



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today we have another episode in our “Listen and Learn” series, on justiciability. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on BarExamToolbox.com, and we’d love to hear from you. And with that, let’s get started.

Lee Burgess: Welcome back to the Law School Toolbox podcast. On this week’s “Listen and Learn”, we’re covering the basics of justiciability. Justiciability primarily pulls from constitutional law, but can also overlap with civil procedure. So with that, let’s get started.

Lee Burgess: There are two big questions you have to ask when it comes to justiciability. First, can this person bring this lawsuit to a federal court? This is also known as standing. The second question is whether this is the right time to hear the case. It might be too early or too late for the court to hear a given case. Courts ask whether the question is ripe, meaning is it too early to hear a case? Another way to ask is whether the dispute is hypothetical. Courts also ask whether a case is moot. Mootness generally means that it’s too late to hear a case. We’re going to dive into these three elements of justiciability: standing, ripeness, and mootness. Let’s start off with standing.

Lee Burgess: A plaintiff must meet three requirements to have standing. The plaintiff must suffer an injury in fact, the defendant must have caused the injury, and the court must be able to address the problem. These requirements are known as injury in fact, causation, and redressability. These are the three simple elements of standing. Make sure you memorize them.

Lee Burgess: Injury in fact means that the plaintiff must have suffered an actual harm or the harm is imminent. It must be concrete and particularized and cannot be hypothetical. A person who simply disagrees with the law probably does not have standing to bring a lawsuit, no matter how passionate the person is.

Lee Burgess: One other wrinkle to watch out for when it comes to the injury in fact is that a plaintiff does not always wait until the harm has happened to bring a lawsuit. If the person is in immediate danger of suffering an injury, she can probably bring the case to court. For example, if Congress passes a law that will force a



business to close, the business can go to court to ask for declaratory or injunctive relief. Another example is taking a patient off life support. Since it would be too late to challenge the decision after the hospital removes life support, a court will probably hear the case before the patient has been harmed.

Lee Burgess: The second question a court asks about standing relates to causation – whether the injury is fairly traceable to the defendant. An easy way to think about this is whether the defendant caused the injury. There should be a clear link between what the defendant allegedly did and the harm to the plaintiff.

Lee Burgess: Some situations are obvious, but some are a closer call. So for example, if Maud puts a hose through Cynthia’s window, Maud will flood Cynthia’s house. In this case, it’s obvious that the flooding is fairly traceable to Maud. Some situations are a bit more complicated. Suppose that a hurricane causes Cynthia’s home to flood and she wants to sue an oil factory because it produces a lot of carbon dioxide. In both situations, Cynthia ends up with a flooded home. It will be easy for her to show that the flooding is fairly traceable to Maud, but she will probably have a hard time showing that the factory is responsible for the flooding in her home. Sometimes think of the issue of causation as similar to “but-for” causation in torts.

Lee Burgess: The third question is whether the court can redress the injury. Put differently, if the court rules in favor of the plaintiff, will anything change? Sometimes there are cases where the federal courts cannot offer the relief requested. For example, a plaintiff might think that the Senate should get rid of the filibuster; however, a federal court cannot order Congress to change its own rules, because the Constitution gives Congress the right to create its own rules. Redressability might also be an issue when the parties are arguing about property outside the U.S. Even if the court orders the defendant to turn over the property to the plaintiff, the other country’s laws might prevent the court from implementing the remedy.

Lee Burgess: Okay, we’ve just talked about standing. Remember the three elements: injury, causation, and redressability. In addition to these three elements, there are a few specific types of plaintiffs who have special standing doctrines. Let’s talk about taxpayer standing, organizational standing, and third-party standing.

Lee Burgess: So, taxpayer standing is the easiest of the special standing doctrines. A good rule of thumb is that there is no taxpayer standing to challenge a government program. Without more, a taxpayer does not have standing because all



taxpayers are paying for the program. A plaintiff must show she is uniquely impacted by a statute beyond her taxes going to that program.

Lee Burgess: Next is third-party standing. A plaintiff generally can't bring a lawsuit on behalf of someone else. For example, no matter how much I love my aunt, I can't bring a lawsuit about someone trespassing on her property. Only she can bring that lawsuit because she experiences the injury in fact.

Lee Burgess: Now, there are a few exceptions to the prohibition of third-party standing. If a person is harmed but faces substantial barriers in asserting his own interests, then a third party may sometimes raise the issue. For example, a criminal defendant can raise a claim on behalf of a potential juror who may have been discriminated against during jury selection. Another example allows a plaintiff to assert the claims of a third party if the plaintiff and the third party are required members of a joint activity. For example, a beer seller could challenge a prohibition on purchasing beer, because the seller was required for the transaction. Similarly, a doctor can also sue on behalf of patients to challenge laws that prevent a patient from receiving medical care. For this exception to apply, look for some obvious connection, like a transaction between the plaintiff and the third party.

Lee Burgess: The last special standing doctrine is organizational standing. An organization can sue on its own behalf if it has been injured. It can also sue on behalf of its members who have been injured. There are three requirements for an organization to sue on behalf of its members. First, a member must have standing to sue in its own right. Second, the interest the organization is protecting must be germane to its purpose. And third, the claim asserted or the relief requested cannot require the individual member to participate.

Lee Burgess: Let's turn to the overarching second question that we discussed earlier in the podcast. Is this the right time to bring the lawsuit? Because we just talked about is it the right person to bring the lawsuit, or the right plaintiff. The court asks whether it is too soon or too late to bring a case. If it is too soon to bring a case, courts say it is not ripe yet. And then if it is too late, the case is moot. So these two concepts focus on timing. A case might not yet be ripe, meaning the plaintiff brought the case too early. For example, Monica hears a rumor that a chemical company is looking for a new place to build a factory and is planning to visit her neighbors' field next week. She might be very worried that the chemical company will buy the land and build a factory next to her house. Even though she is very worried, her lawsuit to prevent this sale is not ripe, because the chemical company might decide they are not going to buy the field.



Lee Burgess: What would make Monica’s case ripe? Well, if the chemical company were to apply for permits to operate a chemical factory, the case would be ripe. Now, what if Monica learns from her neighbor that the chemical company has put in a bid on the land? Well, that case is probably not ripe, because the bid could be rejected or the chemical company might not build a chemical factory there. It could use the land for some other purposes, like employee housing.

Lee Burgess: It can feel like the injury in fact and ripeness overlap, but they are separate concepts and you should evaluate them individually. Remember, a case can be ripe even if a person has not yet been injured because the injury in fact includes imminent harm.

Lee Burgess: Now that we have talked about ripeness, let’s talk about the opposite concept – mootness. A case is moot when it’s too late to bring the case. For example, if there is a lawsuit that challenges a law passed by a City Council, the case will be moot if the City Council cancels the new law. A case about who owns a car will be moot if the car is destroyed, though the parties might still argue about any insurance proceeds. In some instances, courts will hear a case, even though the case would normally be moot. This is the concept called “capable of repetition, yet evading review”.

Lee Burgess: There are two requirements for a case not to be mooted. First, it must be capable of repetition. This means that the injury must be the type of injury that is likely to occur again to the plaintiff. Second, the injury must have a relatively short duration, such that it ends before a case can get through to trial and appeal. The second requirement is the “evading review” part of the doctrine. Now, you might encounter this mootness doctrine in cases about pregnancy, elections, or school admissions. One famous example is *Roe v. Wade*. By the time the Supreme Court heard the case, the plaintiff had given birth and the baby was two and a half years old. Justice Blackmun said the nine-month gestation period “is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied.”

Lee Burgess: Another aspect of mootness to be aware of is class actions. If a class is already certified, the class action can proceed even if the named plaintiff’s case is mooted. For example, a class of people detained by ICE can continue to sue the government for release, even if the named plaintiff is now released.

Lee Burgess: Okay, so now that we know what all the concepts are, let’s quickly talk about where they come from. Many aspects of justiciability come from the



Constitution. The Constitution requires that there would be a dispute between the parties. Specifically Article 3, Section 2 of the Constitution uses the word “case and controversy” to describe the nine types of cases a federal court can hear. But courts won’t hear cases just because someone wants us to know the answer to an interesting legal question. Another way to say this is that the federal courts cannot give advisory opinions. This means that no one, including the President or Congress can ask a federal court for advice about whether a law is constitutional, or how the judge might read the statute before it is enacted. The “case and controversy” requirement explains why the courts care about timing issues like ripeness and mootness. It also explains why courts care about whether there has been an injury.

Lee Burgess: The Constitution does not explain everything about justiciability. Some of the rules are prudential. For example, the Constitution does not prohibit third-party standing, but courts still try to limit cases brought on behalf of other people. If a rule is prudential, then Congress can change it. Scholars argue about whether many of the rules we’ve covered come from the Constitution or are prudential.

Lee Burgess: Okay, so now let’s work through two examples together. Let’s start with an easy example. While Sarah is leaving the United States, U.S. government officials at the border seize all of her jewelry using a civil asset forfeiture law. Sarah is not charged with any crime and wants to file a lawsuit to get her jewelry back. The standing analysis in this is pretty straightforward. Sarah has experienced an injury in fact, because the government took her jewelry. The government caused the loss of her jewelry and the court has the power to order the government to return her jewelry. The question of timing is also straightforward. The case is ripe because the injury has occurred, and the case is not moot because the government still has her jewelry. So, Sarah’s case is justiciable.

Lee Burgess: But what if the government returns her jewelry just as Sarah is filing the lawsuit? Well, then the case is probably moot because there’s no longer a dispute between the parties. In other words, there’s no case or controversy.

Lee Burgess: Now, let’s wrap up with a more complicated example. Patricia lives next to the water in Louisiana. A company that manufactures plastics has just purchased a piece of property down the road from her and submitted a permit application to the zoning board to build a factory. Patricia is a member of her church, and also a national environmental non-profit. She files a federal lawsuit to enjoin the local zoning board from approving the permit. She says pollutants from the factory will contaminate her drinking water. She also claims that the greenhouse



gases will cause the sea level to rise and flood her house. Her church and the national environmental non-profit also join her lawsuit.

Lee Burgess: Now, remember that there are two questions to ask. First, can this plaintiff bring a lawsuit? And second, is this the right time to bring the lawsuit? So let's first determine whether Patricia's claims are justiciable before we discuss the church and the non-profit. Starting with her first alleged injury – that her drinking water will be contaminated – does she have an injury in fact? Well, since the factory has not even been built, we should consider whether the alleged injury is too hypothetical or conjectural.

Lee Burgess: Remember that the plaintiff can have standing even if the injury has not yet occurred, so long as the injury is not hypothetical or conjectural. If Patricia can show that there is some likelihood that the chemicals will leak into her water, she can probably show that her injury is not just conjectural or purely hypothetical. For example, she might point to research studies that show chemicals from factories frequently leaking into drinking water, or she could show that the plans do not account for intense flooding from hurricanes that will cause the drainage ponds to overflow.

Lee Burgess: The next two elements are causation and redressability, which are pretty straightforward on the drinking water issue. A leak from the chemical plant would cause Patricia's water to be contaminated, and if the court enjoins the factory from being built, then the pollutants from the factory won't contaminate Patricia's drinking water. So the court's decision will affect whether or not Patricia is harmed. The court will also consider the timing of the suit. Is it ripe? Even though the factory has not been built, the case is probably ripe because the company has applied to the zoning board for a permit. So the case is definitely not moot.

Lee Burgess: So let's talk through the same analysis on Patricia's claim that the greenhouse gases will cause the sea level to rise and her house to flood. Like the drinking water issue, Patricia will need to show that the harm is not conjectural or hypothetical. She will also have to show that the injury is specific to her – that her house will flood, not just a general grievance about climate change.

Lee Burgess: The next two elements of standing – causation and redressability – are a much closer call. On the one hand, scientists have established that releasing more greenhouse gases is causing sea levels to rise. This makes it more likely that Patricia's house will flood. On the other hand, Patricia's house could still flood from rising sea levels, even if the company does not build the factory, because of existing greenhouse gas emissions. It's going to be much harder for Patricia to



establish causation. For the same reason it's going to be harder for her to establish redressability. If the court grants the injunction and the factory is not built, Patricia's house may still flood because of climate change. The ripeness and mootness analyses are also similar to the drinking water issue.

Lee Burgess: So, don't forget we need to discuss the two other parties – Patricia's church, and the national environmental non-profit. Remember, there are three requirements for organizational standing. First, a member must have standing to sue in his own right. Second, the interest the organization is protecting must be germane to its purpose. And third, the claim asserted or the relief requested cannot require the individual member to participate. The church and non-profit meet the first requirement, assuming Patricia has standing to sue on her own, which we just analyzed. The church may not meet the second requirement – the interest it is seeking to protect must be germane to the organization's purpose. A church is generally involved with spiritual matters, not environmental issues or zoning disputes. However, if Patricia's church is committed to environmental justice, it might be able to show that protecting Patricia's drinking water or protecting her home from flooding is germane to its purpose.

Lee Burgess: The environmental non-profit should have an easier time showing its mission is germane to the lawsuit. However, the factory could argue that the environmental concerns are different from advocating for access to clean drinking water.

Lee Burgess: Assuming the church and the environmental non-profit can show the suit is germane to their mission, they probably meet the third requirement of organizational standing. Even though Patricia is suing the company, she is not required to be involved in order for the two organizations to get injunctive relief.

Lee Burgess: And with that, we're out of time. If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!



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