs to pursue civil action by discouraging plaintiffs with limited resources from pursuing violations and disincentivizing attorneys from specializing in state citizen enforcement. Third, many states impose various waiting periods and minimum plaintiff restrictions, which may make citizens feel that it is easier or cheaper to move from their home or business than to take legal action under a state citizen suit.

To see how these factors limit citizen access to courts, we might return to our hypothetical Jane Doe plaintiff. Jane's attorney set her on the right track by explaining that Jane had administrative remedies she needed to exhaust and by prompting Jane to file her complaint with the IPCB. If Jane had ignored this advice and gone directly to court, perhaps because Jane believed the IPCB would not help her, the court would have considered exceptions to the exhaustion doctrine that would allow her to bypass the IPCB, found that no exceptions applied, and sent Jane back to the IPCB to exhaust her administrative remedies.[145] Jane would have wasted the time she spent waiting for a court date, wasted the money she spent on an attorney, lost profits from the extra time the racetrack spent kicking up dirt on her auto dealership, and lost future earnings from the long-term damage to her business.

However, now that she is before the IPCB, Jane realizes that there are additional logistical barriers to her potential recovery. The IPCB (and the court system, for that matter) will only award her injunctive relief and attorney fees, not damages. In addition, there is a potential waiting period between an unfavorable IPCB decision and a favorable court decision on appeal. These additional barriers may have Jane reassessing her strategy to save her Illinois business. Ultimately, Jane may look for other legal and nonlegal solutions, which may help explain why citizen suits are used so infrequently despite relaxed legislative and judicial standing doctrines.

The following discussion will examine how the logistical hurdles of the exhaustion doctrine, limited damages or attorney fees, and waiting periods and minimum plaintiff restrictions may in fact be more significant barriers to citizen enforcement than a restrictive standing doctrine. Of course, while a dearth of citizen suits may not be inherently bad, it becomes problematic if it is the result of technical barriers that essentially allow environmental externalities to continue unabated. At the very least, state legislatures may see this as a problem and may revise their citizen suit procedures to remove such barriers.

A. *Are Citizen Suits a Funnel Into Administrative Law Tribunals?*

Wherever there is an administrative remedy to a problem, petitioners must first "exhaust" that administrative remedy before coming to court as plaintiffs. This is called the

141. U.S. Const. art. 3, §2, cl. 1.

142. *Infra* Appendix. *See* James R. May, *The Availability of Environmental Citizen Suits*, 18 Nat. Res. & Env't 53, 56 (2004); Gladwin Hill, *5 States With Citizen-Suit Laws Find Fears of Abuse Unfounded*, N.Y. Times (Mar. 24, 1973), https://www.nytimes.com/1973/03/24/archives/5-states-with-citizensuit-laws-find-fears-of-abuse-unfounded-fears.html.

143. *Infra* Appendix A.

144. *Id.*

145. *See* Decatur Auto Auction, Inc. v. Macon Cnty. Farm Bureau, Inc., 627 N.E.2d 1129, 1132 (Ill. App. Ct. 1993):

> [O]rdinarily persons seeking judicial review of decisions of administrative agencies cannot do so without first exhausting remedies within the administrative agency from which review is sought, but certain exceptions existed. Those exceptions included situations where (1) the agency could not provide an adequate remedy, (2) seeking ruling was "patently futile," and (3) irreparable harm would "result from further pursuit of administrative remedies."

exhaustion doctrine, and it applies where a claim is cognizable in the first instance by an administrative agency alone.[146] This means that the more administrative remedies there are in a particular area of law, the less chance that a citizen can go directly to court to litigate a problem, and the greater chance that the citizen will need to initiate an administrative law hearing on an issue.[147] On the one hand, this may result in more accurate outcomes because administrative boards have a high level of expertise on the issues involved. On the other hand, this may frustrate petitioners who are unhappy that administrative boards are not elected fact finders, that administrative proceedings never involve a jury[148] and rarely require formal adjudication procedures,[149] and that petitioners' constitutional rights are being adjudicated in these settings.

For example, Hawaii's judiciary, with its relaxed standing doctrine, has held that citizens cannot bypass an agency's review process by "simply characterizing the issues as a violation of constitutional rights."[150] Even those petitioners who are not concerned with these bigger questions will recognize that administrative law tribunals are no substitute for a court: in general, there are more limits on attorney fees, damages, and civil penalties in administrative law proceedings,[151] plaintiffs may fare better before juries, which are unavailable in administrative settings, "repeat" players have systematic advantages in both common-law and administrative law settings,[152] and those presiding over administrative law adjudications may have limited training and professional qualifications.[153]

Regardless of whether this phenomenon is empirically good or bad, it prevents citizens with standing from reaching courts and having their constitutional or statutory rights adjudicated by a judge. Because of the primacy of administrative agencies in state environmental law, the doctrine of exhaustion of administrative remedies funnels citizens out of courts and into administrative hearings.[154] Although there are exceptions to the exhaustion requirement, they generally involve extraordinary circumstances,[155] and sometimes even futility is not enough to avoid at least some involvement in an administrative action.

Therefore, the exhaustion doctrine has a chilling effect on would-be state citizen suit plaintiffs, except those in Connecticut where the doctrine does not apply to independent actions without an appeal component.[156] Illinois' citizen suit statute is more facially prohibitive than other state statutes because it explicitly denies citizens access to civil remedies until they exhaust their administrative remedies,[157] but all the other states' citizen suit statutes are subject to the exhaustion doctrine as well. Through a series of court cases, New Jersey's judiciary laid out how environmental citizen suits work in most states: the state's government is primarily responsible for prosecuting violators, the state's citizens have a private cause of action[158] but not a substantive cause of action,[159] and the citizens can only bring a civil action when the state's government fails to enforce the law and when citizens have exhausted their administrative remedies.[160] While New Jersey's statute does not explicitly

146. *Id.*

147. A future survey might compare the strength of the environmental protection agencies of the states discussed in this Article. That survey need not include the relative number of civil law actions in which courts reject plaintiffs' cases under the exhaustion doctrine, because there are no published, on point cases in Alaska, Indiana, Louisiana, Minnesota, Nevada, South Dakota, or Wyoming as of 2021.

148. Ballotpedia, *Procedural Rights: States That Provide for Juries to Participate in Agency Adjudication Hearings*, https://ballotpedia.org/Procedural_rights:_States_that_provide_for_juries_to_participate_in_agency_adjudication_hearings (last visited Apr. 22, 2022).

149. Ballotpedia, *Procedural Rights: States That Require Agencies to Follow Formal Adjudication Procedures in Administrative Hearings*, https://ballotpedia.org/Procedural_rights:_States_that_require_agencies_to_follow_formal_adjudication_procedures_in_administrative_hearings (last visited Apr. 22, 2022).

150. Haw. Const. art. XI, §9; Dancil v. Arakawa, 323 P.3d 116, 121 (Haw. Ct. App. 2012):

> Dancil also asserted violations of rights under the Hawaii Constitution and the United States Constitution. We acknowledge that deference to an agency is inappropriate in cases "in which the constitutionality of the agency's rules and procedures is challenged and questions are raised as to whether the agency has acted within the scope of its authority. The agency is not empowered to decide these questions of law."

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 446, 18 ELR 21043 (1988) (However, "a fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."); *Dancil*, 323 P.3d at 121:

> Dancil cannot bypass the agency's review process by simply characterizing the issues as a violation of constitutional rights. Here, a determination by the MPC that the Defendants failed to follow proper procedure for the SMA minor permit would avoid the necessity of a constitutional determination. Therefore, the administrative remedy should be pursued first.

151. This problem is also present at the federal level. *See* Michel Lee, *Attorneys' Fees in Environmental Citizen Suits and the Economically Benefited Plaintiff: When Are Attorneys' Fees and Costs Appropriate?*, 26 Pace Env't L. Rev. 495, 500-01 n.44 (2009).

152. Shauhin Talesh, *How the "Haves" Come Out Ahead in the Twenty-First Century*, 62 DePaul L. Rev. 519 (2013).

153. Ballotpedia, *Procedural Rights: States That Establish Training Requirements or Professional Qualifications for ALJs, Hearing Officers, or Other Agency Officials Who Preside Over Adjudications*, https://ballotpedia.org/Procedural_rights:_States_that_establish_training_requirements_or_professional_qualifications_for_ALJs,_hearing_officers,_or_other_agency_officials_who_preside_over_adjudications (last visited Apr. 22, 2022).

154. Also consider the doctrine of primary jurisdiction, which applies where a claim is originally cognizable in the courts, but enforcing the claim requires the resolution of issues that are within the special competence of an administrative body. *See generally Dancil*, 323 P.3d at 116.

155. *E.g.*, Balcam v. Town of Hingham, 669 N.E.2d 461 (Mass. App. Ct. 1996) (There are exceptions when "the administrative remedy is inadequate . . . , or the issues in the case are of such public significance that the outcome will affect numerous persons in addition to plaintiffs, or where there is no dispute about the facts, and the issue involves merely a question of law.").

156. City of Waterbury v. Town of Washington, 800 A.2d 1102 (Conn. 2002).

157. 415 Ill. Comp. Stat. 31(d) (2021). Illinois' civil enforcement statute is unavailable until adversely affected plaintiffs have exhausted their administrative remedies, then been denied by the IPCB, and waited an additional 30 days after being denied relief.

158. New Jersey Dep't of Env't Prot. v. Exxon Mobil Corp., 181 A.3d 257, 293 (N.J. Super. Ct. App. Div. 2018).

159. *Id.*

160. Superior Air Prods. Co. v. NL Indus., Inc., 216 N.J. Super. 46, 58 (N.J. Super. Ct. App. Div. 1987) ("The bill would not change the existing law which requires a litigant to exhaust his administrative remedies except where the interest of justice requires otherwise. See Rule 4:69-5 of the Court Rules."); N.J. Stat. Ann. §2A:35A-12 (2021) ("This act shall be in addition to existing administrative and regulatory procedures provided by law. No existing civil or criminal remedy now or hereafter available to any person or governmental entity shall be superseded by this act.").

provide restrictions similar to Illinois' restrictions, New Jersey courts have clearly applied the exhaustion doctrine.

Likewise, the Connecticut judiciary has also held that citizen suit provisions supplement existing administrative procedures, to which the court can remand the parties in any citizen suit action, and that no party can ignore its right of appeal and bring an independent action instead.[161] Iowa's judiciary has also held that citizens must exhaust administrative remedies before challenging administrative orders.[162] The judiciaries of Massachusetts,[163] Michigan,[164] North Dakota,[165] Florida,[166] and Maryland[167] have reached the same conclusion.

There are always exceptions to the exhaustion doctrine, but these exceptions are quite limited. For example, Massachusetts' judiciary found that the exhaustion doctrine did not keep one plaintiff from using the citizen suit statute because there was no administrative remedy for that plaintiff to exhaust.[168] In New Jersey, the judiciary found an exception to the exhaustion doctrine in one case, reasoning that the parties involved should have the opportunity to take part in a limited civil suit because it would advance the goal of the legislation.[169]

These two examples demonstrate that a conflict must be truly extraordinary for courts to find exceptions to the exhaustion doctrine, and that most plaintiffs will not be able to bypass administrative action. Instead, when most state citizens are unsatisfied with the outcome of a citizen suit, they will have to appeal the administrative decision in a court and the court will evaluate the administrative process rather than the controversy itself. Therefore, the primacy of administrative law in the environmental space presents an additional hurdle to citizens' access to courts, and explains why relaxing the standing doctrine does not necessarily result in more citizens accessing courts.

For Jane Doe, who initially hired an attorney to file a citizen suit, all of this means that Jane is not going to file a citizen suit and reach a court, at least not initially. Instead, Jane is a petitioner before the IPCB, and the IPCB will likely resolve her complaint by granting her an injunction and ordering the racetrack to treat the dirt to stop the air pollution. Jane's attorney's analysis of whether or not Jane has common-law or statutory standing will likely be irrelevant, because aggrievement is almost certainly the only doctrine that Jane will ever need to meet. This may be a good thing for Jane, as the IPCB's expert administrators may be familiar with similar controversies and Jane may get a favorable judgment in the form of an injunction.

However, the controversy has been ongoing for several months at this point, and Jane's business has taken a hit, as some of her partner-dealers have found other auto dealerships to use for car shows and will not be returning to partner with Jane's business. While Jane initially wanted an injunction and was less concerned about damages, Jane has changed her mind. Now she wants the biggest return for her investment in her attorney. Jane asks her attorney if she can get damages from her current legal strategy, or if she should pursue other legal actions in addition to filing her complaint with the IPCB.

B. Are Costs Prohibitive?

The core purpose of enabling citizen enforcement is not to provide citizens monetary relief; rather, it is to ensure enforcement where an agency has failed to act.[170] This purpose is apparent across multiple states' environmental laws, as the majority of citizen suit statutes offer only equitable relief.[171] Additionally, many states either do not allow

161. Greenwich v. Connecticut Transp. Auth., 348 A.2d 596, 599 (Conn. 1974) (discussing Conn. Gen. Stat. §§22a-14 to 22a-20, inclusive); City of Middletown v. Hartford Elec. Light Co., 473 A.2d 787, 790 (Conn. 1984) (further, the citizen suit statutes must be read in connection with any legislation that defines the authority of the administrative agency in question).
162. Cota v. Iowa Env't Prot. Comm'n, 490 N.W.2d 549 (Iowa 1992) (citing Iowa Code Ann. §17A.19(1) (1989)).
163. City of Worcester v. Gencarelli, 607 N.E.2d 748 (Mass. App. Ct. 1993):
> City's action seeking injunctive relief to force landowner to remedy damage to wetland and to comply with orders and conditions issued by city conservation commission relating to that property was not barred by city's alleged failure to exhaust administrative remedies before filing suit, as there were no such remedies for city to exhaust; landowner did not file notice of intent with commission before undertaking his site work, and when he finally filed such a notice two years later, he did not take an appeal from negative response to his notice of intent by commission.

164. Mich. Comp. Laws §324.1101(1) (2021) (this statute makes an exception under the exhaustion doctrine, but only when a permit or operating license is not involved); Michigan Waste Sys., Inc. v. Department of Nat. Res., 403 N.W.2d 608, 609 (Mich. Ct. App. 1987) ("[G]enerally a party must exhaust its administrative remedies before a circuit court may review the decision of an administrative agency . . . .").
165. Vogel v. Marathon Oil Co., 879 N.W.2d 471, 474, 481 (N.D. 2016) ("Generally, dismissal for lack of subject matter jurisdiction is appropriate if the plaintiff failed to exhaust administrative remedies.").
166. Florida Bd. of Regents v. Armesto, 563 So. 2d 1080, 1080 (Fla. Dist. Ct. App. 1990):
> The companion doctrines of primary jurisdiction and exhaustion of remedies require circuit courts to abstain from exercising their equitable jurisdiction over administrative proceedings where adequate administrative remedies have not been exhausted. An exception exists where threatened agency action is so egregious or devastating that administrative remedies are either too little or too late.

167. Maryland Comm'n on Hum. Rels. v. Bethlehem Steel Corp., 457 A.2d 1146, 1149 (Md. 1983) ("Although this Court has recognized a few limited exceptions to the exhaustion doctrine, it has consistently reiterated that statutorily prescribed administrative and judicial remedies ordinarily must be exhausted if the question presented before an agency concerns the interpretation of a statute.").
168. *Gencarelli*, 607 N.E.2d 748; Balcam v. Town of Hingham, 669 N.E.2d 461 (Mass. App. Ct. 1996).
169. Howell Twp. v. Waste Disposal, Inc., 504 A.2d 19 (N.J. Super. Ct. App. Div. 1986):
> Should State Department of Environmental Protection, notwithstanding its intervention in environmental litigation maintained against owner and operator of sanitary landfill by township and township's board of health and its assumption of responsibility to enforce the diverse and environmental legislation in question, fail to exhaust all relief and remedies which should be made available to either township or board of health, or both, and should it be determined that goal of legislation would be better served by allowing township and board of health to continue some portion of suit, township and board of health could be allowed to proceed with suit on a limited basis.

170. *See generally* Shay S. Scott, *Combining Environmental Citizen Suits and Other Private Theories*, 8 J. Env't L. & Litig. 369 (1993); Kerry D. Florio, *Attorneys' Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?*, 27 B.C. Env't Affs. L. Rev. 707 (2000).
171. Of the states discussed, Hawaii (Haw. Const. art. XI, §9) and Iowa (Iowa Code §455B.111 (2021)) do not describe damages; Massachusetts (Mass. Gen. Laws ch. 214, §7A (2020)), New Jersey (N.J. Stat. Ann. §2A:35A-4

plaintiffs to recover attorney fees or expert fees, or limit fee awards based on the court's discretion.[172] This means that regardless of how relaxed the common-law standing doctrine or administrative law aggrievement doctrine may be, there is a distinct possibility that a plaintiff's inability to recover financially will create an insurmountable barrier, or will at least incentivize the plaintiff to pursue alternative paths to enforcement outside of filing a citizen suit.

This does not necessarily mean that plaintiffs are only looking for monetary relief; if plaintiffs cannot recover their legal fees or be compensated for the damage to their property, they may consider other legal pathways to have those needs met. They may also have trouble finding a competent attorney to handle their case, as the inability to recover legal fees or to recover much financially will serve as a disincentive to potential attorneys willing to take their case. The exhaustion doctrine only adds to plaintiffs' financial woes, as those who end up in front of administrative law tribunals not only incur more costs as time goes on, but may also have a smaller chance of recovering monetary damages or attorney fees in front of the tribunal or on judicial review than they would have if they had reached a court directly under a citizen suit statute.[173]

With respect to damages, environmental citizen suits can leave relief unspecified, or can specify declaratory or equitable relief, fines, or damages. Of the states analyzed in Part II, only Hawaii and Iowa have citizen suit laws that do not explicitly provide which relief plaintiffs can sue for. In the majority of the states discussed, specifically Massachusetts, New Jersey, Connecticut, Illinois, and Maryland, plaintiffs can only sue for declaratory or equitable relief. Plaintiffs in Michigan and Florida can also sue for declaratory and equitable relief, as well as for fines that they will unfortunately not receive. Finally, among the states analyzed in Part II, none have a citizen suit provision that explicitly authorizes citizen action for damages.[174] Plaintiffs who want damages can occasionally sue under additional statutes that provide punitive damages for specific pollution violations[175]; however, it is clear that a lack of damages under general, nonspecific citizen suit provisions is a logistical barrier to citizen action and that economic incentives likely send plaintiffs looking to other areas of the law for better relief.

With respect to attorney fees, parties to a court case are generally responsible for paying their own lawyers. However, relevant exceptions exist where fee-shifting is authorized by statute, as in Connecticut, Florida, Illinois, Louisiana, Minnesota, New Jersey, and Wyoming,[176] and where attorney fees are awarded to plaintiffs under the equitable "private attorney general doctrine." Under the private attorney general doctrine, courts have discretion to award attorney fees to plaintiffs who have vindicated important public rights depending on the strength or societal importance of the public policy the litigation vindicates, the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, and the number of people standing to benefit from the decision.[177]

Notably, this does not mean that plaintiffs will receive all of their expert fees and other court fees. Instead, expert fees are available in Connecticut, Florida, Iowa, Louisiana, Massachusetts, New Jersey, and Wyoming—less than one-half of states with general citizen suit provisions—and court fees are available in even fewer states.[178] Finally, some states even require plaintiffs to post bonds in order to sue, creating even more financial pressure on would-be private attorneys general.[179]

(2021)), Connecticut (Conn. Gen. Stat. §22a-16 (2020)), Illinois (415 Ill. Comp. Stat. Ann. 5/45 (2021)), and Maryland (Md. Code Ann., Nat. Res. §1-503 (2020)) offer only declaratory or equitable relief; Michigan (Mich. Comp. Laws §324.20135(2) (2021)) and Florida (Fla. Stat. Ann. §120.69 (2021)) offer fines that do not go to the plaintiff; and North Dakota (N.D. Cent. Code §32-40-06 (2021)) offers recovery for damages that have occurred as a result of the violation. *See* May, *supra* note 142, at 56.

172. *See* May, *supra* note 142, at 56; Reporters Committee for Freedom of the Press, *Availability of Court Costs and Attorney's Fees*, https://www.rcfp.org/open-government-sections/9-availability-of-court-costs-and-attorneys-fees/ (last visited Apr. 22, 2022). *See*, *e.g.*, Model Laundries & Dry Cleaners v. Amoco Corp., 548 N.W.2d 242, 244 (Mich. Ct. App. 1996) ("Award or denial of attorney fees pursuant to Michigan Environmental Response Act is discretionary and is reviewed for an abuse of discretion . . . ." "[W]hen discussing the abuse of discretion standard of review in the context of awards of attorney fees, '[a]n abuse of discretion exists only when the result so violates fact and logic that it constitutes perversity of will, defiance of judgment or the exercise of passion or bias.'").

173. *See* Lee, *supra* note 151, at 500-01 n.44 (explaining this problem at the federal level). For a discussion of the availability of insured damages when a citizen successfully sues for environmental pollution, see generally Michael F. Aylward, Morrison Mahoney LLP, Environmental Insurance Litigation: A State By State Case Law Survey (Summer 2018 ed.), https://www.morrisonmahoney.com/writable/resources/documents/master_pollution_50_state_survey_2018_.pdf.

174. *Cf.* N.D. Cent. Code Ann. §32-40-06 (2021). Although not analyzed in Section II.A due to a lack of court analysis on standing, North Dakota has a citizen suit provision that explicitly authorizes citizen action for damages. Notably, the availability of damages to North Dakota's plaintiffs does not result in more court appearances in North Dakota as compared to other states, suggesting that North Dakota's plaintiffs can either get better damages through other remedies or cannot make it to court at all, for a variety of reasons.

175. *See*, *e.g.*, Crittenden v. Cook Cnty. Comm'n of Hum. Rts., 990 N.E.2d 1161, 1167 (Ill. 2013) (Under Illinois Compiled Statutes Annotated ch. 415, 5/22.2(k), the IPCB is authorized to impose punitive damages when an individual who is liable for the release of a hazardous substance fails, without sufficient cause, to provide removal or remedial action upon the IPCB's request.).

176. Connecticut (Conn. Gen. Stat. §22a-18(e) (2020)), Florida (Fla. Stat. Ann. §403.412 (2021)), Illinois (415 Ill. Comp. Stat. Ann. 5/45 (2021)), Louisiana (La. Stat. Ann. §30:2026 (2021)), Minnesota (Minn. Stat. §549.211 (2021)), New Jersey (N.J. Stat. §2A:35A-10 (2021)), and Wyoming (Wyo. Stat. §35-11-904 (2021)) provide for the recovery of attorney fees in civil environmental actions. Connecticut (Conn. Gen. Stat. §22a-18e (2020)) and Florida (Fla. Stat. Ann. §120.69 (2021)) provide for the recovery of attorney fees in administrative environmental actions. This has been an issue for decades. *See generally* Robert L. Weiner, *Awarding Attorneys' Fees to the Private Attorney General: Judicial Green Light to Private Litigation in the Public Interest*, 24 Hastings L.J. 733 (1973); Roger M. Leed, *The Development of the Fee-Shifting Doctrine: Attorney's Fees for the Private Attorney General*, 11 Law Notes Gen. Prac. 39 (1975).

177. Sierra Club v. Department of Transp. of State of Haw., 202 P.3d 1226, 1263 (Haw. 2009), *as amended* (May 13, 2009).

178. Conn. Gen. Stat. §22a-18(e) (2020); Iowa Code §455B.111 (2021); La. Stat. Ann. §30:2026 (2021); Mass. Gen. Laws ch. 214, §7A (2020); N.J. Stat. §2A:35A-10 (2021); Wyo. Stat. §35-11-904 (2021); Conn. Gen. Stat. §22a-18(e) (2020); Fla. Stat. Ann. §120.69 (2021). Of the 17 states analyzed in this Article, only Connecticut, Iowa, Louisiana, Massachusetts, New Jersey, and Wyoming provide for the recovery of expert fees in civil environmental actions, and only Connecticut and Florida provide for the recovery of expert fees in administrative environmental actions.

179. Mass. Gen. Laws ch. 214, §7A (2020); Fla. Stat. Ann. §403.412 (2021).

Between the general lack of recovery for attorney fees, expert fees, and court costs, and the uncertainty of fee-shifting under states' private attorney general doctrines, attorneys are disincentivized from specializing in state environmental law.[180] Further, it is not always clear whether attorneys can represent citizens in front of administrative law tribunals.[181] When attorneys are unable to make a living prosecuting state environmental law violations, they move to other areas of law, including federal environmental law, making it even more difficult for plaintiffs to find specialized legal professionals to help them bring cases at the state level.[182]

Luckily for our plaintiff Jane Doe, her hypothetical attorney has made a career bringing citizen suits in Illinois. Less luckily, Jane's attorney answers Jane's earlier question about whether Jane can get damages from her current legal strategy, or should pursue other legal actions in addition to filing her complaint with the IPCB. Jane's attorney tells her that the IPCB will not award her damages, and will only award reasonable attorney fees if Jane succeeds on her claim. Notably, Jane will have to pay the racetrack's attorney fees if she fails on her administrative claim, which could be significant depending on the attorney's experience level and time.

Increasingly concerned about damages, and worried that she could end up paying both her attorney and the racetrack's attorney if she sues under the citizen suit statute, Jane decides not to move forward with the IPCB, because the promise of declaratory relief is not enough to overcome the risk of paying so much in attorney fees. Jane asks her attorney what other actions she can file.

C. *Other Logistical Barriers*

Over and above the limitations discussed in Sections III.A and .B, additional logistical barriers await plaintiffs who file citizen suits and manage to circumvent the administrative barriers discussed above. These additional barriers range from the statutory requirements that plaintiffs experience actual or potential adverse effects discussed in Part II,[183] to lengthy notice requirements[184] and conditional prohibitions,[185] to res judicata and statutes of limitations, to minimum plaintiff requirements,[186] and even to "reasonable" but undefined restrictions.[187] Underlying all of these barriers is the power dynamic between wealthy, "repeat" players and private citizens or advocacy groups, where wealth and experience give "repeat" polluters the advantage of navigating both relaxed administrative discovery and traditional court discovery processes, administrative and court procedures, and settlement negotiations more adeptly than their citizen challengers.[188]

One important barrier to bringing citizen suits—almost as important as standing, aggrievement, damages, or fees—is the "diligent prosecution" condition present in nearly all citizen suit statutes. This prohibits citizens from bringing lawsuits wherever an agency or the state is prosecuting a civil action or negotiating an out-of-court settlement to require abatement of the violation at issue. This means that no citizen can initiate a lawsuit under the overwhelming majority of citizen suit statutes if the state has already taken action. While citizens with standing or aggrievement can generally intervene in these actions, this provides an additional explanation as to why citizens are not bringing lawsuits in court: they may be intervening in them instead. However, because citizen suits were originally developed to overcome the problem of government inaction against polluters, this is likely not the primary explanation behind the low number of citizen suits brought in the past five decades.

A second important barrier is the lengthy waiting period that plaintiffs face if they are initiating a lawsuit, rather than intervening in a suit or filing a complaint with an administrative agency. For those who are able to bring civil lawsuits directly before a court, there is a notice period of up to 60 days in some states, where the plaintiff must serve the violator and the state with a complaint and give the violator time to correct the violation and avoid litigation. If the plaintiff is seeking enforcement, this can be a reasonable solution, as both parties can avoid court fees, expert fees, and most of the attorney fees they would face in court or in settlement negotiations. If the plaintiff is seeking timely enforcement or damages, however, the lengthy

180. *Infra* Section IV.C. *Cf.* Environmental Law Institute, A Citizen's Guide to Using Federal Environmental Laws to Secure Environmental Justice 34 (2002), https://www.epa.gov/sites/production/files/2015-04/documents/citizen-guide-ej.pdf [hereinafter Citizen's Guide] ("It is also useful to know that citizens who win in these [federal] lawsuits often can collect their attorneys' fees and other costs (such as the cost to hire expert witnesses), although some recent court decisions have limited those fee awards in some circumstances.").

181. Ballotpedia, *Procedural Rights: States That Permit Lawyers to Represent Parties During Adjudication Hearings*, https://ballotpedia.org/Procedural_rights:_States_that_permit_lawyers_to_represent_parties_during_adjudication_proceedings (last visited Apr. 22, 2022).

182. *See* May, *supra* note 142, at 56 ("Even though fees are hard to recover under federal law, *every* federal environmental law that allows citizen enforcement has a fee-shifting provision. This has the effect of cannibalizing some actions that could otherwise be brought under state laws that do not.").

183. Wyo. Stat. Ann. §35-11-904 (2021) (Wyoming requires a potentially adverse effect on plaintiffs); La. Stat. Ann. §30:2026 (2021) (Louisiana requires a potentially adverse effect on plaintiffs); N.D. Cent. Code §32-40-06 (2021) (North Dakota requires an adverse effect on plaintiffs).

184. Alaska Stat. §46.03.481 (2020) (Alaska requires 45 days' notice); La. Stat. Ann. §30:2026 (2021) (Louisiana requires 30 days' notice); Mass. Gen. Laws ch. 214, §7A (2020) (Massachusetts requires 21 days' notice); Nev. Rev. Stat. Ann. §41.540 (2021) (Nevada requires 30 days' notice); Wyo. Stat. Ann. §35-11-904 (2021) (Wyoming requires 60 days' notice).

185. La. Stat. Ann. §30:2026 (2021); Mass. Gen. Laws ch. 214, §7A (2020); S.D. Codified Laws §34A-10-1 (2021); Wyo. Stat. Ann. §35-11-904 (2021). Louisiana, Massachusetts, South Dakota, and Wyoming generally will not permit citizen suits where the state has already commenced some form of legal action addressing the issue.

186. Mass. Gen. Laws ch. 214, §7A (2020) (no fewer than 10 residents joined as plaintiffs can sue in Massachusetts).

187. Ill. Const. art. XI, §2; Haw. Const. art. XI, §9.

188. *See generally* Talesh, *supra* note 152.

notice period and lack of monetary relief make lengthy notice provisions a problem.

A third barrier is res judicata,[189] also known as the doctrine of claim preclusion.[190] In federal and state courts, res judicata bars subsequent litigation when a court of competent jurisdiction renders a final judgment on the merits, when there is an "identity of parties," and when there is an "identity of cause of action."[191] An identity of parties means that the parties in the first suit and in the subsequent suit must either be the same or have the same interests.[192] An identity of cause of action means either that the same evidence will be presented in the case or that the underlying facts of the case are the same, depending on the jurisdiction.[193] Together, this all means that when a court renders a judgment, the plaintiff (or a sufficiently similar plaintiff) cannot sue again for that same harm (or for a sufficiently similar harm). Although only Florida expressly mentions res judicata in its citizen suit statute, it is a key doctrine for all state and federal courts.[194]

The doctrine is also important in the administrative law context. Put simply, a plaintiff who is forced to appear before an administrative tribunal prior to any court action may find that decisions of that tribunal become binding on any subsequent court. While the preclusive effect of administrative decisions depends on certain factors such as how "judicial" the administrative proceeding is, it poses a real risk that plaintiffs may never receive a full court hearing of their complaint if forced to appear before an administrative tribunal first.[195] Of course, merely holding an administrative permit to pollute does not insulate violators from tort action in common-law courts, but citizens who challenge permits before administrative tribunals must be careful about pursuing subsequent actions before common-law courts, and must either bring distinct actions or pursue only one avenue when seeking relief. Initiating a subsequent action in court is different from appealing an administrative decision in court, and an appeal does not violate res judicata because it is part of the original administrative action.

Consider Jane Doe, who made the economically sound decision to file an action in court instead of an IPCB complaint. What if Jane's attorney had not informed her of the financial risks and Jane had filed the IPCB complaint? What if the IPCB had found for the racetrack in its final judgment? On top of requiring Jane to pay the racetrack's attorney fees, that IPCB decision could have also effectively barred Jane from taking other legal action, or at least posed a serious barrier to succeeding in any other action. Depending both on whether the racetrack had a permit for its actions and also on what civil action Jane would have filed in addition to the IPCB complaint, res judicata could have barred her subsequent claim in court, especially if there were no material changes of law or fact between the final administrative judgment and Jane's court filing.[196]

Following the IPCB decision, if Jane filed too similar a complaint in court,[197] there would have been a real danger that the court would hold that the administrative proceedings underlying the IPCB's decision were judicial in nature, and that the procedures for adjudicating the racetrack's behavior were mandated by statute and provide for judicial review.[198] The court might have also held that the administrative determination of Jane's claim involved a sufficiently extensive and adversarial hearing, especially if it was conducted under oath and on the record.[199] If a state court had made these findings, the court would have also held that res judicata applied to the administrative decision.[200] This means that the earlier administrative decision may even have been binding on Jane's case, rather than simply persuasive.[201]

Assuming the defendant-racetrack is a "repeat" player with more experienced attorneys who can navigate administrative proceedings better than Jane's attorney, and assuming the racetrack would have taken advantage of the fact that Jane could not access a jury when bringing her complaint before the IPCB, then res judicata would have

189. Barbara Andersen Gimbel, *The Res Judicata Doctrine Under Illinois and Federal Law*, 88 Ill. B.J. 404, 408 (2000); In re Marriage of Potts, 542 N.E.2d 179 (Ill. 1989) (Under res judicata, also called estoppel by judgment or claim preclusion, a valid judgment in a previous action between the parties bars a subsequent action between those parties on the same claim or cause of action. Res judicata applies to issues actually raised in the first proceeding, and to issues that might have been raised in the first proceeding.).

190. *See also Marriage of Potts*, 542 N.E.2d 179 (A second, narrower form of estoppel is estoppel by verdict, also called collateral estoppel or issue preclusion, wherein a prior judgment estops a party from relitigating those issues actually and necessarily decided in prior action.).

191. Gimbel, *supra* note 189, at 408.

192. *Id.*

193. *Id.* ("The federal court system and the Restatement (2d) of Judgments had already adopted the transactional test, not the same-evidence test, . . . [while the] Illinois Supreme Court found that the transactional test was the more appropriate test.").

194. Fla. Stat. Ann. §§120.69, 403.412 (2021).

195. *See* Marco v. Doherty, 276 Ill. App. 3d 121, 124-25 (Ill. App. Ct. 1995) ("In Illinois, administrative decisions have *res judicata* and collateral estoppel effect where the department's determination is made in proceedings which are adjudicatory, judicial, or quasi-judicial in nature."); Osborne v. Kelly, 565 N.E.2d 1340, 1342 (Ill. App. Ct. 1991) ("*[R]es judicata* can preclude litigation of causes of action or issues already addressed in an administrative proceeding that is judicial in nature.").

196. Dowrick v. Village of Downers Grove, 840 N.E.2d 785, 790 (Ill. App. Ct. 2005) (Res judicata does not apply where the relief sought in the second proceeding was previously unavailable because of limitations on the subject matter jurisdiction of the court or other tribunal in the earlier proceeding.).

197. The res judicata doctrine applies to administrative decisions that are adjudicatory, judicial, or quasi-judicial where the issues and parties are identical and where there is a final judgment on the merits rendered by a court of competent jurisdiction. *See* Consiglio v. Department of Fin. & Pro. Regul., 988 N.E.2d 1020 (Ill. App. Ct. 2013), *aff'd sub nom.* Hayashi v. Illinois Dep't of Fin. & Pro. Regul., 25 N.E.3d 570 (Ill. 2014); John O. Schofield, Inc. v. Nikkel, 731 N.E.2d 915, 922 (Ill. App. Ct. 2000).

198. *Osborne*, 565 N.E.2d at 1342.

199. *Id.*

200. Hayes v. State Tchr. Certification Bd., 835 N.E.2d 146, 160 (Ill. App. Ct. 2005) ("In reviewing a final decision under the Administrative Review Law, [the court is] to consider the administrative agency's findings of fact to be *prima facie* correct, and [ ] must not reweigh the evidence or make independent factual findings.").

201. *Osborne*, 565 N.E.2d at 1342; Powers v. Arachnid, Inc., 617 N.E.2d 864, 867 (Ill. App. Ct. 1993) ("After review of an administrative decision, the reviewing court's judgment is *res judicata* as to all issues raised before it, and all issues, which could have been raised on the record but were not, are deemed waived." Because tort, property, and nuisance claims cannot be brought before an administrative judge, they likely cannot be deemed waived.).

had an even greater impact on Jane's chances of recovering. Even more importantly, res judicata would have prevented Jane from having her constitutional right to a healthful environment[202] litigated in court. Thankfully for Jane, her attorney counseled her not to bring the IPCB complaint, and Jane avoided all of these problems.

Returning to the discussion of barriers, the fourth additional barrier to bringing citizen suits is the statute of limitations, a law that sets the maximum amount of time that parties involved in a dispute have to initiate legal proceedings from the date of an alleged offense.[203] States make unique decisions on whether or not to equitably toll those limitations while plaintiffs pursue administrative remedies as required by the exhaustion doctrine. Some states toll the statute of limitations while the plaintiff exhausts his or her administrative remedies.[204] Others do not.[205] In general, statutes of limitations only toll when the plaintiff pursues mandatory administrative proceedings rather than permissive ones.[206] Because all the administrative proceedings discussed in this Article are mandatory, it is likely that most states will equitably toll the statute of limitations during the exhaustion process.

If a state is unwilling to toll the statute of limitations while plaintiffs challenge agencies' permit decisions (and some are unwilling[207]), plaintiffs may have even less of a chance of reaching a court under a citizen suit statute. To be clear, the requirement that parties appeal an administrative decision consistent with the statutory schedule (e.g., within 35 days after notice of a decision is served in the state of Illinois)[208] is not a statute of limitations, and cannot be tolled or waived.[209] Instead, the statute of limitations, and a court's decision not to toll that statute, would either impact a plaintiff's ability to bring the initial citizen suit claim in court or before an administrative tribunal, or the common-law tort claims discussed in Part IV, which may rely to some degree on the outcome of an administrative proceeding.

In addition to checking the applicable state statute of limitations that will apply to their citizen suit, plaintiffs should also become aware of the statutes of limitations for torts such as nuisance and trespass,[210] as plaintiffs may find themselves unable to pursue these common-law claims if they wait too long to complete administrative processes and to bring appeals. However, most jurisdictions' statutes of limitations only begin when the injured person either knows or should know that his or her injury was caused by pollution.[211]

A fifth barrier, a minimum plaintiff requirement, is unique to Massachusetts. Under the state's citizen suit statute, plaintiffs must sue in a group of at least 10 Massachusetts residents in order to gain standing.[212] Although plaintiffs in other states do not face this same barrier, Massachusetts' decision is just one clear example of the overarching problem of state legislatures drafting citizen suits with multiple barriers to actual citizen enforcement. If legislatures are concerned about citizens bringing frivolous lawsuits, legislatures could cut back citizen suit provisions to only enable actions for mandamus. If legislatures want citizens to use their private resources to reduce the government's burden and to support the policy goal of enforcement themselves, however, legislatures should reconsider the number and extent of the logistical barriers that are present in current citizen suit statutes.

IV. Alternative Paths to Enforcement

Returning to hypothetical plaintiff Jane Doe, Jane has chosen not to file a complaint with the IPCB and is consulting with her attorney about the possibility of pursuing alternative legal action. Jane understands that she would not be able to get damages before the administrative law tribunal, that she would never reach a court, and that a court would not grant her damages even if she made it that far under the citizen suit statute. Through this process, Jane learned that citizen suits are about enforcement rather than monetary relief, and Jane feels that she deserves some kind of compensation for the damage the racetrack has done to her business. At minimum, Jane wants to either recover court costs and attorney fees, or to be awarded damages that will cover those expenses.

Jane's attorney agrees to walk Jane through potential tort claims and to research any media-specific state statutes or federal environmental statutes with better damage provisions. Once she learns about all her options, Jane will pick an alternative path to enforcement. If Jane had filed with the IPCB, she might have been able to pursue a sec-

202. Ill. Const. art. XI, §2.
203. Christina Majaski, *Statute of Limitations*, Investopedia (Mar. 29, 2021), https://www.investopedia.com/terms/s/statute-of-limitations.asp.
204. McDonald v. Antelope Valley Cmty. Coll. Dist., 194 P.3d 1026, 1032 (Cal. 2008):
> Where exhaustion of an administrative remedy is mandatory prior to filing suit, equitable tolling is automatic: "It has long been settled in this and other jurisdictions that whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil action, the running of the limitations period is tolled during the time consumed by the administrative proceeding. . . ." This rule prevents administrative exhaustion requirements from rendering illusory nonadministrative remedies contingent on exhaustion.

205. Battle v. Ledford, 912 F.3d 708, 713 (4th Cir. 2019) ("Virginia lacks a generally applicable statute that pauses limitations to accommodate administrative exhaustion requirements." (citing Va. Code Ann. §8.01-229 (enumerating 11 unrelated exceptions suspending tolling limitations periods))).
206. P.B. Dirtmovers, Inc. v. United States, 30 Fed. Cl. 474, 477 (1994) ("[T]here is a critical distinction between mandatory and permissive administrative remedies . . . . Pursuit of such permissive administrative remedies does not affect the accrual of plaintiff's rights or toll the statute of limitations."). *Cf. McDonald*, 194 P.3d at 1032 ("[E]quitable tolling may extend even to the *voluntary* pursuit of alternate remedies.").
207. *See supra* note 205.
208. 735 Ill. Comp. Stat. Ann. 5/3-103 (2021).
209. Carroll v. Department of Emp. Sec., 907 N.E.2d 16, 21 (Ill. App. Ct. 2009).
210. *See generally* Adam David Kimmell Abelkop, *Tort Law as an Environmental Policy Instrument*, 92 Or. L. Rev. 381 (2013); Roger Meiners & Bruce Yandle, *The Common Law: How It Protects the Environment*, 13 PERC Pol'y Series 1, 25 (1998).
211. *See generally* Abelkop, *supra* note 210, at 401; Christopher M. Rhymes, *Environmental Contamination as Continuing Trespass*, 42 Env't L. 1381 (2012).
212. *See supra* note 75.

ond legal claim before a state court, but her attorney would need to carefully choose a claim that would not be barred by res judicata as discussed in Section III.C.

This part will explore three alternative avenues that plaintiffs can take if they are unable to successfully prosecute an action under a general, non-media-specific citizen suit statute, or to get satisfactory relief from an administrative law tribunal. First, citizens may prefer to bring tort lawsuits, especially in states where bringing a citizen suit requires a showing of special injury, adverse effect, or a specific harm. Second, citizens may prefer to bring lawsuits under media-specific state environmental statutes rather than under the general statutes discussed in Parts II and III. Third, citizens may prefer to bring federal citizen suits rather than state citizen suits despite a narrower federal standing doctrine, a decision that may make it easier to find an attorney.

These alternative paths to enforcement and their respective barriers are relevant because, despite relaxed state judicial standing requirements, plaintiffs often must show adverse effects and specific harms, and must go above and beyond to finance enforcement that the government would ideally enforce if it had unlimited resources. Again, just because a state's standing and aggrievement doctrines are relaxed does not mean that bringing a citizen suit is a plaintiff's best legal option, or a good option at all.

A. *Do Special Injury Requirements Push Citizens to Use Tort Law?*

It is no secret that citizens will often get better relief from common-law litigation than they will from their state's environmental protection agency,[213] or that the best common-law sources of relief for environmental plaintiffs are tort claims, such as nuisance and trespass. For decades, plaintiffs have relied on tort suits to "plug loopholes" in the underenforcement of imperfect statutory schemes.[214] Especially when a state's statutory standing or aggrievement doctrines require citizens to meet special injury requirements, like in Iowa, citizens are incentivized to bring tort suits instead of citizen suits, because the requirements are the same but the rewards are greater under the common law.[215] Conversely, when a state's statutory doctrines are relaxed, citizens are incentivized to bring citizen suits or to pursue administrative remedies.[216]

However, as seen with hypothetical plaintiff Jane Doe, it is clear that even relaxing standing and aggrievement doctrines may not create enough of an incentive to overcome the other barriers inherent to citizen enforcement of environmental violations, and that tort law offers better remedies for plaintiffs who meet the classical standing requirements. This means that even if everything would go right for a plaintiff in a citizen suit, it may nevertheless be best for that plaintiff to either pursue a common-law claim in addition to a citizen suit claim,[217] or to go directly to common law and skip the citizen suit altogether.[218] The question, then, is not whether would-be citizen suit plaintiffs *should* seek relief from tort law, but whether or not those plaintiffs *can* seek relief from tort law.

The two greatest barriers to citizen enforcement through tort law are standing, discussed in Part II, and the doctrine of primary jurisdiction. The doctrine of primary jurisdiction is an additional barrier, similar to but distinct from the exhaustion doctrine discussed in Part III. While the exhaustion doctrine applies where a claim is originally cognizable by an administrative agency alone, the doctrine of primary jurisdiction applies where a claim is originally cognizable in the courts, but where enforcement of that claim requires resolution of issues that, under a regulatory scheme, have been placed within the special competence of an administrative body.[219]

In practice, the doctrine of primary jurisdiction results in common-law claims being kicked out of state court and adjudicated by administrative boards when the court lacks the technical experience to adjudicate the claim.[220] Few states expressly provide that plaintiffs can pursue common-law remedies in addition to bringing citizen suits, so some plaintiffs who bring common-law tort claims will inevita-

213. *See generally* Meiners & Yandle, *supra* note 210.

214. Kenneth S. Boger, *The Common Law of Public Nuisance in State Environmental Litigation*, 4 B.C. Env't Affs. L. Rev. 367, 369 (1975).

215. Iowa Code §455B.111 (2021). This may be why Iowa's citizen suit statute explicitly enables plaintiffs to seek common-law relief in addition to statutory relief.

216. *See* English & Carroll, *supra* note 20 (discussing the non-self-effecting constitutional provisions: Mass. Const. amend. 49 (1972); Mont. Const. art. II, §3 (1889); Pa. Const. art. I, §27 (1971); R.I. Const. art. I, §17 (1970)). State legislatures seeking to remove the special injury requirement can either do so explicitly in a citizen suit statute or can introduce a self-effecting environmental amendment to the bill of rights. At present, only two of the six state bill of rights environmental protections are self-effecting: Hawaii's and Illinois'.

217. Iowa Code §455B.111 (2021); Mass. Gen. Laws ch. 214, §7A (2020). Iowa and Massachusetts expressly provide that their citizen suit statutes do not prevent plaintiffs from seeking common-law relief.

218. *See generally* Meiners & Yandle, *supra* note 210.

219. Flo-Sun, Inc. v. Kirk, 783 So. 2d 1029, 31 ELR 20607 (Fla. 2001):

> The "doctrine of exhaustion of administrative remedies" applies where a claim is cognizable in the first instance by an administrative agency alone and requires the withholding of judicial interference until the administrative process runs its course; however, the "doctrine of primary jurisdiction" applies to suspend the judicial process where a claim is originally cognizable in the courts, but enforcement of the claim requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.

220. Swartout v. Raytheon Co., No. 808-CV-890-T-26EAJ, 2008 WL 2756577, at *3 (M.D. Fla. July 14, 2008):

> The particular facts of the *Flo-Sun* case dictated that the issues reached "beyond the ordinary experience of judges and juries" and fell within the special competence attributed to the administrative agency. The case at hand, however, does not dictate the same result because it is distinguishable from *Flo-Sun*. Although *Flo-Sun* involved an environmental action, the case turned on technical questions requiring the expertise of the agency, specifically a claim for public nuisance. In *Flo-Sun*, sugar producers had polluted the community at large by the harvesting and processing of sugar cane by disposing of furfural in deep wells without a permit from the [Florida Department of Environmental Protection]. In contrast, the instant case seeks damages for the loss of use and decrease in property value caused by the contaminants, not the general enforcement of the state's pollution laws in the form of an adjudication of a public nuisance.

bly fail the doctrine of primary jurisdiction and end up before administrative tribunals.

However, because state courts do not actively try to push common-law claims into administrative tribunals, common-law claims remain in the courts whenever administrative expertise is not essential to the outcome of the case.[221] This gives courts the freedom to hear cases that involve permitted facilities' administratively approved violations and to nevertheless find that those facilities have committed torts.[222] On the other hand, if a court felt that a particular pollution permit issue was so technical that only an administrator could resolve the dispute, the court would likely apply the doctrine of primary jurisdiction and send the plaintiff to an administrative tribunal.[223]

The doctrine of primary jurisdiction raises the additional question of whether an administrative tribunal's decision, such as a decision to award a permit to pollute, would influence a court to hold against a plaintiff bringing a separate common-law suit, such as a nuisance suit. To answer this question, assume that Jane Doe's brother John Doe also lives in Illinois. One day, a chemical waste disposal site is established near John's home with the IEPA's express approval.[224] The site buries toxic, cancer-causing waste near John's home and contaminates the soil. The site has contracts with toxic chemical waste generators to haul the waste away from the generators' locations, to test the waste, and to deposit the waste in steel drums buried in trenches at the site near John's home. After the materials are deposited, clay is dumped between the drums and on top of the trench. The IEPA tests the area around the site to ensure compliance with the permit.

Like the defendant-racetrack near Jane's auto dealership, the chemical waste disposal site near John's home kicks up significant dust. Unlike the defendant-racetrack, the site also creates unpleasant odors and is a cancer risk. Having learned from his sister Jane Doe's experience, John decides to hire an attorney to bring a nuisance claim rather than to challenge the IEPA permit before an administrative board. John calls local experts and gathers information about the hazardous conditions at the site. At this point, John's entire town gets involved. The town goes to court and the defendant chemical waste disposal site argues that the court cannot find a nuisance because the site was operating consistent with an IEPA permit.

Will the administrative decision to award the permit, or any other related administrative decision, determine the outcome of John's town's nuisance case in Illinois state court? No, it will not. While courts are required to defer to administrative agencies when the doctrine of primary jurisdiction applies, the doctrine only applies when administrative expertise is necessary to decide the claim. Fortunately for John's town, Illinois has a dual system of enforcement and civil relief.[225] Therefore, even when a court lacks some of the expertise needed to answer a question in Illinois, the court will come to its own conclusion about justiciable matters.[226] This means that a plaintiff is not simply out of luck if an administrative decision is unfavorable, and would-be citizen suit plaintiffs with standing benefit when they pursue tort claims in state courts.

B. Do Citizens Prefer Media-Specific State Citizen Suit Statutes?

While there are fewer than 20 general, non-media-specific state citizen suit statutes in the United States, there are dozens of media-specific state citizen suit statutes. Media-specific statutes authorize citizen suits for specific types of violations such as clean air, clean water, hazardous waste, and mining. Unlike general, non-media-specific state citizen suit statutes that primarily came out of legislative reforms during the environmental movement of the 1970s, media-specific statutes were enacted during the 1980s, 1990s, and 2000s in a more sporadic manner[227] and

221. Village of Wilsonville v. SCA Servs., Inc., 396 N.E.2d 552, 556, 10 ELR 20195 (Ill. App. Ct. 1979), *aff'd and remanded*, 426 N.E.2d 824, 11 ELR 20698 (Ill. 1981):
> We are painfully aware of the lack of expertise in courts to fully understand the complicated technical matters involved in a case of this nature. However, the decision in *Janson* and the various statutes we have cited clearly indicate a policy in this state not to leave the enforcement of environmental matters exclusively in the hands of administrative agencies but to have a dual system of enforcement and civil relief. The causes of action set forth here involved "justiciable matters."

For examples in states outside the scope of this Article, see *Paselk v. Rabun*, 293 S.W.3d 600 (Tex. App. 2009):
> Trial court was not required to postpone resolution of horse ranch owner's suit against dairy farm owners alleging negligence, nuisance, trespass, gross negligence, and negligence per se arising from farm owners' alleged discharge of approximately 90,000 gallons of toxic, dairy lagoon effluent onto horse ranch causing death of numerous horses and significant property damage until Environmental Protection Agency (EPA) or state Commission on Environmental Quality acted, as EPA did not have exclusive or primary jurisdiction over ranch owner's common law tort claims, nor was there any authority requiring court to abate case involving common law tort claims until an administrative agency concluded its investigation into regulatory violations.

People v. Port Distributing Corp., 499 N.Y.S.2d 37 (N.Y. Sup. Ct. 1986):
> Doctrine of primary jurisdiction did not apply to prevent Supreme Court from adjudicating Attorney General's action against beer distributor and its agent for failure to pick up empty containers from stores buying beer, as required by provisions of Returnable Container Act [McKinney's Consolidated Laws of New York ECL §27-1007] and regulations of Department of Environmental Conservation, where Department was a plaintiff in such action and sole issue of whether defendants made pickups at stores as often as they delivered beer to stores was nontechnical factual issue which did not call for prior reference to Department.

222. *E.g.*, *Village of Wilsonville*, 396 N.E.2d at 556; *Port Distrib. Corp.*, 499 N.Y.S.2d at 37.

223. *See generally Village of Wilsonville*, 396 N.E.2d at 556.

224. John Doe's conflict was inspired by *Village of Wilsonville v. SCA Services, Inc.*

225. *Village of Wilsonville*, 396 N.E.2d at 556.

226. *Id.*:
> Where relief requested in suit to enjoin operation of sanitary landfill for hazardous industrial chemicals was not revocation of permits for operation of such landfill but injunction against conduct alleged to create nuisance and to cause pollution, fact that operation of landfill had been authorized by permits issued by administrative agencies did not deprive trial court of jurisdiction to determine issues presented, and court was not required to defer to such administrative agencies under doctrine of primary jurisdiction.

227. In California, for example, the Safe Drinking Water and Toxic Enforcement Act of 1986 was brought as a ballot initiative in 1986. *See* Cal. Health & Safety Code §25249.7 (2020); Julie Anne Ross, *Citizen Suits: California's Proposition 65 and the Lawyer's Ethical Duty to the Public Interest*, 29 U.S.F.

typically involve state-specific problems, such as habitat conservation in Hawaii,[228] radioactive waste pollution in Mississippi,[229] and coal mining in Virginia.[230]

State legislatures seem to prefer media-specific statutes, because more states have media-specific statutes than general statutes, and states with media-specific statutes tend not to have general statutes[231]; they instead tend to have multiple media-specific statutes to cover more types of pollution, although this is not always true.[232] As drafted, one-half of the 17 general citizen suit statutes identified in Part II require citizens to show some version of adverse effect to gain standing. A similar percentage of media-specific state citizen suit statutes have a similar requirement, making general and non-media-specific statutes equally accessible, at least facially.[233]

Because legislatures generally do not provide citizens with both general and media-specific citizen suit statutes, most citizens do not have the opportunity to demonstrate a preference for one over the other.[234] Where citizens do have the option, however, citizens either do not litigate under any environmental citizen suit statute, or choose the general statute over the media-specific statute to enforce their claims.[235] For example, in Louisiana, no cases have been decided under the media-specific coal mining statute or under the general statute.[236] In North Dakota, no cases have been decided under the media-specific hazardous waste management or surface mining statutes, while five cases have been brought under the general statute.[237] In Hawaii, no cases under the media-specific habitat conservation or air pollution statutes have made it to court, while 26 cases have been brought under the general statute.[238]

Based on this limited data, citizens do not seem to share state legislatures' preference for media-specific statutes over general statutes when they are available, and most citizens do not have a choice between the two. In other words, media-specific state citizen suit statutes do not appear to be a viable alternative to general state citizen suit statutes, and their availability does not explain why general statutes are underutilized. Instead, media-specific statutes seem to be even more underutilized than general statutes. If state legislatures are disappointed that citizens are not going to court under media-specific statutes, they should enact general statutes that will cover more environmental harms. If state legislatures are disappointed that citizens are not going to court under general statutes, enacting media-specific statutes will likely not solve the problem.

C. *Do Citizens Prefer Federal Citizen Suit Statutes?*

Although there are no general, non-media-specific federal environmental statutes, and although federal plaintiffs must meet Article III standing requirements, some plaintiffs may pursue federal claims in federal forums, rather than state claims. While a complete survey of the number of federal claims is beyond the scope of this Article, an analysis of the economic incentives serves as a proxy. This part will discuss the damages, attorney fees, and expert fees[239] available to federal plaintiffs suing under the Clean Air Act (CAA), Clean Water Act (CWA), Resource Conservation and Recovery Act (RCRA), Toxic Substances Control Act (TSCA), and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[240]

Note that, in addition to these statutes, federal plaintiffs may have access to federal grants or funding when they pursue federal environmental claims, and more public

L. Rev. 809, 813 (1995) (Prop. 65, the California Safe Drinking Water and Toxic Enforcement Act, was enacted by voter ballot initiative by a 2:1 margin in 1986) ("Prop. 65's citizen suit provision . . . differs in one very important respect from all federal environmental citizen suit provisions: Besides allowing citizens to enjoin a statutory violation, it also provides an incentive to citizen enforcers by awarding them twenty-five percent of all civil penalties collected in the lawsuit.").

228. Haw. Rev. Stat. §195D-32 (2021).
229. Miss. Code Ann. §57-49-15 (2020).
230. Va. Code Ann. §45.1-246.1 (2021).
231. Alabama, Arizona, California, Colorado, Idaho, Mississippi, Montana, New Hampshire, North Carolina, Texas, Virginia, Washington, Washington, D.C., and Wisconsin have media-specific statutes, but do not have general statutes.
232. Arizona, California, Colorado, Hawaii, Montana, New Mexico, North Dakota, Pennsylvania, Texas, and Washington have multiple media-specific statutes.
233. Section IV.B surveys the following 25 media-specific statutes: Ala. Code §9-16-95 (1975); Ariz. Rev. Stat. §§49-407, 49-264 (2021); Cal. Water Code §13002 (2020); Cal. Health & Safety Code §25249.7 (2021); Cal. Code Regs. tit. 11, §§3002, 3003 (2020); Cal. Pub. Res. Code §§30805, 30820 (2020); Colo. Rev. Stat. Ann. §§24-4-106, 25-7-115, 25-13-112 (2020); D.C. Code §8-1505 (2021); Haw. Rev. Stat. §§195D-32, 342B-56 (2021); Iowa Code §39-4416; La. Stat. Ann. §30:920 (2021); Miss. Code Ann. §57-49-15 (2020); Mont. Code Ann. §§75-10-726, 82-4-142, 82-4-354 (2021); N.H. Rev. Stat. §12-E:14 (2020); N.M. Stat. Ann. §§69-25A-24, 69-36-14 (2020); N.C. Gen. Stat. Ann. §143-215.94FF (2021); N.D. Cent. Code §§23.1-04-1553, 38-14.1-40 (2021); 35 P.S. §§7130.508, 6020.1115; 52 P.S. §30.63; Tex. Nat. Res. Code Ann. §§134.182, 191.173 (2021); Tex. Water Code Ann. §36.119; Va. Code Ann. §45.1-246.1 (2021); Wash. Rev. Code Ann. §78.56.140 (2021); W. Va. Code §§22-3-25, 22-18-19 (2021); Wis. Stat. Ann. §293.89 (2021). Of these 25 statutes, the following 11 involved some version of the adverse effect requirement: Ala. Code §9-16-95 (2021); Ariz. Rev. Stat. §§49-407, 49-264 (2021); Colo. Rev. Stat. Ann. §24-4-106 (2020); La. Stat. Ann. §30:920 (2021); Mont. Code Ann. §82-4-354 (2021); N.H. Rev. Stat. §12-E:14 (2020); N.M. Stat. Ann. §§69-25A-24, 69-36-14 (2020); N.D. Cent. Code §§23.1-04-1553, 38-14.1-40 (2021); 52 P.S. §30.63; Va. Code Ann. §45.1-246.1 (2021); W. Va. Code §22-3-25 (2021).
234. Hawaii, Louisiana, and North Dakota have multiple media-specific statutes and general statutes.
235. Consider Hawaii (Haw. Rev. Stat. §195D-32 (2021) (0 cases); *id.* §342B-56 (0 cases)), Louisiana (La. Stat. Ann. §30:920 (2021) (0 cases)), North Dakota (N.D. Cent. Code §23.1-04-15 (2021) (0 cases); *id.* §38-14.1-40 (0 cases)), and, depending on whether its constitutional provision is a citizen suit, Pennsylvania (35 P.S. §7130.508 (2 cases); *id.* §6020.1115 (26 cases, however this is essentially authorizing a tort suit for personal injury or damage); 52 P.S. §30.63 (2 cases)).
236. La. Stat. Ann. §30:920 (2021).
237. *Id.*; *infra* Appendix A.
238. *Infra* Appendix A.
239. *See* Christopher S. Elmendorf, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 Yale L.J. 1003 (2001) (proposing that state courts should adjudicate federal claims and only require state court standing, a perspective that Florida specifically legislated against in 2002 (Fla. Stat. Ann. §403.412 (2021)), and explaining that citizens may choose federal forums to adjudicate environmental claims because there are more attorneys in the federal environmental space); May, *supra* note 142, at 56.
240. *E.g.*, 42 U.S.C. §7604, ELR Stat. CAA §304; 33 U.S.C. §1365, ELR Stat. FLPMA §505; 42 U.S.C. §6972, ELR Stat. RCRA §7002; 15 U.S.C. §2619, ELR Stat. TSCA §20; 42 U.S.C. §9659, ELR Stat. CERCLA §310.

interest attorneys may be drawn to careers in the federal space, either because these lawyers may be more likely to have training as federal law clerks than as state law clerks, or because better federal fee recovery opportunities lead them to spend less time pursuing state matters over time.[241] Overall, these factors may combine in a way that makes it more practical for plaintiffs who can meet Article III standing to pursue federal claims, partially because of better opportunities to recover, but also because it may be easier to find an attorney.[242]

Under the CAA, plaintiffs can only sue for injunctive relief, not for damages.[243] With respect to attorney fees, CAA plaintiffs that "enjoy some degree of success on the merits," and who serve the public interest are entitled to attorney fees for litigating those specific claims on which they obtained at least a modicum of success.[244] With respect to expert fees, CAA plaintiffs can recover those costs that reflect the time necessary for preparation of technical affidavits that concern the impact of challenged standards,[245] but not costs that reflect the time experts spent analyzing rulemaking materials or helping with trial preparation.[246]

Similarly, under the CWA, plaintiffs can also only sue for injunctive relief, not for damages.[247] With respect to attorney fees and expert fees, CWA plaintiffs are eligible for essentially the same fees as under the CAA.[248] Under RCRA, too, plaintiffs can only sue for injunctive relief, not for damages or even for costs for any remediation substantially in place at the time of the lawsuit.[249] With respect to attorney fees and expert fees, the prevailing plaintiff can recover similar fees to those under the CAA and CWA, as well as more generous expert fees that include time where non-testifying experts helped with trial preparation.[250] Under TSCA, plaintiffs can also only sue for injunctive relief, not for damages.[251] With respect to attorney fees and expert fees, TSCA prevailing, substantially prevailing, or even non-prevailing plaintiffs in some cases can recover fees spent pursuing issues that serve the public interest.[252]

Finally, under CERCLA, plaintiffs can sue for injunctive relief and for the recovery of "any other necessary costs of response incurred by any other person consistent with the national contingency plan."[253] Unlike under the previously mentioned federal acts, attorney fees are not recoverable under CERCLA except for legal work so closely tied to the actual cleanup that it is a necessary response cost.[254] Similarly, expert fees are recoverable if they are a necessary cost of remediating a site, not just a cost of preparing for litigation.[255]

While the federal scheme for damages, attorney fees, and expert fees is not ideal, it provides more opportunities for some plaintiffs. For plaintiffs like John Doe facing the threatened or actual release of hazardous substances that may endanger public health or the environment, CERCLA is a strong starting point for recovery.[256] For those plaintiffs with Article III standing and CAA, CWA, TSCA, or CERCLA claims, there is a better chance of recovering attorney fees in a federal forum than by pursuing their state claims in Alaska, Hawaii, Indiana, Iowa, Maryland, Massachusetts, Michigan, Nevada, North Dakota, or South Dakota.[257]

Similarly, plaintiffs in Alaska, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, Nevada, North Dakota, and South Dakota cannot recover expert fees under their states' general citizen suit statutes, but they can recover expert fees from the CAA, CWA, and TSCA, and partially from CERCLA.[258] Like the factors discussed in Sections IV.A and .B, the ability to recover is not dispositive of a plaintiff's choice of claim and forum, but it certainly impacts all plaintiffs' choices of legal strategies and can to some degree explain why state citizen suits remain underutilized.

V. Conclusion

State environmental citizen suits are underutilized, and have been underutilized for half a century.[259] Among the 17 states with general, non-media-specific citizen suit provisions (Alaska, Connecticut, Florida, Hawaii, Illinois, Indi-

241. Ruckelshaus v. Sierra Club, 463 U.S. 680, 13 ELR 20664 (1983) (explaining that without a statute explicitly stating otherwise, the federal government is immune from claims for attorney fees). *See* Citizen's Guide, *supra* note 180, at 35-36; May, *supra* note 142, at 56.
242. *Cf. supra* Section IV.B.
243. Roger A. Greenbaum & Anne S. Peterson, *The Clean Air Act Amendments of 1990: Citizen Suits and How They Work*, 2 Fordham Env't Rev. 79 (2011).
244. Pound v. Airosol Co., Inc., 498 F.3d 1089, 37 ELR 20209 (10th Cir. 2007); Matthew Burrows, *The Clean Air Act: Citizen Suits, Attorneys' Fees, and the Separate Public Interest Requirement*, 36 B.C. Env't Affs. L. Rev. 103 (2009).
245. Davis Cnty. Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. Environmental Prot. Agency, 169 F.3d 755, 29 ELR 20627 (D.C. Cir. 1999).
246. *Id.*
247. Ohio Environmental Council, Watershed Watchdog: Guide to Clean Water Act Citizen Suits, https://www.waterboards.ca.gov/water_issues/programs/swamp/docs/cwt/guidance/112a1.pdf.
248. American Canoe Ass'n, Inc. v. City of Louisa, 683 F. Supp. 2d 480 (E.D. Ky. 2010) (fees are recoverable so long as there was a hope of relief on obtaining the claims, and some benefit was in fact achieved).
249. Express Car Wash Corp. v. Irinaga Bros., 967 F. Supp. 1188, 1194, 27 ELR 21394 (D. Or. 1997); Avondale Fed. Sav. Bank v. Amoco Oil Co., 170 F.3d 692, 29 ELR 21001 (7th Cir. 1999).
250. Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 426 F.3d 694, 35 ELR 20043 (3d Cir. 2005), *as amended* (Nov. 10, 2005).
251. N'Jai v. Environmental Prot. Agency, 705 F. App'x 126 (3d Cir. 2017).
252. Environmental Def. Fund, Inc. v. Environmental Prot. Agency, 672 F.2d 42, 12 ELR 20315 (D.C. Cir. 1982); America Unites for Kids v. Rousseau, 985 F.3d 1075 (9th Cir. 2021).
253. Garry A. Gabison, *The Problems With the Private Enforcement of CERCLA: An Empirical Analysis*, 7 Geo. Wash. J. Energy & Env't L. 189 (2016). U.S. EPA, *Natural Resource Damages: Frequently Asked Questions*, https://www.epa.gov/superfund/natural-resource-damages-frequently-asked-questions (last updated Apr. 11, 2022).
254. United States v. Dico, Inc., 920 F.3d 1174 (8th Cir. 2019); Key Tronic Corp. v. United States, 511 U.S. 809, 24 ELR 20955 (1994); Coastline Terminals of Conn., Inc. v. USX Corp., 156 F. Supp. 2d 203 (D. Conn. 2001).
255. Gussack Realty Co. v. Xerox Corp., 224 F.3d 85, 31 ELR 20035 (2d Cir. 2000).
256. *Id.*; U.S. EPA, *Superfund: CERCLA Overview*, https://www.epa.gov/superfund/superfund-cercla-overview (last updated Feb. 14, 2022).
257. *Infra* Section IV.B.
258. *Id.*
259. *See* May, *supra* note 142, at 56; Hill, *supra* note 142.

ana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, North Dakota, South Dakota, and Wyoming), eight of those states' citizen suit provisions have made it to court too few times to be discussed in this Article. Judiciaries in Indiana,[260] Louisiana,[261] Minnesota,[262] and North Dakota[263] have not comprehensively assessed standing when deciding the handful of citizen suits that have made it to court, and no citizens have sued under Alaska's, Nevada's, or Wyoming's citizen suit laws, so these states' judiciaries have not evaluated citizen suit standing at all. These states represent more than one-third of all states with citizen suit provisions, meaning there are still opportunities for state judiciaries to narrow standing and follow the U.S. Supreme Court's path.[264]

This is unlikely, however, at least in Minnesota[265] and Wyoming,[266] as both states' judiciaries have implied that they would not restrict standing in environmental cases. If courts continue to broaden standing and someday interpret the non-self-effecting environmental bill of rights provisions in Massachusetts, Montana, Pennsylvania, and Rhode Island as self-effecting provisions—and therefore as citizen suit provisions—there may be even more avenues for state citizen enforcement in the future.[267] In any event, it seems more likely that state legislatures and judiciaries will continue to relax standing and aggrievement than narrow them because state judiciaries are not bound by the federal case-or-controversy requirement, and because state legislatures can construct other procedural and financial barriers to keep plaintiffs out of court.

Thus, as Renovitch predicted in her 1974 article, a lack of citizen access to courts ultimately undermined, and continues to undermine, environmental citizen suit statutes.[268] Renovitch explained that if courts construed states' novel citizen suit provisions liberally, citizens would not need to promote alternative legal doctrines to strengthen the judiciary's role in protecting the environment. Nearly half a century later, it is clear that Renovitch was right to identify these risks, although it is the exhaustion doctrine, rather than standing, that presents the greatest barrier to contemporary citizen suit plaintiffs. This Article validates Renovitch's concerns, finds that state legislatures (rather than state judiciaries) are the source of many state standing barriers, and identifies federal citizen suits and tort law as the alternative enforcement opportunities that many citizens prefer over state citizen suits.

Analyzing one such citizen, hypothetical Illinois plaintiff Jane Doe, provides an opportunity to understand what Renovitch was warning against: the erection of barriers that ensure citizen suits will remain underutilized. Even if Jane had successfully pursued a citizen suit claim, she would have almost certainly gotten better relief from a tort claim, which her lawyer will likely advise her to pursue. At a certain point, Jane might decide to move her auto dealership if the racetrack is having such a serious impact on her business.

The real question is not whether Jane should pursue alternative legal and nonlegal remedies instead of a citizen suit, but whether Jane's state legislators are fully aware of the extensive barriers in her path to suing under the citizen suit statute. In the state of Illinois, the answer is clearly yes: Illinois' citizen suit statute explicitly sends would-be citizen suit plaintiffs directly to administrative tribunals. In states where barriers are not explicitly written into citizen suit statutes, however, this may not be the case: Connecticut's judiciary, for example, does not read the exhaustion requirement into its citizen suit statute, and Connecticut has the highest number of citizen suit cases by a broad margin.[269]

With such a wide variety of barriers to citizen suits, only one of which is a state's standing doctrine, it is difficult to appreciate the magnitude of the problem until it is laid out in one place. Hopefully, this Article will serve as a starting point for citizens, legal advocates, community leaders, lobbyists, lawmakers, and anyone else who may be interested in reforming state citizen suit statutes and getting plaintiffs into state court.

260. There is one overruled state case (Cooper Indus. LLC v. City of South Bend, 899 N.E.2d 1274 (Ind. 2009)) and one federal case (Frey v. Environmental Prot. Agency, 270 F.3d 1129, 32 ELR 20310 (7th Cir. 2001)) that applies state law.

261. In re BASF Corp., Chem. Div., 533 So. 2d 971, 973, 18 ELR 21506 (La. Ct. App. 1988); In re Am. Waste & Pollution Control Co., 642 So. 2d 1258, 1262 (La. 1994) (citing Save Ourselves, Inc. v. Louisiana Env't Control Comm'n, 452 So. 2d 1152, 1156, 14 ELR 20790 (La. 1984)).

262. White Bear Lake Restoration Ass'n ex rel. State v. Minnesota Dep't of Nat. Res., 946 N.W.2d 373, 390 (Minn. 2020) (It is not settled whether plaintiffs must also experience a concrete and particularized injury in addition to statutory standing, and this issue has not come before Minnesota's Supreme Court.).

263. N.D. Cent. Code §32-40-06 (2021).

264. State courts could narrow standing in response to litigation under any of the following five statutes: Alaska (Alaska Stat. §46.03.481 (2020)), Indiana (Ind. Code Ann. §13-30-1-1 (2021)), Minnesota (Minn. Stat. §§116B.01-.13 (2021)), Nevada (Nev. Rev. Stat. Ann. §41.540 (2021)), and Wyoming (Wyo. Stat. Ann. §35-11-904 (2021)).

265. *See supra* note 56.

266. *See supra* note 57.

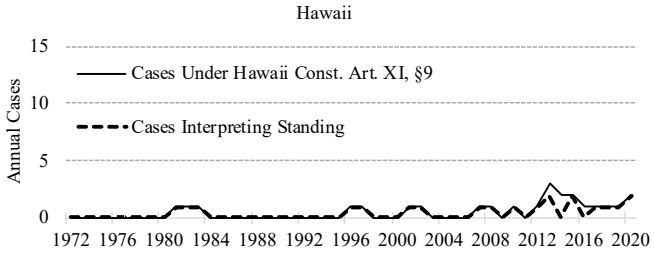
267. *See* English & Carroll, *supra* note 20; Mont. Const. art. II, §3 (1889); Pa. Const. art. I, §27 (1971); R.I. Const. art. I, §17 (1970).

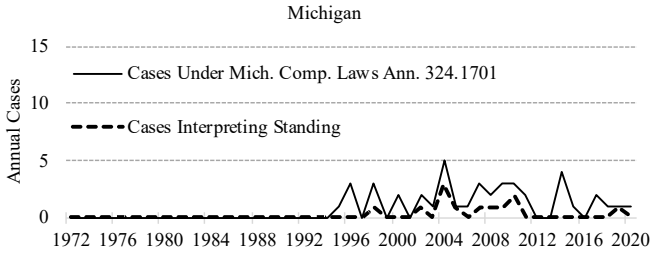
268. Renovitch, *supra* note 1.

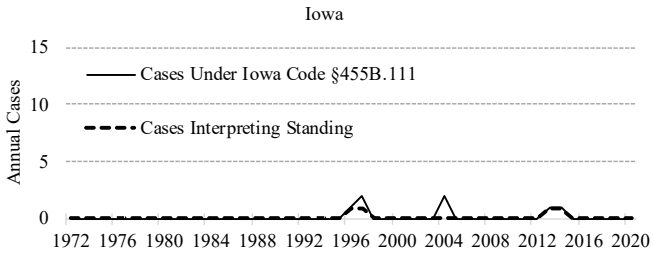
269. *Infra* Appendix B.

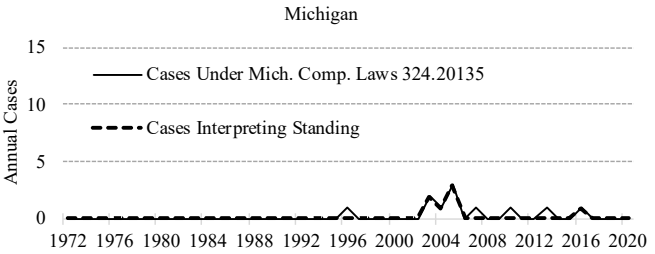
Appendix

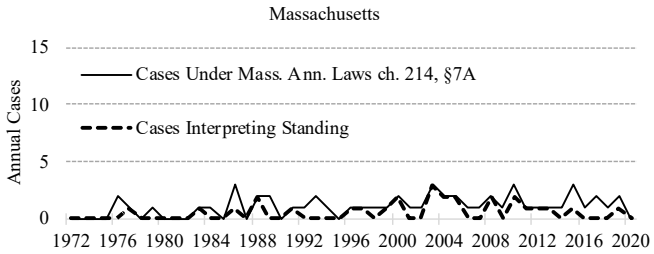
A. *Private Attorneys General and Standing*

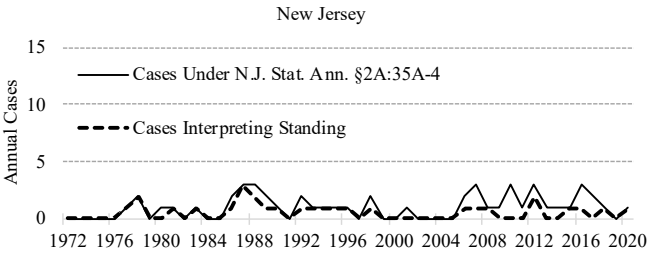












B. *Agency Forcing and Aggrievement*