

2014

# No Article III Standing for Private Plaintiffs Challenging State Greenhouse Gas Regulations: The Ninth Circuit's Decision in Washington Environmental Council v. Bellon

Bradford Mank

University of Cincinnati College of Law, [brad.mank@uc.edu](mailto:brad.mank@uc.edu)

Follow this and additional works at: [http://scholarship.law.uc.edu/fac\\_pubs](http://scholarship.law.uc.edu/fac_pubs)

 Part of the [Constitutional Law Commons](#), and the [Environmental Law Commons](#)

---

## Recommended Citation

Mank, Bradford, "No Article III Standing for Private Plaintiffs Challenging State Greenhouse Gas Regulations: The Ninth Circuit's Decision in Washington Environmental Council v. Bellon" (2014). *Faculty Articles and Other Publications*. Paper 275.  
[http://scholarship.law.uc.edu/fac\\_pubs/275](http://scholarship.law.uc.edu/fac_pubs/275)

This Article is brought to you for free and open access by the College of Law Faculty Scholarship at University of Cincinnati College of Law Scholarship and Publications. It has been accepted for inclusion in Faculty Articles and Other Publications by an authorized administrator of University of Cincinnati College of Law Scholarship and Publications. For more information, please contact [ken.hirsh@uc.edu](mailto:ken.hirsh@uc.edu).

## ARTICLES

# NO ARTICLE III STANDING FOR PRIVATE PLAINTIFFS CHALLENGING STATE GREENHOUSE GAS REGULATIONS: THE NINTH CIRCUIT'S DECISION IN *WASHINGTON ENVIRONMENTAL COUNCIL V. BELLON*

BRADFORD C. MANK\*

*In Washington Environmental Council v. Bellon, the U.S. Court of Appeals for the Ninth Circuit held that private plaintiffs did not have standing to sue in federal court to challenge certain state greenhouse gas (GHG) regulations because the plaintiffs failed to allege that the emissions were significant enough to make a “meaningful contribution” to global GHG levels. By contrast, in Massachusetts v. EPA, the U.S. Supreme Court held that a state government had standing to sue the federal government for its failure to regulate national GHG emissions because states are “entitled to special solicitude in our standing analysis.” Massachusetts implied, but did not decide, that private parties might have less standing rights than states do when it declared that “[i]t is of considerable relevance that the party seeking review here is a sovereign State and not . . . a private individual.” Four years later, in American Electric Power Co. v. Connecticut (“AEP”), the Supreme Court, by an equally divided four-to-four vote, affirmed a decision finding standing for both state and private plaintiffs in a tort suit seeking GHG reductions. The Court stated that “[f]our members of the Court would hold that at least some plaintiffs have Article III standing under*

---

\* James Helmer, Jr., Professor of Law, *University of Cincinnati College of Law*, P.O. Box 210040, *University of Cincinnati*, Cincinnati, Ohio 45221-0040; Telephone 513-556-0094; Fax 513-556-1236; e-mail *brad.mank@uc.edu*. I thank Michael Solimine for his comments. All errors or omissions are my responsibility.

Massachusetts.” Commentators have speculated that the four Justices who found that the AEP plaintiffs had standing may have agreed only that the state plaintiffs had standing.

Justice Kennedy is usually the crucial swing vote in standing cases on the current Court. Based on his questions during the Massachusetts oral arguments, Justice Kennedy may have encouraged the majority to focus on the “special” standing rights of states in that case. He also may be one of the four Justices who supported standing rights for “some” plaintiffs in AEP.

The Ninth Circuit’s decision in *Washington Environmental Council* is important because it is the most straightforward federal court of appeals decision involving only private plaintiffs seeking to regulate GHGs. The decision potentially bars all private GHG suits involving a limited number of GHG emitters or quantity of GHG emissions, but the court did not decide the broader question of whether private parties can challenge the U.S. Environmental Protection Agency’s national regulation of the largest GHG sources, including power plants and motor vehicles. The decision’s broad language is arguably mere dicta that went too far in rejecting the possibility of private GHG suits.

#### TABLE OF CONTENTS

Introduction.....	1527
I. Introduction to Constitutional and Prudential Standing .....	1532
A. Constitutional Article III Standing .....	1532
B. Private Versus Public Standing Rights.....	1534
II. <i>Massachusetts v. EPA: Parens Patriae</i> State Standing .....	1536
A. Justice Stevens’s Majority Opinion on State Standing....	1536
1. The special standing rights of states .....	1536
2. Massachusetts meets the tests for injury, causation, and redressability .....	1539
B. Chief Justice Roberts’s Dissenting Opinion .....	1542
1. The <i>parens patriae</i> doctrine does not provide Massachusetts with greater standing rights.....	1543
2. Chief Justice Roberts argued that the plaintiffs’ claim was a nonjusticiable general grievance that is better suited for resolution by the political branches .....	1545
III. <i>American Electric Power Co. v. Connecticut (AEP)</i> .....	1546
A. The Plaintiffs’ Public Nuisance Action.....	1546
B. The District Court Invokes the Political Question Doctrine .....	1547
C. The Second Circuit Reverses and Allows an “Ordinary Tort Suit” To Proceed .....	1548
D. The Second Circuit’s Standing Analysis .....	1550
E. The Supreme Court’s Standing Decision in <i>AEP</i> .....	1553
1. Summary of the Court’s standing affirmance .....	1553
2. The four Justices on each side of standing in <i>AEP</i> ....	1554

3. The impact of <i>AEP</i> on future standing cases.....	1556
IV. Justice Kennedy’s Approach to Standing.....	1557
A. Justice Kennedy Believes Congress Has Some but Not Unlimited Discretion To Define Statutory Injuries that Give Rise to Article III Injuries.....	1558
B. Justice Kennedy and State Standing in <i>Massachusetts v. EPA</i> .....	1565
V. <i>Washington Environmental Council</i> .....	1567
A. The District Court Decision in Favor of the Plaintiffs Only Briefly Addresses Standing.....	1567
B. The Ninth Circuit’s Decision.....	1569
C. Will <i>Washington Environmental Council</i> Limit Standing in Future Private GHG Suits?.....	1573
D. Briefs on Possible En Banc Review.....	1577
E. Ninth Circuit Denies Rehearing En Banc, but Three Judges Dissent and Two Panel Members Defend Their Decision.....	1579
1. Judge Gould’s dissent from the denial of rehearing en banc.....	1580
2. Judge Smith’s rebuttal to Judge Gould and defense of the panel decision.....	1581
Conclusion.....	1583

## INTRODUCTION<sup>1</sup>

In *Washington Environmental Council v. Bellon*,<sup>2</sup> a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit recently held that

---

1. This Article is one of a series of explorations of modern standing doctrine. The other pieces are: Bradford C. Mank, *Clapper v. Amnesty International: Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV. (forthcoming Winter 2013); Bradford C. Mank, *Informational Standing After Summers*, 39 B.C. ENVTL. AFF. L. REV. 1 (2012); Bradford C. Mank, *Is Prudential Standing Jurisdictional?*, 64 CASE W. RES. L. REV. (forthcoming 2014); Bradford C. Mank, *Judge Posner’s “Practical” Theory of Standing: Closer to Justice Breyer’s Approach to Standing than to Justice Scalia’s*, 50 HOUS. L. REV. 71 (2012) [hereinafter Mank, *Judge Posner’s “Practical” Theory of Standing*]; Bradford C. Mank, *Reading the Standing Tea Leaves in American Electric Power Co. v. Connecticut*, 46 U. RICH. L. REV. 543 (2012) [hereinafter Mank, *Tea Leaves*]; Bradford Mank, *Revisiting the Lyons Den: Summers v. Earth Island Institute’s Misuse of Lyons’ “Realistic Threat” of Harm Standing Test*, 42 ARIZ. ST. L.J. 837 (2010); Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. EPA’s New Standing Test for States*, 49 WM. & MARY L. REV. 1701 (2008) [hereinafter Mank, *States Standing*]; Bradford C. Mank, *Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations To Come?*, 34 COLUM. J. ENVTL. L. 1 (2009) [hereinafter Mank, *Standing and Future Generations*]; Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665 (2009); Bradford C. Mank, *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation*, 2012 MICH. ST. L. REV. 869 [hereinafter Mank, *Standing for Private Parties in Global Warming Cases*]; Bradford Mank, *Standing in Monsanto Co. v. Geertson Seed Farms: Using Economic Injury as a Basis for Standing When Environmental Harm Is Difficult To Prove*, 115 PENN ST. L. REV. 307 (2010); Bradford C. Mank, *Summers v. Earth Island Institute: Its Implications for Future Standing Decisions*, 40 ENVTL. L. REP. 10,958 (2010); Bradford Mank, *Summers v. Earth Island Institute Rejects Probabilistic Standing, but a “Realistic Threat” of Harm Is a Better Standing Test*, 40 ENVTL. L. 89 (2010).

two private non-profit groups did not have standing under Article III of the U.S. Constitution to challenge certain Washington State greenhouse gas (GHG) regulations because the plaintiffs failed to allege that the emissions were significant enough to make a “meaningful contribution to global GHG levels.”<sup>3</sup> By contrast, in *Massachusetts v. EPA*,<sup>4</sup> the U.S. Supreme Court held that a state government had Article III standing to sue the federal government for its failure to regulate national GHG emissions from motor vehicles that arguably cause global climate change, despite the highly diffuse and generalized nature of the harms involved, because states are “entitled to special solicitude in our standing analysis.”<sup>5</sup> The *Massachusetts* Court did not explicitly decide whether private parties have standing rights to bring climate change suits against the federal government or large private GHG emitters. Nevertheless, the Court suggested that private parties may have lesser standing rights when it distinguished *Lujan v. Defenders of Wildlife*<sup>6</sup> and announced that “[i]t is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.”<sup>7</sup>

In *American Electric Power Co. v. Connecticut*<sup>8</sup> (“AEP”), the Supreme Court, by an equally divided vote of four-to-four, affirmed the decision of the U.S. Court of Appeals for the Second Circuit holding that state and private plaintiffs had standing in a tort suit seeking GHG reductions from the five largest utility emitters of certain GHGs in the United States.<sup>9</sup> The Court stated, “Four members of the Court would hold that at least *some plaintiffs* have Article III standing under *Massachusetts*, which permitted a State to challenge [the U.S. Environmental Protection Agency’s (EPA)] refusal to regulate [GHG] emissions; and, further, that no other threshold obstacle bars

---

2. 732 F.3d 1131 (9th Cir. 2013), *reh’g en banc denied*, 741 F.3d 1075 (9th Cir. 2014).

3. *Id.* at 1135, 1145–46 (stating that the plaintiffs only demonstrated that the GHG emissions from Washington State’s five oil refineries made up 5.9% of emissions in the state).

4. 549 U.S. 497 (2007).

5. *Id.* at 518–21 (pointing out that Massachusetts owned a large portion of the affected territory, reinforcing the conclusion that the injury to the state was sufficiently concrete); *see also* Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 871, 881–82 (attributing the Court’s decision to give states greater standing rights in *Massachusetts* to the *parens patriae* doctrine).

6. 504 U.S. 555 (1992).

7. *Massachusetts*, 549 U.S. at 518; *see also* Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 871, 881–82 (summarizing the Court’s view that states are “not normal litigants” for standing purposes because they have a “quasi-sovereign interest in the health and welfare of their citizens”).

8. 131 S. Ct. 2527 (2011).

9. *See id.* at 2533–35 (rejecting the petitioners’ argument that the federal courts lacked jurisdiction to reach the merits of the case).

review.”<sup>10</sup> The Court did not explain whether “some” plaintiffs included only state plaintiffs or also private plaintiffs, but commentators have suggested that the four Justices may have decided only that the state plaintiffs had standing.<sup>11</sup> *AEP* remains an enigmatic decision because both state and private plaintiffs were involved, and the Supreme Court never explained whether private plaintiffs alone might have standing.

Justice Kennedy is usually the crucial swing vote in standing cases on the current Court.<sup>12</sup> Based on his questions during the *Massachusetts* oral argument, Justice Kennedy may have encouraged the majority to focus on states’ special standing rights.<sup>13</sup> Further,

---

10. *Id.* at 2335 (emphasis added) (citation omitted); see also Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 873, 894 (highlighting that the Court “took [an] unusual step” when it explained that it was equally divided on the standing and jurisdictional issues).

11. See, e.g., Michael B. Gerrard, ‘American Electric Power’ *Leaves Open Many Questions for Climate Litigation*, N.Y. L.J., July 14, 2011, available at [http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP\\_NewYorkLawJournal\\_Gerrard\\_7.14.11.pdf](http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP_NewYorkLawJournal_Gerrard_7.14.11.pdf); see also Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 873, 897–98 (pointing out that the ambiguity in the opinion makes it unclear whether the four Justices were also approving standing for private plaintiffs in climate change cases).

12. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (stating that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before,” provided that Congress “identif[ies] the injury it seeks to vindicate and relate[s] the injury to the class of persons entitled to bring suit”); see also Mank, *Informational Standing After Summers*, *supra* note 1, at 25, 46–50, 52–54 (analyzing Justice Kennedy’s swing vote in standing cases and predicting that his vote will be crucial in future standing cases as well); *infra* Part IV (same). See generally Jeremy P. Jacobs, *Supreme Court: Wiretap Ruling Could Haunt Environmental Lawsuits*, GREENWIRE (May 20, 2013), <http://www.eenews.net/stories/1059981453> (speculating that Justice Alito’s footnote in *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138 (2013), was inserted primarily to sway Justice Kennedy to join the conservative group of Justices); Charles Lane, *Kennedy Seen as the Next Justice in Court’s Middle*, WASH. POST (Jan. 31, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/30/AR2006013001356.html> (predicting that, after Justice Alito joined the Supreme Court, “the O’Connor Court” might turn into “the Kennedy Court” because Justices Alito, Roberts, Scalia, and Thomas would form a conservative bloc, leaving Justice Kennedy, “a conservative who . . . occasionally vote[s] with liberals[,] . . . as the [C]ourt’s least predictable member”).

In five-to-four decisions during the most recent 2012–2013 Supreme Court term, Justice Kennedy, the Court’s “swing vote,” agreed with the conservative Justices—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—52–73% of the time, while he agreed with liberal Justices Ginsburg, Breyer, Sotomayor, and Kagan 30–43% of the time. Drew DeSilver, *Chart of the Week: Supreme Court Justices—Who Agrees with Whom*, PEW RES. CENTER (June 28, 2013), <http://www.pewresearch.org/fact-tank/2013/06/28/chart-of-the-week-supreme-court-justices-who-agrees-with-whom> (presenting a chart that depicts the percentages of agreements in full, in part, or only in the judgment in the Justices’ twenty-three five-to-four decisions during the 2012–2013 Supreme Court term).

13. See *infra* Part IV.B (noting that even though none of the petitioners, amicus briefs, or any of the three D.C. Circuit judges cited the *parens patriae* justification in

Justice Kennedy may be one of the four Justices who supported standing rights for “some” plaintiffs in *AEP*, and “some” plaintiffs may refer only to state plaintiffs.<sup>14</sup> The Supreme Court in a future decision should squarely address the standing rights of private parties in GHG litigation to provide clear guidance for courts and litigants.

The Ninth Circuit’s decision in *Washington Environmental Council* is important for courts and parties involved in GHG suits because it is the most straightforward federal court of appeals decision involving only private plaintiffs seeking to regulate GHGs.<sup>15</sup> Two prior district court decisions involved private plaintiffs and a federally recognized tribe.<sup>16</sup> The plaintiffs filed tort suits against various energy companies that sell fossil fuels that release GHGs.<sup>17</sup> The federal district courts applied a strict standing causation standard to dismiss these cases.<sup>18</sup> However, the U.S. Courts of Appeals for the Fifth and Ninth Circuits affirmed these decisions on other grounds and thus avoided the controversial question of whether private parties have Article III standing to file GHG suits.<sup>19</sup>

---

the lead-up to *Massachusetts*, during oral arguments in *Massachusetts*, Justice Kennedy implied that it helped the plaintiffs’ case).

14. See Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 873, 897–98 (surmising that because Justice Kennedy brought up the *parens patriae* doctrine during oral arguments in *Massachusetts*, he may only favor standing for states in climate change cases); Mank, *Tea Leaves*, *supra* note 1, at 591–92 (stating that, analyzing *AEP* and *Massachusetts* together, Justice Kennedy likely believes that only states should have standing in GHG cases).

15. See *infra* Part V (summarizing the district court and Ninth Circuit decisions in *Washington Environmental Council*, which involved private plaintiffs who sued three state government agencies for not enforcing a state plan that purportedly required the agencies to establish standards for GHG emissions).

16. *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 852 (S.D. Miss. 2012) (two private plaintiffs), *aff’d on other grounds*, 718 F.3d 460 (5th Cir. 2013); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009) (Village of Kivalina, whose inhabitants are a self-governing, federally recognized tribe of Inupiat Eskimos), *aff’d on other grounds*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013).

17. *Comer*, 839 F. Supp. 2d at 852 (group of oil companies); *Kivalina*, 663 F. Supp. 2d at 868 (twenty-four oil, energy, and utility companies).

18. *Comer*, 839 F. Supp. 2d at 860–61 (finding that the plaintiffs could not prove standing causation because they had not “allege[d] that the defendants’ particular emissions led to their property damage” and asserting that the court did not have a “legal basis for adopting a . . . lenient causation standard in global warming lawsuits” (emphasis added)); *Kivalina*, 663 F. Supp. 2d at 878–81 (holding that the plaintiff, the village, could not prove standing causation in a public nuisance action because it could not trace its harms to specific actions taken by the defendants that resulted in GHG emissions and also rejecting the plaintiff’s other theories of causation). *But see infra* Part II.B (describing Chief Justice Roberts’s dissenting opinion in *Massachusetts*, in which he argued that all global warming suits are generalized grievances best resolved by the political branches rather than judges, and also asserting that the Court should not apply a more lenient standing test for states).

19. See *Comer*, 718 F.3d at 469 (affirming on *res judicata* grounds and not addressing standing); *Kivalina*, 696 F.3d at 855–58 (holding that the Clean Air Act

Whether private GHG suits meet Article III standing requirements is a difficult question for lower courts because *Massachusetts* and *AEP* did not resolve that issue. Furthermore, the concept of private plaintiffs suing about a global problem raises the issue of whether, as Chief Justice Roberts's dissenting opinion in *Massachusetts* argued, generalized grievances affecting the public at large are better resolved by the political branches rather than by the federal judiciary.<sup>20</sup>

Accordingly, the Ninth Circuit's decision in *Washington Environmental Council* that private plaintiffs are not entitled to the special standing rights of state governments and that plaintiffs must allege that their proposed remedy will make a "meaningful contribution to global GHG levels"<sup>21</sup> could be precedent-setting. The decision also could make future GHG suits by private parties more difficult, but arguably not impossible, as it may not bar private suits involving the EPA's national regulation of the largest GHG emitters.<sup>22</sup> Unfortunately, Part V will show that the broad language in the Ninth Circuit's decision is arguably mere dicta that went beyond the facts of the case in rejecting the possibility of private GHG suits.<sup>23</sup> Part I

---

displaced the plaintiff's federal common law public nuisance claims but not deciding Article III standing issues); see also Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 872–73, 901–17 (providing a detailed overview of how "[l]ower courts have divided regarding whether private parties have standing in climate change cases," including the *Comer* and *Kivalina* courts). Previously, in *Comer*, a three-judge panel concluded that private plaintiffs had Article III standing in a GHG suit, but the Fifth Circuit vacated that decision when it granted en banc review. *Comer v. Murphy Oil USA*, 585 F.3d 855, 860 (5th Cir. 2009), *reh'g en banc granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed en banc*, 607 F.3d 1049 (5th Cir. 2010). Bizarrely, the Fifth Circuit declined to hear the case after granting rehearing en banc because too many judges had recused themselves. *Comer*, 607 F.3d at 1053–55. Eventually the plaintiffs re-filed the case but only to have the district court dismiss the case for lack of standing. See *Comer*, 839 F. Supp. 2d at 852–53, 860–62 (recounting the complicated prior proceedings in the case and dismissing the case); see also Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 904–18 (clarifying *Comer*'s complicated procedural history and summarizing the panel's now-vacated opinion and rationale for finding standing).

20. See *infra* Parts II–III (discussing *Massachusetts*, including Chief Justice Roberts's dissent, and *AEP*, including the district court's finding that the political question doctrine barred jurisdiction and the Second Circuit's reversal of that finding).

21. *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1145–47 (9th Cir. 2013), *reh'g en banc denied*, 741 F.3d 1075 (9th Cir. 2014).

22. See *id.* at 1145–46 (distinguishing *Massachusetts*, in which "the Court observed that the GHG emission levels from motor vehicles were a 'meaningful contribution' to global GHG concentrations, given that the U.S. motor-vehicle sector accounted for 6% of world-wide carbon dioxide emissions," from the present case in which the GHG emissions made up only 5.9% of emissions in Washington state, thereby implying that plaintiffs may be more likely to satisfy the causation requirement if they sue larger emitters of GHGs).

23. See *infra* Part V.D (highlighting that even the defendant-appellant in *Washington Environmental Council* argued that the panel should rehear the case or at



discusses the basics of Article III standing and some possible differences between the standing rights of private and public parties. Part II examines the seminal state GHG suit standing decision in *Massachusetts* and Chief Justice Roberts's dissenting opinion. Part III explores the decisions of the district court, the Second Circuit, and the Supreme Court in *AEP*, which involved both state and private plaintiffs. Part IV analyzes Justice Kennedy's crucial swing vote in standing cases, his emphasis on the role of statutory language in defining standing rights, and his propensity to favor special standing rights for states. Part V elucidates the Ninth Circuit's decision in *Washington Environmental Council* and explores how it might affect future private GHG suits.

## I. INTRODUCTION TO CONSTITUTIONAL AND PRUDENTIAL STANDING

### A. *Constitutional Article III Standing*

Although the Constitution does not explicitly require a plaintiff to possess "standing" to file suit in federal courts, the Supreme Court has inferred from Article III's limitation of judicial decisions to "Cases" and "Controversies" that federal courts must utilize standing requirements to guarantee that the plaintiff has a genuine interest and a stake in the outcome of a case.<sup>24</sup> "The federal courts have

---

least revise its opinion to temper the broad dicta that suggested private parties might never be able to satisfy standing causation requirements in GHG cases).

24. The constitutional standing requirements are derived from Article III, Section 2, which provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2 (footnote omitted); see *Stark v. Wickard*, 321 U.S. 288, 310 (1944) (stating that Article III grants courts the power to "adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action or private persons or by the exertion of unauthorized administrative power"); see also *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340–41 (2006) (explaining why the Supreme Court infers that Article III's case and controversy requirement necessitates standing limitations and clarifying that "[i]f a dispute is not a proper case or controversy, the courts have no business deciding it"); Mank, *States Standing*, *supra* note 1, at 1709–10 (presenting the Supreme Court's three-prong constitutional standing test and noting that "[a] federal court must dismiss a case without deciding the merits if the plaintiff fails to meet" this test). *But see* *Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs*, 650 F.3d 652, 655–56 (7th Cir. 2011) (questioning whether standing is based on Article III requirements and citing academic literature by "reputable scholars" that critique the Article III standing argument). See generally

jurisdiction over a case only if at least one plaintiff can prove that it has standing for each form of relief sought.”<sup>25</sup> For a federal court to have jurisdiction over a claim, at least one plaintiff must be able to prove standing for each form of relief sought; the court must dismiss the case if no plaintiffs meet the standing requirements.<sup>26</sup>

Standing requirements are related to broader constitutional principles. The standing doctrine prohibits unconstitutional advisory opinions.<sup>27</sup> Furthermore, standing requirements are consistent with separation of powers principles delineating the division of powers between the judiciary and political branches of government so that “the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society.”<sup>28</sup> There is disagreement, however, regarding to what extent separation of powers principles limit Congress’s authority to authorize standing to sue in federal courts for private citizens challenging executive branch under- or non-enforcement of congressional requirements that are mandated by statute.<sup>29</sup>

---

Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 CASE W. RES. L. REV. 1023, 1036–38 (2009) (discussing a scholarly debate on whether the Framers intended the Constitution to require standing to sue).

25. Mank, *States Standing*, *supra* note 1, at 1710; *see DaimlerChrysler*, 547 U.S. at 351–52 (confirming that “a plaintiff must demonstrate standing separately for each form of relief sought” (quoting *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000))).

26. *See DaimlerChrysler*, 547 U.S. at 340–41 (emphasizing the importance of the case or controversy requirement); *Friends of the Earth*, 528 U.S. at 180 (adding that courts have an affirmative duty at the outset of the litigation to ensure that litigants satisfy all Article III standing requirements).

27. *See Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (“Article III of the Constitution restricts the power of federal courts to ‘Cases’ and ‘Controversies.’ Accordingly, [t]o invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision. Federal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinion[s] advising what the law would be upon a hypothetical state of facts.” (alterations in original) (citations omitted) (internal quotation marks omitted)).

28. *DaimlerChrysler*, 547 U.S. at 341 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)) (internal quotation marks omitted); *see Mank, Standing and Future Generations*, *supra* note 1, at 26.

29. *Compare Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–78 (1992) (concluding that Articles II and III of the Constitution limit Congress’s authority to authorize citizen suits by any person lacking a concrete injury and citing several recent Supreme Court decisions for support), *with id.* at 602 (Blackmun, J., dissenting) (arguing that the “principal effect” of the majority’s approach to standing was “to transfer power into the hands of the Executive at the expense—not of the Courts—but of Congress, from which that power originates and emanates”). *See generally* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 496 (2008) (suggesting the “disagreement” is “[u]nsurprising[.]” and arguing that courts should not use standing doctrine “as a backdoor way to limit Congress’s legislative power”); *infra* Part IV.A (discussing Justice Kennedy’s views on the extent to which Congress may define Article III standing injuries).

The Supreme Court has established a three-part standing test that requires a plaintiff to show that (1) she has “suffered an injury-in-fact,” which is (a) “concrete and particularized” and (b) “actual or imminent, not conjectural or hypothetical”; (2) “there [is] a causal connection between the injury and the conduct complained of, meaning that the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court”; and (3) “it [is] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”<sup>30</sup> The burden is on the plaintiff to prove all three elements of standing.<sup>31</sup> While the strict three-part standing test discussed in *Lujan* remains in effect, the Court somewhat softened its effect in certain environmental cases by subsequently holding in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*<sup>32</sup> that plaintiffs who avoid recreational or aesthetic activities because of “reasonable concerns” about pollution have a requisite injury for Article III standing even if they cannot prove actual harm to themselves or the environment.<sup>33</sup>

### B. Private Versus Public Standing Rights

There are important historical distinctions between standing in “public” and in “private” rights cases.<sup>34</sup> For example, “[u]nder early English and American practice, a private individual could bring suit only to vindicate the violation of a private, as opposed to a public, right.”<sup>35</sup> More specifically, under English common law, only the King could prosecute the alleged violation of public rights, such as the navigation of public waters or public highways.<sup>36</sup> Further, beginning

---

30. *Lujan*, 504 U.S. at 560–61 (second, third, and fourth alterations in original) (citations omitted) (internal quotation marks omitted); see also Mank, *Standing and Global Warming*, *supra* note 1, at 23–24 (stating that the Court also requires an injury-in-fact for standing to bring suit under the Administrative Procedure Act).

31. *DaimlerChrysler*, 547 U.S. at 342 (stating that parties asserting federal jurisdiction must “carry the burden of establishing their standing under Article III”); *Lujan*, 504 U.S. at 561 (same); see also LARRY W. YACKLE, *FEDERAL COURTS* 336 (3d ed. 2009) (adding that a plaintiff may initially allege general facts that, if true, would establish the three standing elements, but, at the summary judgment stage, the plaintiff must argue these facts more specifically and with additional support and must ultimately prove the existence of injury, causation, and redressability).

32. 528 U.S. 167 (2000).

33. See *id.* at 181–84; see also *infra* notes 369–72 and accompanying text.

34. See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 279–81 (2008) (describing “public rights” as those held by the community and “private rights” as those held by individuals and granted or restricted by legislative action).

35. *Id.* at 279.

36. *Id.* at 279–80.

with the American Revolution and then throughout the nineteenth century, American courts followed the English rule that the violation of every private right carried a remedy and, therefore, “awarded nominal damages for violations of private rights that did not result in harm.”<sup>37</sup>

During the twentieth century, the relationship between public and private law in the United States became more complicated, but important distinctions between the two categories remain.<sup>38</sup> The government is still more likely to take a leading role in enforcing public rights.<sup>39</sup> For example, the Supreme Court’s decision in *Massachusetts* demonstrates that states have special rights to protect their natural resources, as discussed below.<sup>40</sup> However, private individuals may now sue to vindicate constitutional or statutory rights in ways that pre-twentieth century courts would not have recognized.<sup>41</sup>

The standing doctrine originally developed from the principle that private parties could only enforce private rights and not public rights.<sup>42</sup> Modern standing doctrine recognizes that private parties may enforce some types of public rights if a statute or constitutional provision creates a private right of action, if a plaintiff has suffered a personal injury, and if the suit does not violate separation of powers principles.<sup>43</sup> Because current standing doctrine does not clearly distinguish between how litigants in private and public rights cases must meet the three-part standing test discussed above, there are many uncertainties about how standing principles apply in those cases.<sup>44</sup> Arguably, courts should apply a more lenient standing test in common law private rights suits against private defendants than in public rights suits against the government that raise separation of powers concerns because standing causation involves one less step if a

---

37. *Id.* at 284–85.

38. *Id.* at 286–88 (explaining that, over time, the notion of public rights has expanded beyond the traditional common law rights and that it now includes statutory and constitutional rights as well).

39. *Id.* at 286.

40. *See infra* Part II.A.1 (noting that states can sue under the *parens patriae* doctrine to protect their interests in health, welfare, and natural resources).

41. Hessick, *supra* note 34, at 286–89 (indicating that “the Court has recognized [42 U.S.C.] § 1983 actions for violations of, inter alia, the Establishment Clause, the Free Speech Clause, [and] the Due Process Clause” (footnotes omitted)).

42. *Id.* at 289.

43. *Id.* at 289–90.

44. *See id.* (stating that the Court’s failure to distinguish between public and private rights for standing purposes has created a “confused and confusing body of [standing] law”); Gregory Bradford, Note, *Simplifying State Standing: The Role of Sovereign Interests in Future Climate Litigation*, 52 B.C. L. REV. 1065, 1073 (2011) (“Despite its primary focus on the separation of powers as a justification for restrictive standing, the Supreme Court has never clearly distinguished private rights from public rights lawsuits for standing purposes.”).

plaintiff is suing a private defendant for harm allegedly caused by its action than if the plaintiff is claiming the government has failed to regulate a private party that is allegedly harming the plaintiff.<sup>45</sup>

## II. MASSACHUSETTS V. EPA: PARENS PATRIAE STATE STANDING

In *Massachusetts v. EPA*, the Supreme Court concluded that the Commonwealth of Massachusetts had standing to sue the EPA for failing to regulate GHGs from motor vehicles, which allegedly cause climate change.<sup>46</sup> Notably, the Court recognized that, pursuant to the *parens patriae* doctrine, states sometimes have greater standing rights than private litigants.<sup>47</sup> However, because climate change affects everyone in the world, Chief Justice Roberts argued in a dissenting opinion that states do not have greater standing rights than other litigants and also that the generalized injuries resulting from climate change are better addressed through the political process than by the judiciary.<sup>48</sup>

### A. Justice Stevens's Majority Opinion on State Standing

#### 1. The special standing rights of states

The majority in *Massachusetts* used the *parens patriae* doctrine as a justification for giving greater standing rights to states than to other litigants.<sup>49</sup> The *parens patriae* doctrine developed as an English common law doctrine regarding the authority of the English King to protect incompetent persons, including minors, the mentally ill, and

---

45. See *Comer v. Murphy Oil USA*, 585 F.3d 855, 864–65 (5th Cir. 2009) (arguing that the private suit in *Comer* involved a causal chain of one less step than the causal chain accepted by the Supreme Court in *Massachusetts* because, in *Comer*, the defendants' emissions were contributing to climate change, which, in turn harmed the plaintiffs, whereas in *Massachusetts*, the EPA's failure to regulate led to increased emissions, which contributed to climate change and thereby harmed the plaintiffs), *reh'g en banc granted*, 598 F.3d 208 (5th Cir.), *appeal dismissed en banc*, 607 F.3d 1049 (5th Cir. 2010); Hessick, *supra* note 34, at 299–300, 310, 316–17, 324–27 (arguing that courts should not require proof of injury-in-fact in private rights cases); Mary Kathryn Nagle, *Tracing the Origins of Fairly Traceable: The Black Hole of Private Climate Change Litigation*, 85 TUL. L. REV. 477, 480–82 (2010) (criticizing strict standing causation—and especially the “fairly traceable” requirement—as constitutionally unwarranted in private rights cases).

46. *Massachusetts v. EPA*, 549 U.S. 497, 525–26 (2007).

47. *Id.* at 518–20. See generally Mank, *Standing and Future Generations*, *supra* note 1, at 68 (interpreting Justice Stevens's majority opinion as “suggest[ing] that states have the authority to protect future generations” from climate change problems).

48. *Massachusetts*, 549 U.S. at 535–37 (Roberts, C.J., dissenting).

49. *Id.* at 518–20 (majority opinion).

mentally limited persons.<sup>50</sup> Since the early twentieth century, federal courts have recognized that states may sue as *parens patriae* to protect their quasi-sovereign interests in the health, welfare, and natural resources of their citizens.<sup>51</sup>

Relying on the *parens patriae* doctrine, Justice Stevens, writing for the majority, stated that “the special position and interest of Massachusetts” was important in determining standing.<sup>52</sup> He declared that “[i]t is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.”<sup>53</sup> Justice Stevens cited the Court’s 1907 decision in *Georgia v. Tennessee Copper Co.*,<sup>54</sup> where the Court held that Georgia had standing to sue on behalf of its citizens to protect them from air pollution crossing over the state’s borders because of the state’s quasi-sovereign interests in its natural resources and the health of its citizens.<sup>55</sup> He also observed that the Court had long ago “recognized that States are not normal litigants for the purposes of invoking federal jurisdiction.”<sup>56</sup> Justice Stevens concluded that “[j]ust as Georgia’s independent interest ‘in all the earth and air within its domain’ supported federal jurisdiction a century ago, so too does Massachusetts’ well-founded desire to preserve its sovereign territory today.”<sup>57</sup> Additionally, the majority stated that Massachusetts’ ownership of a substantial amount of coastline allegedly affected by GHG emissions further justified the exercise of federal judicial power because the state’s ownership constituted a significant stake in the outcome of the case.<sup>58</sup>

Further explicating the *parens patriae* doctrine, Justice Stevens explained that states had standing to protect their quasi-sovereign interest in the health and welfare of their citizens because states have

---

50. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982); see Mank, *States Standing*, *supra* note 1, at 1756–57 (stating the English King had authority from his entitlement as the “father of the country”).

51. See *Massachusetts*, 549 U.S. at 518–19 (“[A] State [may bring suit] for an injury to it in its capacity of quasi-sovereign. In that capacity[,] the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.” (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907))); see also Mank, *States Standing*, *supra* note 1, at 1757–59 (adding that the Court also initially recognized states’ quasi-sovereign interests in not being denied their rightful place in the federal system).

52. *Massachusetts*, 549 U.S. at 518.

53. *Id.*

54. 206 U.S. 230 (1907).

55. *Massachusetts*, 549 U.S. at 518–19 (citing *Tenn. Copper*, 206 U.S. at 237).

56. *Id.* at 518.

57. *Id.* at 519.

58. *Id.*

surrendered three crucial sovereign powers to the federal government: (1) states may not use military force; (2) states are constitutionally prohibited from negotiating treaties with foreign governments; and (3) state laws are sometimes preempted by federal law.<sup>59</sup> Because states have yielded these three powers to the federal government, the Court invoked the *parens patriae* doctrine to preserve a special role for the states in a federal system of government by recognizing that states can sue in federal court to protect their quasi-sovereign interest in the health, welfare, and natural resources of their citizens.<sup>60</sup>

Justice Stevens somewhat confusingly combined the *parens patriae* doctrine with other arguments for granting standing in *Massachusetts*, including a procedural right conferred in the Clean Air Act<sup>61</sup> (CAA) to challenge the EPA's decision to reject the plaintiffs' rulemaking petition.<sup>62</sup> To support its conclusion that Massachusetts had the right to sue, the Court relied on statutory language in the CAA to conclude that Congress had required the EPA to use the federal government's sovereign powers to protect states from vehicle emissions that "in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."<sup>63</sup> Additionally, Justice Stevens observed that Congress had specifically created a procedural right to judicial review of the EPA's denial of a rulemaking petition.<sup>64</sup> Combining these justifications, the majority concluded that Massachusetts was entitled to "special solicitude" under the Court's standing analysis.<sup>65</sup>

A serious problem with the *Massachusetts* decision is that it did not clarify to what extent the Court's recognition of special state standing rights resulted from the *parens patriae* doctrine as opposed to either statutory rights in the CAA or the special standing rights of plaintiffs seeking to vindicate procedural rights.<sup>66</sup> Because the Court's decision in *Massachusetts* rested upon multiple considerations and not only the special *parens patriae* standing rights of states, it is complicated to

---

59. *Id.*

60. *Id.* at 519–20.

61. 42 U.S.C. §§ 7401–7671q (2012).

62. *Massachusetts*, 549 U.S. at 519–20.

63. *Id.* (alteration in original) (quoting 42 U.S.C. § 7521(a)(1) (2006)).

64. *Id.* at 520 (citing 42 U.S.C. § 7607(b)(1)).

65. *Id.*

66. See Mank, *States Standing*, *supra* note 1, at 1733–34, 1746–47, 1755–56 (recognizing the resultant confusion over which factor was more important to the Court's standing analysis—the existence of a procedural right or the involvement of a state—and observing that this confusion has created ambiguity about, for example, whether a private party owning a large piece of coastal property would have standing based on the procedural right to judicial review under the facts of *Massachusetts*).

evaluate whether the Ninth Circuit's approach to private party standing rights in *Washington Environmental Council* is harmonious with *Massachusetts*.<sup>67</sup>

2. *Massachusetts meets the tests for injury, causation, and redressability*

While believing that states are entitled to a more lenient standing test under the *parens patriae* doctrine, the *Massachusetts* majority also suggested that the Commonwealth had met the traditional three-part Article III standing test for injury, causation, and redressability.<sup>68</sup> Regarding the injury prong, the Court determined that climate change had caused rising sea levels that had already harmed Massachusetts' coastline and could cause future harms as well.<sup>69</sup> Rejecting the premise that prudential or constitutional principles bar standing for any plaintiff seeking to challenge a generalized grievance,<sup>70</sup> Justice Stevens argued that the fact that the "climate-change risks were 'widely shared' did not minimize Massachusetts' interest in the outcome of [the] litigation."<sup>71</sup> Because Massachusetts "own[ed] a substantial portion of the state's coastal property," the Court concluded that the Commonwealth "ha[d] alleged a particularized injury in its capacity as a landowner" even if many others had suffered similar injuries.<sup>72</sup>

Addressing the causation prong of the standing test, the Court pointed out that the EPA did not dispute the causal connection between GHG emissions and global warming.<sup>73</sup> In light of this acknowledgement, the EPA's failure to regulate GHG emissions at the very least "contribute[d]' to Massachusetts' injuries."<sup>74</sup> Nevertheless, the EPA "maintain[ed] that its decision not to regulate [GHG] emissions from new motor vehicles contribute[d] so

---

67. See *infra* Part V.B (explaining that the Ninth Circuit in *Washington Environmental Council* did not apply the relaxed standing approach from *Massachusetts* and instead found that the plaintiffs failed to satisfy the causation and redressability prongs of the standing test because their injuries were too attenuated from the defendants' failure to set and apply GHG emissions standards).

68. *Massachusetts*, 549 U.S. at 526.

69. *Id.* at 521–23; see Mank, *Standing and Future Generations*, *supra* note 1, at 71–73 (explaining that the Court evaluated current and future harms to the Commonwealth and suggesting that the "decision potentially allows states to serve as representatives for future generations").

70. See *supra* Part II (discussing whether prudential standing or constitutional standing principles restrict or prohibit suits alleging generalized grievances and detailing the Justices' conflicting views as expressed in *Massachusetts*).

71. *Massachusetts*, 549 U.S. at 522 (indicating that "[w]here a harm is concrete, though widely shared, the Court has found injury-in-fact" (quoting *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998)) (internal quotation marks omitted)).

72. *Id.*

73. *Id.* at 523.

74. *Id.*



insignificantly to [the] petitioners' injuries that the Agency [could not] be haled into federal court to answer for them," primarily because GHG emissions increases from countries like China and India were "likely to offset any marginal domestic decrease" that might result if the agency regulated GHGs from new vehicles.<sup>75</sup>

The Court rejected EPA's causation argument because it "rest[ed] on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum."<sup>76</sup> Additionally, the Court concluded that reducing domestic automobile emissions would have a significant impact on global GHG emissions because the U.S. transportation sector emitted more than 1.7 billion metric tons of carbon dioxide in 1999 and roughly similar amounts in each succeeding year.<sup>77</sup> Because domestic automobile emissions account for more than 6% of worldwide carbon dioxide emissions, the Court determined that "U.S. motor-vehicle emissions make a *meaningful contribution* to greenhouse gas concentrations."<sup>78</sup> As Part V discusses, the Ninth Circuit in *Washington Environmental Council* emphasized the "meaningful contribution" language in *Massachusetts* as a crucial test for distinguishing viable standing causation in GHG challenges.<sup>79</sup>

Finally, in *Massachusetts*, the EPA similarly argued that the plaintiffs could not satisfy the redressability prong of the standing test because most GHG emissions come from other countries.<sup>80</sup> Rejecting the EPA's argument, the Court emphasized that the EPA had a duty to reduce future harms to Massachusetts even if it could not prevent all such harms, reasoning that "[w]hile it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether the EPA has a duty to take steps to *slow* or *reduce* it."<sup>81</sup> Responding to the EPA's argument that its regulation of GHG emissions from new

---

75. *Id.* at 523–24.

76. *Id.* at 524.

77. *Id.*

78. *Id.* at 524–25.

79. *See* Wash. Evtl. Council v. Bellon, 732 F.3d 1131, 1145–46 (9th Cir. 2013) (explaining that the Ninth Circuit in *Washington Environmental Council* decided not to apply the relaxed standing approach from *Massachusetts* and instead found that the plaintiffs failed to satisfy the causation and redressability standing prongs because their injuries were too attenuated from the defendants' failure to regulate GHG emissions), *reh'g en banc denied*, 741 F.3d 1075 (9th Cir. 2014); *infra* Part V (explaining why the Ninth Circuit did not find a sufficient nexus to establish a "meaningful contribution" between the oil refineries' emissions levels and global GHG levels in *Washington Environmental Council*).

80. *Massachusetts*, 549 U.S. at 525–26.

81. *Id.* at 525.

vehicles would have little impact because of increasing emissions from other countries, the Court stated: “A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.”<sup>82</sup> Furthermore, the Court suggested that the EPA had a duty to prevent catastrophic harms to future generations.<sup>83</sup> As Part V discusses, the Ninth Circuit in *Washington Environmental Council* interpreted the Supreme Court’s approach to redressability in *Massachusetts* to require that a plaintiff’s proposed remedy significantly slow or reduce climate change and not encompass any remedy that might only tangentially reduce GHGs by a small amount.<sup>84</sup>

Despite its assertion that states enjoy “special solicitude” in deciding standing questions,<sup>85</sup> the Court’s analysis of injury, traceable causation, and redressability requirements in *Massachusetts* did not provide clear reasons for distinguishing between the standing rights of state and private plaintiffs. For example, a private landowner could suffer similar injuries from rising sea levels as the Commonwealth of Massachusetts. While the Court did mention that the Commonwealth of Massachusetts “owns a substantial portion of the state’s coastal property,”<sup>86</sup> there is no logical reason under standing requirements why an injury to a large amount of land should affect standing requirements differently from a similar injury to a small amount of land, provided both injuries are concrete.<sup>87</sup> The traceable causation and redressability issues in climate change cases arising from the fact that most emissions originate from outside the United States are arguably similar whether the plaintiffs are states or private parties.<sup>88</sup>

---

82. *Id.* at 526.

83. *Id.* (“The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge [the] EPA’s denial of their rulemaking petition.”).

84. *See Wash. Envtl. Council*, 732 F.3d at 1146–47 (concluding that the plaintiffs did not prove that the action they sought would have reduced climate change to any significant degree); *infra* Part V.B (analyzing the Ninth Circuit’s reasoning).

85. *Massachusetts*, 549 U.S. at 520.

86. *Id.* at 522 (internal quotation marks omitted).

87. *See Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 342, 344 & n.21 (2d Cir. 2009) (finding that both the states and private land trusts had standing to sue five defendant electric power companies that used large amounts of fossil fuels because both the states and private complaints asserted imminent future injuries to their lands), *rev’d*, 131 S. Ct. 2527 (2011); *see also infra* Part III (discussing the Second Circuit’s conclusion in *AEP* that both the private and state plaintiffs had standing).

88. *See Am. Elec. Power*, 582 F.3d at 345, 347–49 (noting that the states’ and private parties’ complaints alleged the defendants, as GHG emitters, caused their injuries and were redressable by the courts, but not explicitly comparing what the states and

Because the Court did not clearly articulate the differences between states' and private parties' standing rights, it is difficult to discern whether the Ninth Circuit's narrow approach to private party standing rights in *Washington Environmental Council* is consistent with *Massachusetts*.<sup>89</sup> Besides the difference between private and state parties in these two cases, the outcomes of *Washington Environmental Council* and *Massachusetts* may have differed because the quantity of GHGs at issue in the former case was far less than in the latter case.<sup>90</sup> That difference could be used to deny standing rights in any case where a plaintiff does not allege that the defendant's emissions have a significant impact on total global GHG emissions.<sup>91</sup>

### B. Chief Justice Roberts's Dissenting Opinion

In his dissenting opinion, Chief Justice Roberts argued that the global problem of climate change was a nonjusticiable general grievance that should be decided by the political branches rather than by the courts.<sup>92</sup> Additionally, he reasoned that it was inappropriate for the Court to apply a more generous standing test for states because there was no precedent, statutory basis, or logic for such a differentiation.<sup>93</sup> Furthermore, he contended that states do not have greater standing rights under the *parens patriae* doctrine.<sup>94</sup> While suggesting that states and private parties have roughly equivalent standing rights,<sup>95</sup> Justice Roberts's dissenting opinion essentially rejected the entire concept of GHG litigation by either private parties or states. He asserted that growing emissions in developing countries will eclipse any possible reductions ordered by U.S. courts against domestic GHG emitters because U.S. sources are only a minority source of global GHG emissions.<sup>96</sup>

---

private parties specifically needed to show that they had standing); *infra* Part III.D (detailing the Second Circuit's standing analysis).

89. See *infra* Part V.C (discussing observations regarding inconsistencies between *Washington Environmental Council* and *Massachusetts*).

90. Compare *Massachusetts*, 549 U.S. at 524 (involving 6% of global GHG emissions), with *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013) (involving 5.9% of GHG emissions in the state of Washington), *reh'g en banc denied*, 741 F.3d 1075 (9th Cir. 2014).

91. See *infra* Parts V.C, Conclusion (speculating on the impact of the Ninth Circuit's decision).

92. *Massachusetts*, 549 U.S. at 535 (Roberts, C.J., dissenting).

93. *Id.* at 536–40.

94. *Id.* at 538–39.

95. *Id.* (comparing private associations with states and asserting that, to bring a claim, both must justify that their members or citizens satisfy Article III standing requirements).

96. See *id.* at 545 (noting that 80% of global GHGs originate outside of the United States).

1. *The parens patriae doctrine does not provide Massachusetts with greater standing rights*

Chief Justice Roberts conceded that *Tennessee Copper* treated states more favorably than private litigants, but he argued that the case did so “solely with respect to available remedies.”<sup>97</sup> He reasoned that “[t]he case had nothing to do with Article III standing.”<sup>98</sup> His point is technically correct because the Court did not develop modern standing doctrine until the 1940s, several decades after the Court decided *Tennessee Copper*.<sup>99</sup> However, Justice Roberts did not address the majority opinion’s implication that broad standing rights for states would enhance states’ abilities to enforce their quasi-sovereign interests in protecting the health of their citizens and natural resources.<sup>100</sup>

Applying a narrow interpretation of the *parens patriae* doctrine, Chief Justice Roberts argued that the doctrine could not decrease a state plaintiff’s obligation to prove an injury because “[a] claim of *parens patriae* standing is distinct from an allegation of direct injury.”<sup>101</sup> “Far from being a substitute for Article III injury,” he continued, “*parens patriae* actions raise an additional hurdle for a state litigant: the articulation of a ‘quasi-sovereign interest’ *apart* from the interests of particular private parties.”<sup>102</sup> According to Chief Justice Roberts, “a State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III,” and “[f]ocusing on Massachusetts’ interests as quasi-sovereign makes the required showing here harder, not easier.”<sup>103</sup>

Chief Justice Roberts argued that the Court did not explain how its “special solicitude” for Massachusetts affected its standing analysis “except as an implicit concession that petitioners cannot establish standing on traditional terms.”<sup>104</sup> There is some merit to his criticism of the majority opinion because Justice Stevens never clearly explained to what extent the Court used Massachusetts’ status as a

---

97. *Id.* at 537–38 (explaining that *Tennessee Copper* gave Georgia the right to equitable relief while private litigants could obtain only a legal remedy).

98. *Id.* at 537.

99. *See supra* Part I.A (providing a brief overview of the history of Article III standing and contemporary requirements).

100. *See supra* Part II.A.1 (highlighting states’ role in acting on behalf of their citizens in light of *Massachusetts*).

101. *Massachusetts*, 549 U.S. at 538 (Roberts, C.J., dissenting).

102. *Id.* (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)).

103. *Id.*

104. *Id.* at 540.

state to change its standing analysis.<sup>105</sup> Chief Justice Roberts asserted that “the status of Massachusetts as a State cannot compensate for [the] petitioners’ failure to demonstrate injury in fact, causation, and redressability.”<sup>106</sup> He argued that the petitioners failed to prove that a causal connection existed between the alleged injury of loss of coastal land in Massachusetts and the lack of new motor vehicle GHG emission standards because “domestic motor vehicles [only] contribute about 6[%] of global carbon dioxide emissions and 4[%] of global [GHG] emissions.”<sup>107</sup> He concluded that “[i]n light of the bit-part domestic new motor vehicle [GHG] emissions have played in what petitioners describe as a 150-year global phenomenon, and the myriad additional factors bearing on petitioners’ alleged injury—the loss of Massachusetts coastal land—the connection is far too speculative to establish causation.”<sup>108</sup> Chief Justice Roberts would probably agree with the Ninth Circuit in *Washington Environmental Council* that the far smaller 5.94 million metric tons of carbon dioxide equivalents at issue, or 5.9% of Washington State GHG emissions, were too insignificant to be a legally significant cause of the global problem of climate change.<sup>109</sup>

Furthermore, Chief Justice Roberts argued that the issue of redressability was particularly troublesome for the plaintiffs because of the “tenuous link between [the] petitioners’ alleged injury and the indeterminate fractional domestic emissions at issue [in the case],” as well as the additional problem that the “petitioners [could not] meaningfully predict what [would] come of the 80[%] of [GHG] emissions that originate outside the United States.”<sup>110</sup> Chief Justice Roberts rejected the majority’s conclusion that “*any* decrease in domestic emissions will slow the pace of global emissions increases, no matter what happens elsewhere.”<sup>111</sup> He argued that the Court’s reasoning failed to satisfy the requirement that it be “*likely*” that a remedy will redress the “particular injury in fact” at issue in the

---

105. See Mank, *States Standing*, *supra* note 1, at 1733–34, 1746–47, 1755–56 (criticizing the *Massachusetts* majority for not clarifying whether and to what extent the special treatment of state standing in the case resulted from the *parens patriae* doctrine as opposed to the special standing rights of plaintiffs seeking to vindicate procedural rights).

106. *Massachusetts*, 549 U.S. at 540 (Roberts, C.J., dissenting).

107. *Id.* at 544.

108. *Id.* at 544–45.

109. See *Wash. Envntl. Council v. Bellon*, 732 F.3d 1131, 1143 (9th Cir. 2013) (providing the quantity of emissions in question), *reh’g en banc denied*, 741 F.3d 1075 (9th Cir. 2014); *infra* Part V.B (discussing how the relatively small amount of emissions may have been a factor in the Ninth Circuit’s decision).

110. *Massachusetts*, 549 U.S. at 545 (Roberts, C.J., dissenting).

111. *Id.* at 546.

case.<sup>112</sup> Chief Justice Roberts reasoned that “even if regulation *does* reduce emissions—to some indeterminate degree, given events elsewhere in the world—the Court never explains why that makes it *likely* that the injury in fact—the loss of land—will be redressed.”<sup>113</sup> Again, Chief Justice Roberts would likely agree with the Ninth Circuit’s conclusion in *Washington Environmental Council* that the far smaller 5.94 million metric tons of carbon dioxide equivalent (or 5.9% of Washington State GHG emissions) at issue were too insignificant to redress global climate change when foreign emissions are growing at a far greater rate than any possible reductions from tightened regulations in one state.<sup>114</sup>

2. Chief Justice Roberts argued that the plaintiffs’ claim was a nonjusticiable general grievance that is better suited for resolution by the political branches

Even granting the plaintiffs’ assumption that climate change is a significant public policy problem, Chief Justice Roberts argued that complaints about climate change are nonjusticiable general grievances that should be decided by the political branches rather than by the federal courts.<sup>115</sup> Initially, he asserted that the petitioners’ injuries from global warming failed to meet *Lujan*’s requirement that the alleged injury be “particularized” because the injuries were common to the general public.<sup>116</sup> Moreover, Chief Justice Roberts contended that the Court’s lax application of standing principles in this case failed to consider separation of power principles limiting the judiciary to “concrete cases.”<sup>117</sup> He also argued that the majority’s recognition of standing in a case involving policy issues affecting the entire nation and the world led the Court to intrude into policy decisions that are only appropriate for resolution by the political branches of government.<sup>118</sup> Clearly, Chief Justice Roberts would deny standing in climate change cases to both private and state plaintiffs because he believes that the political branches rather than the Article III courts should address generalized harms from global issues.

---

112. *Id.*

113. *Id.*

114. *Wash. Envtl. Council*, 732 F.3d at 1143–44; see also *infra* Part V (providing the Ninth Circuit’s reasoning).

115. *Massachusetts*, 549 U.S. at 535–36 (Roberts, C.J., dissenting).

116. *Id.* at 540–41 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 & n.1 (1992)).

117. *Id.* at 539–40, 547.

118. *Id.* at 535, 548–49.

III. *AMERICAN ELECTRIC POWER CO. V. CONNECTICUT* (AEP)A. *The Plaintiffs' Public Nuisance Action*

The plaintiffs in *American Electric Power Co. v. Connecticut* filed suit before the Supreme Court's seminal *Massachusetts* decision in 2007.<sup>119</sup> In 2004, two groups of plaintiffs filed separate complaints in the U.S. District Court for the Southern District of New York alleging that the five defendant electric power companies were committing a public nuisance.<sup>120</sup> According to the plaintiffs, the power companies operated fossil fuel burning plants in the United States that emitted large quantities of carbon dioxide and that significantly contributed to global climate change.<sup>121</sup> Eight states filed the first complaint ("the state plaintiffs"),<sup>122</sup> and three nonprofit land trusts<sup>123</sup> filed the second complaint ("the land trust plaintiffs").<sup>124</sup> The defendants were "four private companies and the Tennessee Valley Authority, a federally owned corporation that operates fossil-fuel fired power plants in several [s]tates."<sup>125</sup> The complaints asserted that the defendants "[were] the five largest emitters of carbon dioxide in the United States."<sup>126</sup> Annually, the five utilities collectively emitted 650 million tons of carbon dioxide, which constituted "25[%] of emissions from the domestic electric power sector, 10[%] of emissions from all domestic human activities, and 2.5[%] of all anthropogenic emissions worldwide."<sup>127</sup> By contrast, the plaintiffs in *Washington Environmental Council* sought more stringent regulation of industries that emitted only 5.94 million metric tons of carbon dioxide equivalents, or 5.9% of Washington State's total GHG emissions, and did not specifically address how much those emissions comprised of national or global GHGs emissions levels.<sup>128</sup>

---

119. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2533 (2011).

120. *Id.* at 2333–34.

121. *Id.*

122. California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin filed the first complaint; however, New Jersey and Wisconsin withdrew by the time the case went before the Supreme Court. *Id.* at 2533–34 & n.3.

123. *Id.* at 2534 n.4.

124. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527 (2011).

125. *Am. Elec. Power*, 131 S. Ct. at 2534 & n.5 (noting that the four private defendants were the American Electric Power Co. and one of its wholly owned subsidiaries, Southern Co., Xcel Energy Inc., and Cinergy Corporation).

126. *Id.* at 2534.

127. *Id.*

128. *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1143–44 (9th Cir. 2013), *reh'g en banc denied*, 741 F.3d 1075 (9th Cir. 2014).

In their complaints, the plaintiffs asserted that the defendants' carbon dioxide emissions worsened global climate change and thereby violated either the federal common law of interstate nuisance, or, in the alternative, state tort law.<sup>129</sup> The state plaintiffs alleged that their public lands, their infrastructure, and the health of their citizens were at risk from climate change.<sup>130</sup> The land trust plaintiffs alleged that climate change would destroy habitats for animals and rare species of trees and plants on land they owned and conserved.<sup>131</sup> Both plaintiffs "sought injunctive relief requiring each defendant to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade."<sup>132</sup>

*B. The District Court Invokes the Political Question Doctrine*

In 2005, the Southern District of New York dismissed both suits as presenting non-justiciable political questions.<sup>133</sup> Invoking separation of powers concerns, the court held that the complex issue relating to whether and how to reduce carbon dioxide emissions from fossil fuel burning power plants was a political question for resolution by the political branches and, therefore, not appropriate for judicial resolution.<sup>134</sup> Relying on the six-factor test from *Baker v. Carr*<sup>135</sup> for determining what is a non-justiciable political question,<sup>136</sup> the district court concluded that a public nuisance suit seeking to reduce carbon dioxide emissions from numerous electric power plants presented a non-justiciable political question because of "the impossibility of deciding [the issue] without an initial policy determination of a kind

---

129. *Am. Elec. Power*, 131 S. Ct. at 2534.

130. *Id.*

131. *Id.*

132. *Id.* (internal quotation marks omitted).

133. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *rev'd*, 131 S. Ct. 2527.

134. *Id.*

135. 369 U.S. 186 (1962).

136. *Id.* at 217 (asserting that, unless one of the factors is inseparable from a particular case, a court should not dismiss the case as a non-justiciable political question). In *Baker v. Carr*, the Court set forth six independent tests for the existence of a political question:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.*



clearly for nonjudicial discretion.”<sup>137</sup> The court determined that the “identification and balancing of economic, environmental, foreign policy, and national security interests” is a policy determination properly suited for resolution by the political branches, and, therefore dismissed the plaintiffs’ complaints.<sup>138</sup> The district court’s use of the political question doctrine to dismiss GHG suits is inconsistent with the Supreme Court’s willingness to consider GHG suits by states in *Massachusetts*. It is closer in approach to Chief Justice Roberts’s dissenting opinion in *Massachusetts* in characterizing GHG suits as better addressed by the political branches rather than by the judiciary.<sup>139</sup>

C. *The Second Circuit Reverses and Allows an “Ordinary Tort Suit” To Proceed*

The Second Circuit vacated the district court’s decision.<sup>140</sup> The case’s procedural history was unusual because the case was argued in 2006 but not decided until 2009.<sup>141</sup> The long delay was likely caused in part by the Second Circuit postponing its decision until the Supreme Court decided *Massachusetts*, which the Second Circuit discussed extensively.<sup>142</sup> Additionally, Judge Sonia Sotomayor was a member of the original three-judge panel of the Second Circuit until she became a Supreme Court Justice in August 2009.<sup>143</sup> The two remaining members of the Second Circuit panel decided the case on September 21, 2009, pursuant to a Second Circuit rule that allows two judges to decide a case if the third member of the panel becomes unavailable.<sup>144</sup>

---

137. *Am. Elec. Power*, 406 F. Supp. 2d at 272 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion)). The court explained that the plaintiffs’ prayer for relief, which would have required the plants to reduce their carbon dioxide emissions over several years, was non-justiciable for several reasons. *Id.* The court noted that making a decision on the plants’ carbon dioxide emissions would require the court to arbitrarily set a cap on the defendants’ emissions and determine what percentage reduction to impose. *Id.* The court would then have to set a schedule to implement the reductions, consider the foreign policy implications of its plan, assess the availability and practicality of alternative energy sources, and then balance the implications with national security concerns—all without policy determinations from Congress or the Executive. *Id.* at 272–73.

138. *Id.* at 274.

139. *See supra* Part II.B (asserting that the global problem of climate change is a non-justiciable generalized grievance and rejecting the concept of GHG litigation by states and private parties).

140. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 315 (2d Cir. 2009), *rev’d*, 131 S. Ct. 2527 (2011).

141. *Id.* at 310.

142. *Id.* at 336–38.

143. *Id.* at 314 n.\*.

144. *Id.* at 310, 314 n.\*.

Addressing the threshold jurisdictional questions, the court of appeals held that the suits were not barred by the political question doctrine and that all of the plaintiffs' complaints met Article III standing requirements.<sup>145</sup> The Second Circuit rejected the district court's and the defendants' views that the complex issues involved in the case made it a non-judiciable political question.<sup>146</sup> The Second Circuit observed that federal courts had adjudicated many complicated common law public nuisance cases for more than one hundred years.<sup>147</sup> Crucially, the Second Circuit characterized the plaintiffs' suit as "an ordinary tort suit" suitable for judicial resolution.<sup>148</sup> The court of appeals acknowledged that Congress, by legislation, or the executive branch, by appropriate regulations, might regulate power plant emissions of carbon dioxide and thereby displace the judiciary's role under federal common law.<sup>149</sup> Nevertheless, the court concluded that the political question doctrine did not bar the plaintiffs' suit because it was similar in its essential nature to other public nuisance cases that courts had handled in the past, even if climate change was a new issue.<sup>150</sup>

Assessing the merits of the case, the Second Circuit held that all of the plaintiffs had stated a claim pursuant to the federal common law of nuisance.<sup>151</sup> The court of appeals relied on several Supreme Court decisions that held that states may maintain suits to abate air and water pollution produced by other states or by out-of-state industry.<sup>152</sup> At the time, the EPA had not promulgated a rule to regulate GHGs.<sup>153</sup> Accordingly, the Second Circuit concluded that the CAA did not displace the plaintiffs' federal common law cause of action because it could not "speculate as to whether the hypothetical regulation of

---

145. *Id.* at 332, 349 (observing that "not every case with political overtones is non-judiciable" because "[i]t is error to equate a political question with a political case" (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962))).

146. *See id.* at 329 (asserting that although the plaintiffs' injuries resulted from a global problem with climate change, it did not mean the courts could not assess the defendants' contributions to the problem).

147. *Id.* at 326.

148. *Id.* at 329, 331.

149. *Id.* at 332.

150. *See id.* at 329, 332 (reiterating that federal courts are adept at assessing complex scientific evidence); *see also infra* Part III.D (discussing the Second Circuit's application of standing doctrine).

151. *Am. Elec. Power*, 582 F.3d at 371.

152. *See id.* at 350–51 (citing a case that involved acid gas from a Tennessee foundry that destroyed orchards and crops in Georgia, as well as a case involving sewage from Illinois that was poisoning Missouri's water supply).

153. *See id.* at 379 (recognizing that the "EPA ha[d] not even *proposed* to make any findings" when the Second Circuit ruled in *AEP*).

[GHGs] under the Clean Air Act would in fact ‘speak[] directly’ to the ‘particular issue’ raised” by the plaintiffs.<sup>154</sup>

*D. The Second Circuit’s Standing Analysis*

The district court explicitly refused to address the defendants’ standing arguments because it found that the standing issues were “intertwined” with the merits and concluded that the regulation of greenhouse gases was a political question beyond the scope of the federal courts’ jurisdiction.<sup>155</sup> Because it reversed the district court’s dismissal of the case on political question grounds, the Second Circuit found it necessary to address whether the plaintiffs had standing to sue.<sup>156</sup> The court examined whether the state plaintiffs had *parens patriae* standing and concluded that any uncertainties in *Massachusetts* about the relationship between that standing doctrine and traditional Article III standing were irrelevant because the state plaintiffs met both tests.<sup>157</sup> The Second Circuit also discussed whether the state and land trusts plaintiffs had Article III standing in their proprietary capacity as property owners.<sup>158</sup> The court then applied the three-part Article III standing test for (1) injury, (2) causation and traceability, and (3) redressability.<sup>159</sup>

The Second Circuit found that the state plaintiffs had adequately alleged a current injury by demonstrating that increasing temperatures caused by rising levels of carbon dioxide had reduced the size of the California snowpack and thereby reduced the supply of freshwater in that state.<sup>160</sup> Additionally, similar to the majority’s decision in *Massachusetts*, the court determined that the states also reasonably alleged future injury to their coastal lands from rising sea levels caused by climate change because there was sufficient scientific evidence that rising sea levels would inevitably harm the states’ coastlines and that such a certain injury was imminent even if it might

---

154. *Id.* at 380–81 (second alteration in original) (citing *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236–37 (1985)).

155. *Id.* at 332 (quoting *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 271 n.6 (S.D.N.Y. 2005)).

156. *Id.* at 315, 333.

157. *Id.* at 334–39. The Second Circuit did not specifically address whether New York City had standing because only one plaintiff needs to have standing for a suit to proceed. *Id.* at 339 n.17 (citing *Rumsfeld v. Forum for Academic & Inst’l Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)).

158. *See id.* at 339–40 (recognizing that the standing test for trusts is the same as that for individuals).

159. *Id.* at 340–49.

160. *See id.* at 341–42 (holding that property damage unique to California satisfied both the concrete and particularized injury requirements).

not occur for years.<sup>161</sup> For the same reason, the land trust plaintiffs had adequately proven future harm to their properties from rising sea levels caused by increasing levels of carbon dioxide.<sup>162</sup>

Following the reasoning in *Massachusetts*, the Second Circuit concluded that the defendants' significant contribution as the five largest utility sources of GHGs in the United States was sufficient to establish causation and traceable injury for Article III standing, even though a majority of global GHG emissions come from other sources.<sup>163</sup> The Second Circuit also cited decisions from two other courts of appeals for the principles "that, particularly at the pleadings stage, the 'fairly traceable' standard is not equivalent to a requirement of tort causation" and, therefore, that the plaintiffs' allegations of harm from the defendants' power plants were sufficient to prove standing causation at that stage of the pleadings.<sup>164</sup> The Ninth Circuit's decision in *Washington Environmental Council* is arguably distinguishable on the issue of standing causation because it involved the far smaller GHG emissions of five refineries in one state rather than the five largest utility GHG emitters in the United States.<sup>165</sup>

Regarding the redressability prong of the standing test, the defendants argued that the plaintiffs had failed to demonstrate that their proposed remedy of reducing carbon dioxide emissions from the defendants' power plants was likely to prevent global warming.<sup>166</sup> The Second Circuit concluded that the defendants' redressability arguments were foreclosed by the *Massachusetts* decision.<sup>167</sup> Following the reasoning in *Massachusetts*, the plaintiffs demonstrated that a court decision ordering reductions in the defendants' power plant emissions would likely slow or reduce the pace of global climate

---

161. *Id.* at 342–44; *cf.* *Massachusetts v. EPA*, 549 U.S. 497, 521–23 (2007) (pointing to the "strong consensus" by scientific experts that climate change would continue to cause environmental and economic harm to Massachusetts).

162. *See Am. Elec. Power*, 582 F.3d at 342–44 (commenting that even though the trusts did not provide a specific time frame for their injuries, the injuries were certainly imminent).

163. *Id.* at 345, 347; *cf.* *Massachusetts*, 549 U.S. at 523–25 (rejecting the argument that any relief the petitioners sought would be offset by substantial increases in GHG emissions from China, India, and other developing nations because even "a small incremental step . . . can [be] attacked in a federal judicial forum").

164. *Am. Elec. Power*, 582 F.3d at 346–47.

165. *See infra* Part V.B (explaining why the Ninth Circuit held that the plaintiffs failed to prove causation in *Washington Environmental Council*).

166. *See Am. Elec. Power*, 582 F.3d at 348 (rejecting the contention that the negative effects of global warming can only be redressed by regulating emissions from third parties not party to the litigation).

167. *Id.*

change, even if it would not stop it entirely.<sup>168</sup> Similar to the overlapping issue of standing causation, the Ninth Circuit's decision in *Washington Environmental Council* is arguably distinguishable from the Second Circuit's decision in *AEP* on the issue of redressability because the former case involved the far smaller GHG emissions of five refineries in one state, while the latter case involved the five largest utility GHG emitters in the United States.<sup>169</sup>

The Second Circuit's conclusion that the state plaintiffs had standing was understandable given the similarities in the injuries alleged and the causation and redressability in *Massachusetts* and *AEP*.<sup>170</sup> However, the Second Circuit's conclusion that the private land trust plaintiffs had standing was more questionable because the *Massachusetts* decision did not address private parties' standing rights and because the Second Circuit did not need to resolve whether the private parties had standing once it found that the state parties had standing to raise the same claims and to seek the same remedies as the private plaintiffs.<sup>171</sup> Moreover, the *Massachusetts* decision even suggested that the states had greater standing rights than private parties.<sup>172</sup> The Second Circuit arguably should have avoided the controversial issue of standing for the private plaintiffs since the states and private land trust plaintiffs sought the same injunctive remedies.<sup>173</sup> The court possibly treated the standing rights of the private and state plaintiffs as roughly equivalent, although the court never explicitly compared the standing rights of states and private parties.<sup>174</sup> By contrast, the Ninth Circuit's in *Washington Environmental*

---

168. *Id.* at 348–49.

169. See *infra* text accompanying notes 308–11 (explaining how the Ninth Circuit distinguished the two cases).

170. See *supra* Part III.A (discussing the Second Circuit's conclusion in *AEP* that both the private and state plaintiffs had standing).

171. See *Am. Elec. Power*, 582 F.3d at 348–49.

172. See *Massachusetts v. EPA*, 549 U.S. 497, 518–20 (2007) (attributing the special standing analysis for the Commonwealth to the protection of its quasi-sovereign interests); *supra* Part II.A (discussing *Massachusetts* and the Court's analysis of state standing).

173. See Jonathan H. Adler, *The Supreme Court Disposes of a Nuisance Suit: American Electric Power v. Connecticut*, 2011 CATO SUP. CT. REV. 295, 304–05, 312 n.79 (suggesting the Court's standing analysis should have stopped once it determined that at least one state satisfied the constitutional requirements).

174. See *Am. Elec. Power*, 582 F.3d at 342, 344–45, 347–49 (finding the states' and trusts' complaints both primarily concerned imminent future injuries, alleged the defendants caused their injuries, and were redressable by the courts, but not explicitly comparing what the states and private parties specifically needed to show to demonstrate that they had standing).

*Council* emphasized that private plaintiffs in GHG suits do not enjoy the same standing rights as the state plaintiff did in *Massachusetts*.<sup>175</sup>

### E. *The Supreme Court's Standing Decision in AEP*

#### 1. *Summary of the Court's standing affirmance*

In almost all cases involving a tie vote, the Supreme Court simply announces that “[t]he judgment is affirmed by an equally divided Court.”<sup>176</sup> The Supreme Court usually follows that formulaic response because an equally divided vote simply affirms the decision below without setting precedent for other lower courts outside of that circuit.<sup>177</sup> In the *AEP* decision, however, the Court took the unusual step of providing some explanation of how it divided on the standing and other jurisdictional questions, although it did not announce the identities of the Justices who voted for or against standing.<sup>178</sup> The Court stated:

The petitioners contend that the federal courts lack authority to adjudicate this case. Four members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*, which permitted a State to challenge [the] EPA’s refusal to regulate [GHG] emissions; and, further, that no other threshold obstacle bars review. Four members of the Court, adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit’s exercise of jurisdiction and proceed to the merits.<sup>179</sup>

---

175. See *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1145 (9th Cir. 2013) (concluding that the plaintiffs, as “private organizations, . . . [could not] avail themselves of the ‘special solicitude’ extended to Massachusetts by the Supreme Court”), *reh’g en banc denied*, 741 F.3d 1075 (9th Cir. 2014).

176. See, e.g., *Flores-Villar v. United States*, 131 S. Ct. 2312, 2313 (2011) (per curiam); see also *Neil v. Biggers*, 409 U.S. 188, 191–92 (1972) (noting that the Court has affirmed decisions by equally divided votes since the early 1800s and explaining that an affirmance by equally divided Supreme Court does not have precedential weight).

177. *Biggers*, 409 at 191–92; see *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 110–13 (1868) (discussing doctrine in American and English law that no affirmative action can be taken on a case where the judges are equally divided); Lyle Denniston, *Opinion Analysis: Warming an EPA Worry, at First*, SCOTUSBLOG (June 20, 2011, 1:31 PM), <http://www.scotusblog.com/2011/06/opinion-analysis-warming-an-epa-worry-at-first> (“Because the Court split [four-to-four] on the right to sue issue, that part of the Second Circuit decision was left intact, but without setting a nationwide precedent.”); see also *Gerrard*, *supra* note 11 (stating that the standing portion of the *AEP* decision did not technically set precedent).

178. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2535 (2011).

179. *Id.* (citations omitted).

While technically not binding on the lower courts outside of the Second Circuit,<sup>180</sup> the Court's four-to-four affirmance of the standing decision provides important clues about how the Court might rule in future standing cases, at least until the Court's membership changes.

## 2. *The four Justices on each side of standing in AEP*

The voting in the *Massachusetts* decision offers the best guide to how the eight Justices voted in *AEP*. In *Massachusetts*, five Justices found that the Commonwealth had standing under the *parens patriae* doctrine and general Article III standing principles: Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer.<sup>181</sup> Three of these Justices—Justices Kennedy, Ginsburg, and Breyer—were still members of the Court when *AEP* was decided, and some commentators have assumed that they voted in favor of standing in *AEP*, consistent with their endorsement of broad state standing principles in the *Massachusetts* decision.<sup>182</sup>

Four Justices dissented in the *Massachusetts* decision—specifically, Justices Scalia, Thomas, and Alito—joined Chief Justice Roberts and said that standing was inappropriate.<sup>183</sup> These four Justices remained on the Court at the time of the *AEP* decision.<sup>184</sup> Again, the most logical presumption is that these four Justices voted against standing in *AEP*, as they had in *Massachusetts*.<sup>185</sup>

By the time of the *AEP* decision, Justices Stevens and Souter had retired from the Court and had been replaced by Justices Kagan and Sotomayor, respectively.<sup>186</sup> Justice Kagan was the only member of the Court who voted in *AEP*, but she was not a member of the Court when *Massachusetts* was decided. Commentators have assumed that she voted with Justices Kennedy, Ginsburg, and Breyer in *AEP*

---

180. See *supra* note 177 and accompanying text.

181. See *Massachusetts v. EPA*, 549 U.S. 497, 501, 526 (2007) (naming the Justices who found that the Commonwealth had standing because rising sea levels had harmed Massachusetts and because a favorable ruling from the Court could reduce the risk of future harm to the Commonwealth).

182. See, e.g., Gerrard, *supra* note 11 (“Though unnamed in the opinion, clearly the four [J]ustices who find standing, and no other obstacles to review, are Justices Ginsburg, Stephen Breyer, Elena Kagan, and Anthony Kennedy.”).

183. See *Massachusetts*, 549 U.S. at 535 (Roberts, C.J., dissenting) (rejecting the challenges as non-justiciable).

184. See *Members of the Supreme Court of the United States*, U.S. SUP. CT., <http://www.supremecourt.gov/about/members.aspx> (last visited May 14, 2014) (displaying the Court's membership in a timeline, stretching back to the Court's inception).

185. See Gerrard, *supra* note 11 (“The four who disagree [that there is standing in the *AEP* decision] are Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito.”).

186. See *Members of the Supreme Court of the United States*, *supra* note 184 (providing the length of Justices' terms and who they replaced on the Court).

because it is unlikely that any of the Justices who dissented in *Massachusetts* changed their minds about standing for the *AEP* decision.<sup>187</sup> Furthermore, in her brief time on the Court, Justice Kagan has generally endorsed a permissive view of standing for plaintiffs<sup>188</sup> and has most often voted with Justices Ginsburg and Breyer.<sup>189</sup> Similarly, based on her permissive view of standing<sup>190</sup> and propensity to vote with the other justices appointed by Democratic Presidents,<sup>191</sup> it is likely, although not certain, that

---

187. Experienced judges do not easily change their views once they declare them in a written dissenting opinion, as Justices Scalia, Thomas, and Alito did when they joined Chief Justice Roberts's dissenting opinion in *Massachusetts*, which is discussed *supra*, Part II.B. Furthermore, these same four Justices, in an opinion written by Justice Alito, adopted a narrow "certainly impending" standing test in a case that denied standing in a suit in which plaintiffs plausibly alleged that the National Security Agency (NSA) was likely spying on their telephone and e-mail communications because they represented clients who were suspected terrorists or linked in some way to suspected terrorists because the plaintiffs could not prove with absolute certainty that the Agency was spying on them, even though it seemed more likely than not. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013).

188. *See, e.g., United States v. Windsor*, 133 S. Ct. 2675, 2681, 2685–89 (2013) (noting that Justice Kagan joined Justice Kennedy's majority opinion, which drew sharp distinctions between prudential standing and Article III standing in stating that prudential standing rules are "more flexible" than the jurisdictional requirements of Article III standing and concluded that the requirement of adversarial parties was a flexible prudential requirement that could be satisfied by the participation of leaders of the House of Representatives as *amicus curiae*, even though the plaintiffs and the defendant U.S. Government agreed that a statute denying federal marital tax exemptions and other privileges to same-sex couples was unconstitutional); *Clapper*, 133 S. Ct. at 1159–65 (Breyer, J., dissenting) (indicating that Justice Kagan joined Justice Breyer's dissenting opinion, which argued for broad probabilistic standing and rejected the majority opinion's narrow "certainly impending" test in a case denying standing against the NSA where it seemed likely that the government was spying on the plaintiffs but they could not prove their claims with absolute certainty); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1450–52 (2011) (Kagan, J., dissenting) (arguing, in an opinion joined by Justices Ginsburg, Breyer, and Sotomayor, that the majority opinion "devastate[d] taxpayer standing" and that the plaintiff taxpayers had standing to challenge Arizona's tuition tax credit); *see also Adler, supra* note 173, at 313 (finding it likely that Justice Sotomayor would have found at least one plaintiff satisfied the Article III standing requirements had she participated and voted in *AEP*).

189. During the Supreme Court's 2010–2011 term, Justice Kagan voted with Justices Ginsburg and Breyer in 91% and 87% of all cases, respectively. *Stat Pack for October Term 2010*, SCOTUSblog 19 (June 28, 2011), [http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB\\_OT10\\_stat\\_pack\\_final.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_OT10_stat_pack_final.pdf) [hereinafter *Stat Pack*].

190. *See sources cited supra* note 188.

191. *See* Robert Barnes, *Justices Who Will Shape Supreme Court's Future Are Matching Pairs*, WASH. POST (June 28, 2011), [http://www.washingtonpost.com/politics/justices-who-will-shape-supreme-courts-future-are-matching-pairs/2011/06/28/AGOaNoPH\\_story.html](http://www.washingtonpost.com/politics/justices-who-will-shape-supreme-courts-future-are-matching-pairs/2011/06/28/AGOaNoPH_story.html) (suggesting that the voting consistency of new Justices might be related to the highly scrutinized process of selecting nominees and noting that "[Justice] Sotomayor has voted consistently with liberal Justices Ruth Bader Ginsburg and Stephen G. Breyer"); *see also Stat Pack, supra* note 189, at 19 (reporting that, between liberal Justices Breyer, Ginsburg, Sotomayor, and Kagan, Justices Breyer and Ginsburg and Justices Ginsburg and Sotomayor agreed the least number of times during the 2010–2011 term—at 85% of the time).



Justice Sotomayor would vote for state standing in cases similar to *Massachusetts* and *AEP*.<sup>192</sup>

### 3. *The impact of AEP on future standing cases*

Implicitly, the Court's decision in *AEP* supported and even broadened the Court's standing analysis in *Massachusetts*.<sup>193</sup> Four Justices concluded that at least "some" of the *AEP* plaintiffs met Article III standing requirements in light of *Massachusetts*.<sup>194</sup> The plaintiffs mentioned in *AEP* were probably the state plaintiffs because the *Massachusetts* decision only clearly endorsed standing rights for states to bring suits involving climate change.<sup>195</sup> Accordingly, the Ninth Circuit's decision in *Washington Environmental Council* implied that the plaintiffs referred to in *AEP* were likely only the state plaintiffs, and, therefore, that private plaintiffs seeking to regulate GHGs did not enjoy the same rights as state plaintiffs.<sup>196</sup>

The four Justices who concluded that at least some of the plaintiffs had Article III standing also observed that "no other threshold obstacle bars review."<sup>197</sup> In a footnote, the Court explained: "In addition to renewing the political question argument made below, the petitioners now assert an additional threshold obstacle: They seek dismissal because of a 'prudential' bar to the adjudication of generalized grievances, purportedly distinct from Article III's bar."<sup>198</sup> The four Justices who found that some of the *AEP* plaintiffs had Article III standing also implicitly concluded that neither the political question doctrine, the prudential standing doctrine, nor any "other threshold obstacle" barred review of their claims.<sup>199</sup> As a result, these four Justices implicitly "expanded standing rights beyond *Massachusetts*' statutory setting to common law cases."<sup>200</sup>

What remains uncertain is whether a majority of the Court would grant the same standing rights to private plaintiffs in climate change

---

192. See Mank, *Tea Leaves*, *supra* note 1, at 593 (predicting that Justice Sotomayor will vote with other liberal Justices because she "has also generally endorsed a permissive view of standing"); Dru Stevenson & Sonny Eckhart, *Standing as Channeling in the Administrative Age*, 53 B.C. L. REV. 1357, 1382 (2012) (same).

193. Mank, *Tea Leaves*, *supra* note 1, at 545, 596, 601.

194. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2535 & n.6 (2011).

195. See Adler, *supra* note 173, at 309–10 (suggesting the four Justices in *AEP* who found that "at least some plaintiffs" had standing were most likely referring to the state plaintiffs); Gerrard, *supra* note 11 (same).

196. See *infra* Part V.B (detailing the Ninth Circuit's decision and reasoning).

197. *Am. Elec. Power*, 131 S. Ct. at 2535.

198. *Id.* at 2535 n.6.

199. Mank, *Tea Leaves*, *supra* note 1, at 596–98.

200. *Id.* at 598 (stating the Justices "[i]mplicitly . . . refused . . . to narrow the reach of the standing analysis in *Massachusetts*").

cases as it did to states in *Massachusetts*. Further, it is unclear whether the four Justices who voted for standing in *AEP* would support standing for private plaintiffs in a climate change case. During oral argument in *Massachusetts*, Justice Kennedy observed that the *Tennessee Copper* decision, which none of the briefs in the case had addressed, was the “best case” for the plaintiffs.<sup>201</sup> Therefore, the Court’s recognition of special state standing rights under the *parens patriae* doctrine was arguably Justice Kennedy’s idea.<sup>202</sup> Professor Michael Gerrard, an experienced environmental litigator who now specializes in climate change issues,<sup>203</sup> has speculated that when the assertion from the *AEP* opinion that “[f]our members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*”<sup>204</sup> is “considered in conjunction with *Massachusetts*,” a reasonable lawyer would likely infer that “Justice Kennedy believes that only states would have standing.”<sup>205</sup> “Thus,” Gerrard continued, “there might be a [five-to-four] majority against any kinds of GHG nuisance claims (and maybe other kinds of GHG claims) by non-states.”<sup>206</sup> The Ninth Circuit in *Washington Environmental Council* seemed to agree that the Supreme Court in *Massachusetts* and *AEP* only clearly recognized the standing of state plaintiffs in GHG suits and imposed a more stringent standing test on the private plaintiffs seeking to regulate GHGs.<sup>207</sup>

#### IV. JUSTICE KENNEDY’S APPROACH TO STANDING

Justice Kennedy was the only Justice to join the majority in all five of the Court’s key recent cases on standing, although he wrote concurring opinions in three of them.<sup>208</sup> Accordingly, any effort to

---

201. Transcript of Oral Argument at 14–15, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120) [hereinafter *Massachusetts* Oral Argument] (suggesting that *Tennessee Copper* demonstrated that the plaintiffs had “special” state standing rights).

202. Mank, *States Standing*, *supra* note 1, at 1738–40 (inferring that Justice Kennedy may have prompted the majority to apply *Tennessee Copper* because the plaintiffs did not discuss the case in their briefs and, furthermore, because Justice Kennedy has historically supported federalism and states’ rights).

203. For Professor Gerrard’s biography, see *Michael B. Gerrard*, COLUM. L. SCH., [http://www.law.columbia.edu/fac/Michael\\_Gerrard](http://www.law.columbia.edu/fac/Michael_Gerrard) (last visited May 14, 2014).

204. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2535 (2011).

205. Gerrard, *supra* note 11.

206. *Id.*

207. See *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1144–45, 1147 (9th Cir. 2013) (declining to extend *Massachusetts*’ and *AEP*’s conferral of standing to state claimants to private plaintiffs), *reh’g en banc denied*, 741 F.3d 1075 (9th Cir. 2014); see also *infra* notes 302–15 (discussing the Ninth Circuit’s interpretation of *Massachusetts* and *AEP* and its decision to deny standing to the private plaintiffs).

208. See *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1142 (2013) (noting that Justice Kennedy joined the majority opinion); *Summers v. Earth Island Inst.*, 555 U.S. 488, 501 (2009) (Kennedy, J., concurring) (demonstrating that in addition to

find a consistent line of reasoning in the Supreme Court's standing cases must focus on Justice Kennedy.<sup>209</sup>

A. *Justice Kennedy Believes Congress Has Some but Not Unlimited Discretion To Define Statutory Injuries that Give Rise to Article III Injuries*

Justice Kennedy's concurring opinion in *Lujan* offers the most insight into whether Congress has the authority to recognize injuries that would not have satisfied common law requirements, and, thus, to enlarge the definition of concrete injury while still satisfying Article III standing requirements.<sup>210</sup> There has been considerable debate about the extent to which Congress may enlarge the definition of concrete injury under Article III's constitutional standing requirements.<sup>211</sup> In his majority opinion in *Lujan*, Justice Scalia argued that Article III and broader separation of powers principles limit Congress's authority to grant universal standing rights to

---

joining the majority opinion "in full," Justice Kennedy also wrote a concurring opinion); *Massachusetts v. EPA*, 549 U.S. 497, 501 (2007) (indicating that Justice Kennedy joined the majority opinion); *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring) (showing that Justice Kennedy joined the majority opinion but wrote separately to assert that some of the case's more complicated issues were "best reserved for a later case"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 579 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (acknowledging that Justice Kennedy "agree[d] with the essential parts of the Court's analysis" but "wr[ote] separately to make several observations"). See generally Stephen I. Vladeck, *Standing and Secret Surveillance*, 9 I/S: J.L. & PUB. POL'Y FOR INFO. SOC'Y (forthcoming 2014) (manuscript at 7–8), available at <http://moritzlaw.osu.edu/students/groups/is/files/2013/11/Vladeck.pdf> (interpreting Justice Kennedy's concurring opinions in recent standing cases as indicative of his belief that Congress has "wide latitude . . . to confer standing upon plaintiffs who might not otherwise be entitled to sue").

209. See Mank, *Informational Standing After Summers*, *supra* note 1, at 44–45 (acknowledging that "Justice Kennedy was the only [J]ustice to join the majority" in several key standing cases and suggesting that "[o]ne may arguably infer from Justice Kennedy's concurring opinions . . . that the Supreme Court is likely to give some deference to Congress if it establishes an explicit public right to information along with a relevant citizen suit provision"); see also Vladeck, *supra* note 208 (manuscript at 7–8) (suggesting that Justice Kennedy's recent opinions in these key standing cases demonstrate that he believes Congress has broad powers to confer standing).

210. See *Lujan*, 504 U.S. at 580–81 (Kennedy, J., concurring in part and concurring in the judgment) (arguing that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," provided that Congress "identif[ies] the injury it seeks to vindicate and relate[s] the injury to the class of persons entitled to bring suit"); see also *Summers*, 555 U.S. at 501 (Kennedy, J., concurring) (declining to find that the plaintiffs had standing because Congress did not define a concrete injury in the statute at issue in the case (citing *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment))).

211. See Solimine, *supra* note 24, at 1028–31 (discussing several interpretations of the scope of Congress's authority to confer Article III standing on several classes of plaintiffs in light of the Supreme Court's standing jurisprudence).

plaintiffs who lack a concrete injury.<sup>212</sup> More controversially, he contended that both Article III limits on judicial authority and the President's Article II authority to enforce federal laws require federal courts to impose standing injury requirements that limit congressional authorization of suits against the executive branch.<sup>213</sup> In his dissenting opinion in *Lujan*, Justice Blackmun argued that Justice Scalia's approach to standing has the practical effect of aggrandizing executive authority and undermining Congress's ability to ensure that the executive branch faithfully enforces the law.<sup>214</sup> Yet, Justice Scalia in *Lujan* acknowledged that Congress may "elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law."<sup>215</sup>

Some commentators have sought a middle ground on congressional authority to modify Article III standing requirements that balances both the executive and congressional role in making and enforcing federal law, as well as a limited but appropriate role for judicial review.<sup>216</sup> Justice Kennedy's concurring opinion in *Lujan*

---

212. See *Lujan*, 504 U.S. at 576–78 (arguing that “[t]o permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit 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’” and to enable courts to operate outside of their Article III powers to review agency actions within the agencies’ purview (quoting U.S. CONST. art. II, § 3)). See generally Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 895–96 (1983) (arguing, nearly a decade before the *Lujan* decision, that “the democratic process,” rather than Article III courts, was designed to protect citizens’ interests).

213. *Lujan*, 504 U.S. at 577. See generally Scalia, *supra* note 212, at 892 (stating that “[e]ven if it were true . . . that the doctrine of standing never excludes issues entirely from the courts, it would still have an enormous effect upon the relationship among the branches” if courts were given power to review agency actions traditionally within agency control); Solimine, *supra* note 24, at 1049 (arguing that Chief Justice Roberts and Justice Scalia believe “that Congress cannot tinker with the core constitutional standing requirements, though it might relax the prudential ones”).

214. See *Lujan*, 504 U.S. at 602 (Blackmun, J., dissenting) (noting that “the principal effect” of the majority’s approach to standing was “to transfer power into the hands of the Executive at the expense—not of the Courts—but of Congress, from which that power originates and emanates”); cf. Solimine, *supra* note 24, at 1050 (“With respect to the argument that a broad reading of Article III standing improperly limits executive power under Article II, some scholars contend that it does not give sufficient weight to the balance, as opposed to the separation, of powers.”).

215. *Lujan*, 504 U.S. at 578 (emphasis omitted).

216. See, e.g., Solimine, *supra* note 24, at 1052 (contending that liberal and conservative critiques of standing requirements both have “persuasive arguments regarding the appropriate interaction of the first three articles of the Constitution” but that the two viewpoints can be reconciled). The liberal view seeks to broaden the judiciary’s and private parties’ powers “at the expense of representative government in general and of the executive branch in particular.” *Id.* Conversely, the

suggests that he may take such a position with respect to Congress's authority to modify standing requirements beyond traditional common law requirements for a concrete injury, as he suggested that Congress has the authority to modify common law injury requirements, or even constitutional standing requirements, for a concrete injury.<sup>217</sup> He agreed with the majority that a plaintiff must demonstrate a concrete injury and that the affiants had failed to do so when they only offered vague future plans to visit endangered species in foreign countries allegedly threatened by construction projects partially funded by U.S. government financing.<sup>218</sup> He suggested, however, that "[a]s Government programs and policies become more complex and far reaching," courts should recognize, at least to some extent, congressional authority to expand the definition of a concrete injury to include new rights of action that do not correlate to rights traditionally recognized in common law.<sup>219</sup> Justice Kennedy reasoned that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."<sup>220</sup> He limited his potentially broad endorsement of congressional authority to redefine Article III standing with the caveat that "[i]n exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."<sup>221</sup>

In his concurrence in *Lujan*, Justice Kennedy balanced Congress's discretionary authority to expand the definition of injuries beyond common law limits against separation of powers concerns that restrict Article III standing to concrete injuries.<sup>222</sup> Specifically, he observed that "the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government."<sup>223</sup>

---

conservative view broadens the President's power while also "in theory" enhancing Congress's authority to oversee the executive agencies. *Id.*

217. *See Lujan*, 504 U.S. at 579–80 (Kennedy, J., concurring in part and concurring in the judgment) (establishing that Justice Kennedy agreed with the majority's decision that the private affiants in *Lujan* lacked an injury for Article III standing but also demonstrating that he is receptive to the idea that, given the complexity of contemporary executive agency programs, the Court "must be sensitive to the articulation of new rights of action that do not have clear analogs in [the] common-law tradition").

218. *Id.* at 579 (indicating that plaintiffs must "demonstrate that they themselves are among the injured" (internal quotation marks omitted)).

219. *Id.* at 580.

220. *Id.*

221. *Id.*

222. *Id.* at 580–82.

223. *Id.* at 581.

With respect to the specific statute at issue in *Lujan*, Justice Kennedy concluded that the citizen-suit provision of the Endangered Species Act (ESA) was problematic to the extent that it purported to extend standing to “any person.”<sup>224</sup> The ESA did not define how the government would injure citizen litigants through violating the Act or explain why “any person” is entitled to sue the government under the statute.<sup>225</sup> Justice Kennedy treated the concrete-injury requirement, which ensures that both parties in a case have “an actual . . . stake in the outcome,” as crucial to ensure that the opposing parties are engaged in a genuine adversarial process in which both sides are argued with skill.<sup>226</sup> The requirement, according to Kennedy, further ensures that legal questions “will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.”<sup>227</sup>

Justice Kennedy’s views from his concurring opinion in *Summers v. Earth Island Institute*,<sup>228</sup> which echoed those in his *Lujan* concurrence, are also instructive. In *Summers*, Justice Kennedy explained that a plaintiff can challenge the alleged violation of a procedural right, such as the Forest Service’s alleged duty to provide public notice and comment before selling or leasing certain public forest land, only if the plaintiff can demonstrate a separate concrete injury.<sup>229</sup> He concluded that the *Summers* plaintiffs did not meet this standard because the statute at issue did not include an express citizen-suit provision, meaning that Congress did not intend the statute to bestow any right other than a procedural right.<sup>230</sup> The plaintiffs alleged that the procedural right required the Forest Service to provide public notice and comment before making certain decisions about the sale and cutting down of trees in national forests.<sup>231</sup> Justice Kennedy asserted that the “case would present different considerations if Congress had sought to provide redress for a concrete injury ‘giv[ing] rise to a case or controversy where none existed before.’”<sup>232</sup>

---

224. *Id.* at 580 (quoting 16 U.S.C. § 1540(g)(1)(A) (1998)).

225. *Id.* (remarking that Congress, when conferring standing to a class of persons or entities through a statute, must clearly define the injury in that statute).

226. *Id.* at 581.

227. *Id.* (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).

228. 555 U.S. 488 (2009).

229. *Id.* at 501 (Kennedy, J., concurring) (citing *Lujan*, 504 U.S. at 572).

230. *Id.*

231. *Id.* at 490–91 (majority opinion).

232. *Id.* at 501 (Kennedy, J., concurring) (alteration in original) (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)).

Thus, like his concurrence in *Lujan*, Justice Kennedy's concurrence in *Summers* left open the possibility that he might have found that the plaintiffs met Article III standing requirements, despite Justice Scalia's more fundamental separation of powers concerns, if Congress had enacted a more explicit statute that clearly defined when a procedural injury constitutes a concrete harm to a particular class of plaintiffs.<sup>233</sup>

In response to Justice Kennedy's opinions, Professor Michael Solimine, a noted scholar of federal courts and civil litigation,<sup>234</sup> has suggested that courts interpret a statute by assessing its language, structure, history, and purpose before they decide whether a plaintiff's asserted facts are sufficient for Article III standing.<sup>235</sup> Moreover, Professor Stephen Vladeck, an expert on federal courts and U.S. constitutional issues,<sup>236</sup> has suggested that Justice Kennedy believes Congress has significant autonomy to define standing rights "[s]o long as Congress is not creating standing for what is (1) effectively a generalized grievance; or (2) a procedural right without a substantive deprivation."<sup>237</sup> In *Washington Environmental Council*, the Ninth Circuit avoided the question of whether the CAA citizen-suit provision invoked by the plaintiffs even allowed them to sue state regulators rather than the federal government; furthermore, the Ninth Circuit did not consider whether Congress might have intended to allow GHG suits under that provision.<sup>238</sup> In light of Justice Kennedy's willingness to consider statutory language as at least one factor in defining Article III standing, another federal court might be more willing than the *Washington Environmental Council* panel to consider whether the CAA enlarges the ability of private citizens to file GHG suits; however, the lack of explicit language in the citizen-suit provision might prove fatal to a claim

---

233. See *id.*; see also Vladeck, *supra* note 208 (manuscript at 11) (acknowledging that Justice Kennedy wrote a separate concurring opinion in *Summers* because the federal statute at issue in the case defined an "injury" that was "more capacious than [the Court] would otherwise have identified").

234. For Professor Solimine's biography, see *Michael E. Solimine*, U. CIN. C.L., <http://www.law.uc.edu/faculty-staff/faculty/michael-e-solimine> (last visited May 14, 2014).

235. Solimine, *supra* note 24, at 1055.

236. For Professor Vladeck's biography, see *Stephen I. Vladeck*, AM. U. WASH. C.L., <http://www.wcl.american.edu/faculty/vladeck> (last visited May 14, 2014).

237. Vladeck, *supra* note 208 (manuscript at 18–19) (footnote omitted).

238. *Wash. Evtl. Council v. Bellon*, 732 F.3d 1131, 1135 n.2 (9th Cir. 2013) (urging the court to align itself with the Sixth Circuit's ruling in *Sierra Club v. Korleski*, 681 F.3d 342 (6th Cir. 2012), and hold that the CAA's citizen-suit provision does not allow plaintiffs to bring suit against the government acting in its regulatory capacity under the CAA, such that plaintiffs lack Article III standing), *reh'g en banc denied*, 741 F.3d 1075 (9th Cir. 2014).

that the statute seeks to enable what is arguably a non-justiciable generalized grievance.<sup>239</sup>

Professor Dave Owen<sup>240</sup> has interpreted the Supreme Court's decision in *Massachusetts* as reflecting common federalist concerns about the right of states to protect their citizens.<sup>241</sup> He has also argued that Justice Kennedy prefers to interpret constitutional norms in light of legislative determinations.<sup>242</sup> The *Massachusetts* decision demonstrates this theory through its reliance on the statutory framework of the CAA to find standing, although the Court's attempt to use that statutory framework to justify greater standing rights for states is somewhat questionable because the CAA does not treat states differently from other parties, as Chief Justice observed in his dissenting opinion.<sup>243</sup> The Court in *Massachusetts* interpreted the

239. The CAA citizen-suit provision provides, in pertinent part:

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, [or]

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator . . . .

42 U.S.C. § 7604(a)(1)–(2) (2012).

240. For Professor Owen's biography, see *Dave Owen*, U. ME. SCH. L., <http://mainelaw.maine.edu/faculty/profiles/owen.html> (last visited May 14, 2014).

241. Dave Owen, *A Few Initial Thoughts on Windsor (and Massachusetts v. EPA)*, ENVTL. L. PROF BLOG (June 26, 2013), [http://lawprofessors.typepad.com/environmental\\_law/2013/06/a-few-initial-thoughts-on-windsor-and-massachusetts-v-epa.html](http://lawprofessors.typepad.com/environmental_law/2013/06/a-few-initial-thoughts-on-windsor-and-massachusetts-v-epa.html) (“[I]n *Massachusetts v. EPA*, the Court attributed ‘considerable relevance’ to the state status of the plaintiff.”). Professor Owen argued that the Court's opinion in *United States v. Windsor*, 133 S. Ct. 2675 (2013), reflects the same concerns about federal and states' rights. Owen, *supra*. In *Windsor*, the majority, in an opinion written by Justice Kennedy, held that a federal law denying federal marital benefits to same-sex married couples who are legally recognized as married in a state violated the Fifth Amendment's Equal Protection provisions in part because the federal law was inconsistent with the general principle that states have the primary role in our federalist system of defining marriage. See *Windsor*, 133 S. Ct. at 2693, 2695–96 (reflecting that “[t]he responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people”).

242. Owen, *supra* note 241 (“It seems that Justice Kennedy would very much like to give legislative pronouncements a greater voice in constitutional interpretation, even where the interpretive questions involve matters like the scope of individual rights or the jurisdiction of the courts.”).

243. See *supra* Part II.A.1 (stating that the *Massachusetts* majority opinion used the *parens patriae* doctrine and statutory interpretation to find that *Massachusetts* had standing in the case but arguing also that the opinion does not clarify which of the two doctrinal principles was more essential to the Court's holding).



CAA to require the EPA to regulate GHGs on behalf of states and other parties if those emissions “endanger[] the public health or welfare.”<sup>244</sup> Additionally, the Court observed that Congress has “recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious.”<sup>245</sup> Furthermore, the *Massachusetts* Court noted that the statute specifically listed states as one of the parties that may sue to enforce this right.<sup>246</sup>

However, Chief Justice Roberts in his dissenting opinion argued that nothing in the statute suggested that states were entitled to more generous standing rights than other parties.<sup>247</sup> The majority in *Massachusetts* implied that the statute supported its theory that states have greater standing rights than private parties,<sup>248</sup> but Chief Justice Roberts’s dissenting opinion convincingly demonstrated that there is nothing in the statutory language to support greater standing rights for states than for other types of plaintiffs.<sup>249</sup>

Arguably, the *Massachusetts* majority’s citation to the statute to bolster its state standing theory is consistent with Professor Owen’s theory that Justice Kennedy prefers a statutory justification for constitutional interpretation, including standing.<sup>250</sup> Justice Stevens in his majority opinion also specifically cited Justice Kennedy’s *Lujan* concurrence.<sup>251</sup> As discussed below, a significant obstacle to private plaintiff standing in GHG suits is the strong emphasis in *Massachusetts*

---

244. See *Massachusetts v. EPA*, 549 U.S. 497, 506 & n.7, 519–20, 530, 533 (2007) (quoting 42 U.S.C. § 7521(a)(1) (2006)) (discussing the EPA’s statutory duty under the CAA to “protect Massachusetts (among others) by prescribing applicable standards” to regulate emissions from new motor vehicles).

245. *Id.* at 520 (citing 42 U.S.C. § 7607(b)(1)).

246. See *id.* at 519–20 (stating “Congress has ordered [the] EPA to protect *Massachusetts* (among others)”).

247. See *id.* at 536–37 (Roberts, C.J., dissenting) (“Under the law on which petitioners rely, Congress treated public and private litigants exactly the same.”).

248. See *id.* at 518–20 (majority opinion) (stressing that the CAA provided *Massachusetts* standing because it is “a sovereign State,” whereas the CAA did not confer the private litigants in *Lujan* a similar right).

249. *Id.* at 536–37 (Roberts, C.J., dissenting) (arguing that “Congress knows how to . . . afford[] States the right to petition [the] EPA to directly regulate certain sources of pollution[,] but it has does nothing of the sort here”).

250. Owen, *supra* note 241.

251. See *id.* *Massachusetts*, 549 U.S. at 516–17 (majority opinion) (quoting extensively from Justice Kennedy’s concurrence in *Lujan* and establishing that, consistent with that opinion, plaintiffs must demonstrate a concrete injury to be eligible for Article III standing); see also Vladeck, *supra* note 208 (manuscript at 10) (“Justice Stevens [in *Massachusetts*] also emphasized the critical role of Congress—citing to Justice Kennedy’s view thereof [from *Lujan*]: ‘The parties’ dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court. Congress has moreover authorized this type of challenge to EPA action. That authorization is of critical importance to the standing inquiry.” (quoting *Massachusetts*, 549 U.S. at 516)).

on the superior standing rights of states and the possibility that Justice Kennedy, the key swing vote in standing cases, believes that states have superior standing rights.<sup>252</sup>

*B. Justice Kennedy and State Standing in Massachusetts v. EPA*

Justice Kennedy appears to have been the driving force behind the *Massachusetts* majority's reliance on the *parens patriae* justification for state standing derived from the Court's decision in *Tennessee Copper*.<sup>253</sup> As Chief Justice Roberts noted in his dissenting opinion, the petitioners did not cite *Tennessee Copper* in their briefs, nor did any of the numerous amicus briefs or any of the three judges for the U.S. Court of Appeals for the D.C. Circuit who wrote separate opinions in the case below.<sup>254</sup> Arizona and four other states filed an amicus brief in which they argued that states suffer a concrete injury and have standing to sue the federal government when a federal agency's actions may preempt their state laws and, more specifically, that the EPA's actions would preempt their state GHG emissions regulations.<sup>255</sup> The amici based their preemption argument on states' sovereign interests in enacting its own laws rather than on the quasi-sovereign *parens patriae* theory adopted in *Tennessee Copper*.<sup>256</sup> The Commonwealth of Massachusetts and the other petitioners cited the Arizona brief.<sup>257</sup> During oral argument in *Massachusetts*, the petitioners argued that states have standing to sue the federal

---

252. See *infra* Part IV.B.

253. See Mank, *States Standing*, *supra* note 1, at 1706, 1738–40 (explaining that *Tennessee Copper* “recognized a special standing doctrine of *parens patriae* standing to allow states to protect certain quasi-sovereign interests including the health, welfare, or natural resources of their citizens” and that Justice Kennedy told the petitioners in *Massachusetts* that *Tennessee Copper* was the best authority to support their claim of standing).

254. *Massachusetts*, 549 U.S. at 539 (Roberts, C.J., dissenting); see Jonathan H. Adler, *Warming Up to Climate Change Litigation* 93 VA. L. REV. ONLINE 63, 65 (2007) (acknowledging that Justice Kennedy said *Tennessee Copper* was “Massachusetts’ ‘best case’ supporting standing,” but observing also that Justice Kennedy’s “reasons for doing so [were] not entirely clear”).

255. See Brief of the States of Arizona et al. as Amici Curiae in Support of Petitioners at 20–21, 24, *Massachusetts*, 549 U.S. 497 (No. 05-1120) [hereinafter Arizona Amicus Brief] (asserting that “courts have long recognized” states’ sovereign interests in “preserving [their] sovereignty” and “standing to sue when [they] allege [that] an interest has been interfered with or diminished”); see also Mank, *States Standing*, *supra* note 1, at 1737–38 (noting that a majority of the Court ultimately found that “Massachusetts was properly asserting its quasi-sovereign interest to require the federal government to enforce the CAA”).

256. Mank, *States Standing*, *supra* note 1, at 1738–39.

257. See Brief for the Petitioners at 6 n.5, *Massachusetts*, 549 U.S. 497 (No. 05-1120) (directing the Court to the Arizona Amicus Brief, *supra* note 255, for a discussion of how the “EPA’s decision . . . threatens to have ripple effects on . . . States’ sovereign power to enforce State laws”).

government when federal laws or regulations threaten to preempt state laws, and Justice Ginsburg's comments and questions suggest that she agreed with their preemption argument.<sup>258</sup> However, the Court did not adopt or even mention the preemption argument put forth in that brief.<sup>259</sup>

Instead, during oral argument of *Massachusetts*, Justice Kennedy suggested to the petitioners that *Tennessee Copper* was their "best case" supporting standing.<sup>260</sup> Then, in the resulting majority opinion, Justice Stevens emphasized the *parens patriae* approach in *Tennessee Copper*.<sup>261</sup> Justice Kennedy was likely attracted to this justification for standing because of his propensity to strongly support federalism and states' rights.<sup>262</sup> For all of these reasons, it appears that the *parens*

---

258. See *Massachusetts* Oral Argument, *supra* note 201, at 14–17 (referencing the Arizona Amicus Brief and a case from the D.C. Circuit as support for the proposition that states have standing when federal laws and regulations threaten to preempt state regulations); see also *West Virginia v. EPA*, 362 F.3d 861, 864, 868 (D.C. Cir. 2004) (rejecting the EPA's argument that West Virginia and Illinois, the petitioners, did not have standing to challenge the EPA's order concerning "electric generating unit ('EGU') growth-factor determinations" used in creating GHG emissions regulations because the states were suing on their own behalves rather than on behalf of their EGUs); Dru Stevenson, *Special Solitude for State Standing: Massachusetts v. EPA*, 112 PENN ST. L. REV. 1, 30 (2007) (tracing the discussion during the *Massachusetts* oral argument about the notion of "automatic or 'special' standing, at least when there is an issue of federal preemption preventing states from regulating themselves").

259. Mank, *States Standing*, *supra* note 1, at 1739; see Stevenson, *supra* note 258, at 31–36 (describing the four circuit cases cited in the Arizona Amicus Brief, *supra* note 255, as support for providing states standing under a preemption theory and noting that the *Massachusetts* petitioners' preemption claim was only briefly discussed during oral arguments before the Supreme Court and not in either of the Court's majority or dissenting opinions).

260. See *Massachusetts* Oral Argument, *supra* note 201, at 14–15 (suggesting, in contrast to the petitioners' assertion that no Supreme Court opinion within the previous 200 years had found state standing on preemption grounds, that the 1907 *Tennessee Copper* opinion, which "was pre-*Massachusetts* versus *Mellon*" supported the preemption argument); Thomas J. Donlon, *Supreme Court Boldly Steps into Global Warming Debate*, A.B.A. SEC. LITIG. 2 (Apr. 2007), [http://www.rc.com/publications/Donlon\\_ABA\\_Article\\_APR07.pdf](http://www.rc.com/publications/Donlon_ABA_Article_APR07.pdf) ("Apparently, [*Tennessee Copper*] was first raised by Justice Kennedy at oral argument."); Douglas T. Kendall & Jennifer Bradley, *How Environmentalists Can Win Over the Supreme Court*, NEWREPUBLIC ONLINE (Dec. 1, 2006), <http://communityrights.org/PDFs/TheNewRep12.01.06.pdf> ("Not a single brief in the case cited *Tennessee Copper*, making it clear that [Justice] Kennedy had done his homework and was approaching the standing issue from a unique perspective.").

261. See *Massachusetts*, 549 U.S. at 518–20 (arguing that in *Tennessee Copper*, as in the case at hand, the states' "independent interest[s] in all the earth and air within its domain" supported federal jurisdiction" (quoting *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907))); *supra* text accompanying notes 52–60 (explaining how the majority of the Court relied on the *parens patriae* doctrine in *Massachusetts*).

262. See, e.g., *Alden v. Maine*, 527 U.S. 706, 754 (1999) (holding, in an opinion written by Justice Kennedy, "that the States retain immunity from private suit in their own courts" and explaining that any interference with the states' sovereignty violates the Constitution); *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (acknowledging that federal statutes enacted through the Commerce Clause may violate "the etiquette of federalism" when they direct the states to enact federal policies as well as when they lack a "strong[] connection or identification

*patriae* approach in *Massachusetts* was Justice Kennedy's idea and that he supplied the crucial fifth vote for standing in that case.

In light of his emphasis on the *parens patriae* approach, Justice Kennedy may only support standing for states in GHG litigation and not for private parties.<sup>263</sup> This emphasis, in combination with the "some plaintiffs" language in the *AEP* opinion, has led Professor Gerrard to speculate that "Justice Kennedy believes that only states would have standing. Thus, there might be a five-to-four majority against any kinds of GHG nuisance claims (and maybe other kinds of GHG claims) by non-states."<sup>264</sup> If Professor Gerrard is correct, then the Ninth Circuit's implication in *Washington Environmental Council* that private plaintiffs have a much greater standing burden than states in GHG suits may be correct—at least for the current members of the Supreme Court.<sup>265</sup>

## V. WASHINGTON ENVIRONMENTAL COUNCIL

### A. *The District Court Decision in Favor of the Plaintiffs Only Briefly Addresses Standing*

In *Washington Environmental Council*, the two plaintiffs, the Washington Environmental Council and the Sierra Club, sued the three directors of the "Agencies"—the Washington State Department of Ecology ("the Department"), the Northwest Clean Air Agency ("NWCAA"), and the Puget Sound Clean Air Agency ("PSCAA")—under the CAA.<sup>266</sup> The plaintiffs alleged that the three agencies were not enforcing Washington's State Implementation Plan ("the Plan"), which they contended required the agencies to establish reasonably

---

with commercial concerns"); Mank, *States Standing*, *supra* note 1, at 1739–40 & n.217 (speculating that Justice Kennedy's record of supporting states' rights made him "attracted to *Tennessee Copper*"); Kendall & Bradley, *supra* note 260 (arguing that the notion of state sovereignty was one of the key principles behind the Court's decision in *Tennessee Copper* and suggesting that Justice Kennedy's reference to the case during oral arguments in *Massachusetts* reflects his support for states' rights); Owen, *supra* note 241 (stating that "it seems fairly likely that Justice Stevens's opinion [in *Massachusetts*] was written in large part to appeal to Justice Kennedy's concerns" about states' rights); cf. Michael C. Blumm & Sherry L. Bosse, *Justice Kennedy and the Environment: Property, States' Rights, and a Persistent Search for Nexus*, 82 WASH. L. REV. 667, 721–22 (2007) (opining that, although Justice Kennedy's support for federalism and states' rights is "a hallmark of his jurisprudence," he has also been known "to dispense with state police power where not doing so might produce dual regulation").

263. Mank, *States Standing*, *supra* note 1, at 1738–40.

264. Gerrard, *supra* note 11.

265. See *infra* Part V (analyzing how the Ninth Circuit's opinion may affect the standing of future litigants in GHG cases).

266. *Wash. Envtl. Council v. Sturdevant*, 834 F. Supp. 2d 1209, 1211 (W.D. Wash. 2011), *vacated sub nom.*, *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013), *reh'g en banc denied*, 741 F.3d 1075 (9th Cir. 2014).

available control technology (“RACT”) standards for GHG emissions and to apply those standards to any oil refineries in the state.<sup>267</sup> They also asserted that the five oil refineries that operate in Washington State were responsible for a significant portion of the state’s total GHG emissions.<sup>268</sup> The Western States Petroleum Association (“WSPA”), of which all five oil refineries are members, entered an appearance as intervenor-defendants.<sup>269</sup> The plaintiffs and the WSPA filed cross-motions for summary judgment, and the Department, NWCAA, and PSCAA moved to dismiss.<sup>270</sup>

The district court granted the plaintiffs’ motion for summary judgment.<sup>271</sup> The court concluded that “[the Department, NWCAA, and PSCAA were] obligated to establish RACT for GHG emissions.”<sup>272</sup> Moreover, the CAA established a floor for the minimum requirements that must be met.<sup>273</sup> The CAA did not preclude Washington from imposing greater regulatory requirements, which it did in its Plan through the heightened RACT standards.<sup>274</sup> Because “the currently-approved RACT provision requires the Agencies [to] develop [standards] for GHGs, the [court found the p]laintiffs [had] assert[ed] a federally-enforceable cause of action.”<sup>275</sup> The defendants had conceded that they were not applying the Plan’s standards to GHG emissions, leading the court to side with the plaintiffs.<sup>276</sup>

The district court only briefly mentioned Article III standing when it denied the defendants’ motion to strike the plaintiffs’ standing declarations.<sup>277</sup> The district court observed that the defendants tried to strike some of the plaintiffs’ exhibits and contested the standing issue, but the court only agreed that the exhibits were irrelevant to the case.<sup>278</sup> The court explained that the nine exhibits sought to document the connection between GHGs and climate change in

---

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 1212.

271. *Id.* at 1219.

272. *Id.* at 1212. *See generally id.* at 1213–15 (explaining that the state agencies were required to establish RACT standards for GHG emissions based on the plain language of the RACT provision, but also disagreeing with the plaintiffs that the defendants violated the “Narrative Standard” because that standard “is not actionable as a citizen suit”).

273. *See id.* at 1216 (examining the plain language of the CAA and noting that the Act merely creates minimum requirements and allows states to promulgate broader emission standards as long as they meet the requirements).

274. *Id.* at 1220.

275. *Id.*

276. *Id.*

277. *Id.* at 1219–20.

278. *Id.* at 1219.

various ways.<sup>279</sup> It concluded that documenting this connection was irrelevant to whether the three agencies had a duty to regulate GHGs as they addressed “broader policy questions” beyond the scope of the litigation.<sup>280</sup> After observing that those declarations had been “submitted for the purpose of satisfying Article III and jurisprudential standing requirements,” the court denied the defendants’ motion to strike the plaintiffs’ standing declarations.<sup>281</sup> Thus, the district court must have concluded that the plaintiffs’ declarations had met Article III standing requirements, but the court did not explain its reasoning.

### B. *The Ninth Circuit’s Decision*

The defendants did not challenge the plaintiffs’ statement of injuries, which alleged that increased GHGs cause a “greenhouse effect” as GHGs trap heat in the atmosphere and, in turn, cause harms, such as reduced snow pack and more frequent forest fires.<sup>282</sup> The Ninth Circuit assumed, without deciding, that the plaintiffs’ allegations established an injury in fact.<sup>283</sup> The plaintiffs supported their allegations with by several declarations that the “[d]efendants’ failure to set and apply RACT standards has contributed to greenhouse gas pollution and caused their members to suffer recreational, aesthetic, economic, and health injuries.”<sup>284</sup> While the court of appeals found that the plaintiffs satisfied the first requirement of standing by asserting a concrete injury, it ultimately held that the plaintiffs failed to satisfy the causality and redressability prongs.<sup>285</sup> Therefore, the Ninth Circuit vacated the district court’s decision and remanded with “instructions that the action be dismissed for lack of subject matter jurisdiction.”<sup>286</sup>

First, in looking at causality, the Ninth Circuit agreed with the WSPA that the connection between the defendants’ alleged

---

279. *Id.*

280. *Id.* at 1219–20.

281. *Id.* at 1220 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), which iterated the Supreme Court’s contemporary standing requirements).

282. *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1140–41 (9th Cir. 2013) (detailing the plaintiffs’ various claims of that the defendants purportedly caused), *reh’g en banc denied*, 741 F.3d 1075 (9th Cir. 2014).

283. *Id.* at 1141.

284. *Id.* at 1140.

285. *Id.* at 1135, 1141, 1147; *see also* Richard Frank, *New Standing Barriers Erected for Federal Court Climate Change Litigation*, LEGAL PLANET (Oct. 24, 2013), <http://legal-planet.org/2013/10/24/new-standing-barriers-erected-for-federal-court-climate-change-litigation> (analyzing the Ninth Circuit’s discussion of the causation and redressability requirements for Article III standing and arguing that the court’s standards for private plaintiffs are “formidable”).

286. *Wash. Envtl. Council*, 732 F.3d at 1135.

misconduct and the plaintiffs' injuries was "too attenuated."<sup>287</sup> The court observed that the plaintiffs had the burden of establishing that their injuries were "causally linked or 'fairly traceable' to the Agencies' alleged misconduct" rather than the result of GHG emissions from third parties that were not part of the litigation.<sup>288</sup> The court of appeals appeared to accept that the plaintiffs' assertions that GHG emissions were causing serious environmental harms in Washington State were valid; the defendants did not dispute the assertion, and the EPA's findings supported it as well.<sup>289</sup> Nevertheless, the Ninth Circuit found that the "[p]laintiffs offer[ed] only vague, conclusory statements that the Agencies' failure to set RACT standards at the Oil Refineries contribute[d] to greenhouse gas emissions, which in turn, contribute to climate-related changes that result in their purported injuries."<sup>290</sup> Because the plaintiffs failed to explain how the lack of RACT controls at five refineries caused specific injuries to their members, the Ninth Circuit concluded that the plaintiffs had "failed to satisfy their evidentiary burden of showing causality at the summary judgment stage."<sup>291</sup>

In a broad statement likely to haunt and infuriate future private plaintiffs filing GHG suits against individual states or single projects, the Ninth Circuit concluded, in what is arguably dicta, that it is difficult to prove standing causation between a local source of GHGs and the global problem of climate change.<sup>292</sup> Indeed, attempting to establish a causal nexus in this case may be a particularly challenging task because there is a natural disjunction between the plaintiffs' localized injuries and the greenhouse effect. The Ninth Circuit explained:

Greenhouse gases, once emitted from a specific source, quickly mix and disperse in the global atmosphere and have a long atmospheric lifetime. Current research on how greenhouse gases influence global climate change has focused on the cumulative environmental effects from aggregate regional or global sources. But there is limited scientific capability in assessing, detecting, or

---

287. *Id.* at 1141.

288. *Id.*

289. *Id.* at 1142.

290. *Id.*

291. *Id.* at 1142–43. In a footnote, the Ninth Circuit distinguished the Second Circuit's finding of standing causation in *AEP* "because the Second Circuit case involved a different procedural posture (a motion to dismiss, rather than summary judgment) and state entities—both of which permit less strenuous levels of proof to achieve standing." *Id.* at 1143 n.6.

292. *Id.* at 1143.

measuring the relationship between a certain GHG emission source and localized climate impacts in a given region.<sup>293</sup>

Because the plaintiffs could not “quantify a causal link” between GHG emissions from the five refineries in Washington State with global climate change in that state or “anywhere else,” the Ninth Circuit concluded that the plaintiffs had failed to prove standing causation.<sup>294</sup> The Ninth Circuit’s reasoning, however, is based on current scientific methods. Scientists are currently developing “downscaling”<sup>295</sup> methods to examine smaller geographic areas than those typically found in global climate computer models and to enable plaintiffs to “assess[], detect[], or measure[e] the relationship between a certain GHG emission source and localized climate impacts in a given region.”<sup>296</sup>

The Ninth Circuit correctly observed that there are many different sources of GHG emissions within and outside of the United States that combine to cause climate change.<sup>297</sup> The court next relied on the declaration of the WSPA’s expert that the GHG emissions of the five oil refineries in Washington State, which emit 5.94 million metric tons of carbon dioxide equivalents or 5.9% of GHG emissions in the state, were “scientifically indiscernible” because of “the emission levels, the dispersal of GHGs world-wide, and the absence of any meaningful nexus between Washington refinery emissions and global GHG concentrations now or as projected in the future.”<sup>298</sup> The Ninth Circuit concluded the plaintiffs’ purported causal chain was “too tenuous” because multiple third parties not before the court also contribute to global GHG emissions.<sup>299</sup>

In response to the WSPA’s argument that it could not prove causation when numerous third parties emit far more GHGs than the five Washington State refineries at issue in the case, the plaintiffs contended “a causal connection is inferred.”<sup>300</sup> The Ninth Circuit

---

293. *Id.*

294. *Id.* at 1143–44 (internal quotation marks omitted). The court also noted that it had “explained in a case involving potential GHG emissions from aviation activities that the causal chain between those activities and localized environmental harm is untenable.” *Id.*

295. “Downscaling” is a process that involves using climate models, statistics, and data to calculate, on a case-by-case basis, local and regional climate characteristics and how they may impact global climate change. *From Global Climate Change to Local Consequences*, REALCLIMATE (Nov. 3, 2013), <http://www.realclimate.org/index.php/archives/2013/11/from-global-climate-change-to-local-consequences>.

296. *Wash. Envtl. Council*, 732 F.3d at 1143.

297. *Id.*

298. *Id.* at 1143–44 (internal quotation marks omitted).

299. *Id.* at 1144.

300. *Id.*



rejected the plaintiffs' inferred causal connection argument by distinguishing between a possible inference of adverse environmental effects from the Agencies' failure to set RACT standards, as opposed to the plaintiffs' standing burden of proving that the alleged regulatory failure injured them.<sup>301</sup>

Further, the Ninth Circuit rejected the plaintiffs' argument that the relaxed standing approach in the *Massachusetts* decision applied to their case.<sup>302</sup> The court explained: "In contrast to *Massachusetts v. EPA*, the present case neither implicates a procedural right nor involves a sovereign state. Rather, [the] Plaintiffs are private organizations, and therefore cannot avail themselves of the 'special solicitude' extended to *Massachusetts* by the Supreme Court."<sup>303</sup> Furthermore, the Ninth Circuit reasoned that, even assuming the plaintiffs were entitled to this relaxed standard, "the extension of *Massachusetts* to the present circumstances would not be tenable."<sup>304</sup> The court of appeals limited the scope of *Massachusetts* by emphasizing the Court's language.<sup>305</sup> The *Massachusetts* majority had described the proposed regulation of GHG emissions from U.S. motor vehicles as making a "meaningful contribution" to global GHG levels because the American motor-vehicle sector constituted 6% of global carbon dioxide emissions.<sup>306</sup> By contrast, the Ninth Circuit reasoned that the GHG emissions in its case did not make a "meaningful contribution" to global GHG emissions because the five Washington State refineries only contributed 5.94 million metric tons of carbon dioxide equivalents, or 5.9% of state GHG emissions, and the plaintiffs failed to address the extent to which those emissions contributed to national or global GHG emissions.<sup>307</sup>

In a footnote, the Ninth Circuit distinguished the Supreme Court's standing analysis in *AEP*.<sup>308</sup> Because *AEP* only clearly suggested that the state plaintiffs in the case had standing, the Ninth Circuit implied that the decision offered no support to the solely private plaintiffs in

---

301. *Id.* The court explained: "Injury to the environment alone is not enough to satisfy the causation prong for standing. Here, [the] Plaintiffs must still establish that their specific, localized injuries are fairly traceable to the Agencies' failure to set RACT standards for the GHG emissions from the Oil Refineries." *Id.* (citation omitted).

302. *Id.*

303. *Id.* at 1145.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.* at 1145-46.

308. *Id.* at 1146 n.8.

*Washington Environmental Council*.<sup>309</sup> Additionally, the GHG emissions at issue in *AEP* were far greater than those at stake in *Washington Environmental Council* because the plaintiffs in *AEP* asserted that the electric companies were “the five largest emitters of carbon dioxide in the United States, collectively responsible for 650 million tons annually—equivalent to 25% of emissions from the domestic electric power sector, 10% of emissions from all human activities [in the United States], and 2.5% of all man-made emissions worldwide.”<sup>310</sup> By contrast, the Ninth Circuit remarked that the *Washington Environmental Council* plaintiffs “fail[ed] to provide any allegation or evidence of [the impact of the five Washington State refineries on] global GHG levels at the summary judgment stage.”<sup>311</sup>

The Ninth Circuit found that the plaintiffs could not prove redressability.<sup>312</sup> The court observed that any possible reduction of GHG emissions from imposing RACT standards would not be meaningful “because RACT is a low bar and many sources are likely already meeting or exceeding RACT.”<sup>313</sup> Furthermore, the court reasoned that even the complete elimination of all GHG emissions from Washington refineries would result in “scientifically indiscernible” reductions in global GHG levels.<sup>314</sup> Ultimately, the Ninth Circuit held that the private plaintiffs were not entitled to the relaxed redressability standards the Supreme Court had granted to the state plaintiffs in *Massachusetts*.<sup>315</sup>

### C. Will Washington Environmental Council Limit Standing in Future Private GHG Suits?

Professor Richard Frank<sup>316</sup> has sharply criticized the Ninth Circuit’s decision in *Washington Environmental Council*, complaining that its approach to standing in private plaintiff GHG suits “bodes ill for future climate change litigation, both within the Ninth Circuit and nationwide.”<sup>317</sup> He has argued that the court was wrong to sharply distinguish between private and state plaintiffs when it declined to

---

309. *Id.* See generally *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2532, 2535 (2011) (reasoning, based on *Massachusetts*, that at least “some plaintiffs” had standing because three of the plaintiffs were states).

310. *Wash. Envtl. Council*, 732 F.3d at 1146 n.8.

311. *Id.*

312. *Id.* at 1146.

313. *Id.* (internal quotation marks omitted).

314. *Id.* at 1146–47 (internal quotation marks omitted).

315. *Id.* at 1147.

316. For Professor Frank’s biography, see *Richard Frank*, U.C. DAVIS SCH. L., <http://www.law.ucdavis.edu/faculty/frank/index.aspx> (last visited May 14, 2014).

317. Frank, *supra* note 285.

follow *Massachusetts* because “that distinction actually was not especially relevant to the Supreme Court’s expansive interpretation and application of the causation and redressability standing rules in *Massachusetts*.”<sup>318</sup> However, even if the *Massachusetts* decision was ambiguous or vague about the extent to which state plaintiffs enjoy greater standing rights than private plaintiffs, the Ninth Circuit’s interpretation of the *Massachusetts* decision in *Washington Environmental Council* is narrow but not clearly inconsistent with that decision.<sup>319</sup>

Professor Frank also criticized the *Washington Environmental Council* court for not distinguishing or discussing the court’s own 2004 decision in *Covington v. Jefferson County*,<sup>320</sup> where the court “had found standing in [a] climate change case based on facts roughly analogous to those in *Washington Environmental Council*, and using an expansive standing analysis that closely presaged that adopted in *Massachusetts*.”<sup>321</sup> The majority opinion in *Covington*, however, took a relatively narrow approach to standing by concluding that the private plaintiffs had standing pursuant to the Resource Conservation and Recovery Act (RCRA) because chlorofluorocarbons (CFCs) had leaked from refrigerators located in the defendants’ landfill onto the plaintiffs’ neighboring property.<sup>322</sup> In a concurring opinion, Judge Gould argued that, in some circumstances, plaintiffs should be able to sue based on the global impacts of chemicals like CFCs on the environment; however, he also acknowledged that courts might have

---

318. *Id.*; see also Jonathan Zasloff, Comment to *New Standing Barriers Erected for Federal Court Climate Change Litigation*, LEGAL PLANET (Oct. 29, 2013, 6:49 PM), <http://legal-planet.org/2013/10/24/new-standing-barriers-erected-for-federal-court-climate-change-litigation> (taking issue with Professor Frank’s characterization of the case because “Stevens did indeed fudge the standing argument: he said that a state has special solicitude, and then went ahead as if he was using the regular [*Lujan*] framework[, b]ut it’s a little hard to say that [*Massachusetts*] lets private parties sue on climate issues”). For Professor Zasloff’s biography, see *Jonathan M. Zasloff*, UCLA SCH. L., <http://www.law.ucla.edu/faculty/all-faculty-profiles/professors/Pages/jonathan-m-zasloff.aspx> (last visited May 14, 2014).

319. See Zasloff, *supra* note 318 (commenting “I agree with you that this was a very conservative panel, but it seems to me to be something of a stretch to say that the panel was out-of-bounds here”).

320. 358 F.3d 626 (9th Cir. 2004).

321. Frank, *supra* note 285; see Zasloff, *supra* note 318 (noting that *Covington* predated *Massachusetts*).

322. *Covington*, 358 F.3d at 633, 635, 638–40, 650 (explaining that the Ninth Circuit found that the plaintiffs had standing under the RCRA because they produced evidence that the county’s inadequate operation of its landfill increased the risk “of fires, of excessive animals, . . . and of groundwater contamination,” thus harming the plaintiffs and satisfying the standing requirements); see also Mank, *Standing and Global Warming*, *supra* note 30, at 40–41 (adding that the Ninth Circuit found that the *Covington* plaintiffs also had standing under the CAA).

to put some limits on global environmental impact suits if they became too numerous.<sup>323</sup>

Professor Frank's characterization of *Covington* more accurately reflects Judge Gould's concurring opinion than the majority opinion. Because Judge Gould's concurring opinion pre-dates the Supreme Court's decision in *Massachusetts*, it is not clear whether it would still be valid precedent even if it were a majority opinion of the Ninth Circuit and not merely a concurring opinion.<sup>324</sup> The Ninth Circuit in *Washington Environmental Council* was not bound as a matter of precedent by Judge Gould's concurring opinion,<sup>325</sup> although the Ninth Circuit's opinion would have been more persuasive if it had mentioned *Covington* as a background decision.

Professor Frank concluded that the Ninth Circuit's decision in *Washington Environmental Council* will effectively bar most private plaintiff GHG suits. Specifically, he has said:

Assuming the Ninth Circuit's decision in *Washington Environmental Council* remains undisturbed, it is likely to have profound, adverse effects on climate change litigation advanced by citizen suit plaintiffs in the future. Indeed, it is difficult to imagine *any* private citizen or environmental group that could satisfy the formidable causation and redressability standards recently fashioned by the Ninth Circuit. And given the Ninth Circuit's nationwide influence when it comes to environmental and natural resources law, one can expect that *Washington Environmental Council* will be cited and followed in other federal courts around the nation.

When it comes to Article III standing rules in climate change litigation, the precedential effect of [*Massachusetts*] has, in a

---

323. *Covington*, 358 F.3d at 650–55 (Gould, J., concurring); see also Mank, *Standing and Global Warming*, *supra* note 30, at 41–45 (discussing Judge Gould's concurring opinion in *Covington* and his generally broad view of standing in lawsuits involving global pollution issues, as well as his reservation that federal courts have prudential authority to limit such suits if they became so numerous that they burden the courts).

324. See *supra* note 321 and accompanying text.

325. See *Alexander v. Sandoval*, 532 U.S. 275, 285 n.5 (2001) (implying that concurring opinions normally do not have precedential effect); *Bronson v. Bd. of Educ. of Cincinnati*, 510 F. Supp. 1251, 1265 (S.D. Ohio 1980) (stating "concurring opinions have no legal effect, and thus, are in no way binding on any court"); Ryan M. Moore, Comment, *I Concur! Do I Matter?: Developing a Framework for Determining the Precedential Influence of Concurring Opinions*, 84 TEMP. L. REV. 743, 744 (2012) (explaining that "concurring opinions written by a single appellate-level jurist are not considered binding upon lower courts and have almost no dispositive impact upon the law on which they speak" although they may indirectly influence the development of future legal decisions). In rare cases involving a "fragmented" Supreme Court in which there is no majority opinion, a limiting concurring opinion may establish binding law. See *Marks v. United States*, 430 U.S. 188, 193–94 (1977) (giving an example of a plurality holding that established the legal standard regarding constitutionally protected materials).

relatively short period of time, become marginalized to an extreme degree. How unfortunate.<sup>326</sup>

Professor Frank's claim that the *Washington Environmental Council* decision would eliminate most or all private GHG suits if courts outside of the Ninth Circuit follow it is likely true for private GHG suits targeting a single state or project, but it is not necessarily true for private suits challenging national regulations that involve large amounts of GHGs. The Ninth Circuit's approach to standing causation and redressability would likely bar most suits involving a single state's emissions or the emissions of a single project, which generally are far smaller than the national vehicle emissions constituting 6% of global carbon dioxide emissions that were at stake in *Massachusetts*.<sup>327</sup> Private groups arguably could still sue the EPA over national rules that affect large amounts of GHGs, such as suits involving the regulation of GHGs from fossil fuel power plants.<sup>328</sup> For example, the Obama Administration is currently proposing to regulate GHG emissions from new electric utility generating units.<sup>329</sup> If adopted, environmental groups could theoretically challenge the regulations as insufficiently stringent to address climate change because the large amount of emissions involved arguably would meet the "meaningful contribution" causation standard from *Massachusetts*.<sup>330</sup>

The Supreme Court has granted certiorari in a case that might limit but not totally eliminate the EPA's ability to regulate GHGs from stationary sources.<sup>331</sup> But assuming that the case does not completely foreclose the EPA's regulation of GHGs from stationary sources pursuant to the CAA, private environmental groups could still possibly challenge national regulations concerning either mobile (vehicular) or stationary sources. Those sources arguably meet the

---

326. Frank, *supra* note 285.

327. *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007).

328. *E.g.*, Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1430, 1433 (proposed Jan. 8, 2014) (to be codified at 40 C.F.R. pt. 60) (proposing a rule "limit[ing] GHG emissions from fossil fuel-fired power plants, specifically [carbon dioxide], since they are the nation's largest sources of carbon pollution").

329. *Id.* at 1430.

330. *Massachusetts*, 549 U.S. at 524–26 (stating that although regulating vehicle emissions would not solve the problem of global warming, such prospective regulations satisfied the redressability standard because their "meaningful contribution" would "slow or reduce" global emissions).

331. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 418 (2013) (limiting review to the following question: "Whether [the] EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases").

“meaningful contribution” causation and the “slow or reduce” redressability standards from *Massachusetts*.<sup>332</sup> Because regulations with national or global GHG impacts were not before it, the Ninth Circuit’s decision in *Washington Environmental Council* did not address and does not foreclose private GHG suits involving a substantially larger quantity of GHGs than the 5.94 million metric tons of carbon dioxide at issue in the case.

#### D. Briefs on Possible En Banc Review

On October 31, 2013, fourteen days after the three-judge panel had issued its decision, the Ninth Circuit issued an order in *Washington Environmental Council* announcing that a judge had called for a vote to rehear the case en banc.<sup>333</sup> The plaintiffs’ brief supporting rehearing en banc argued that the panel had misinterpreted *Massachusetts* and *AEP* when it denied standing.<sup>334</sup> The plaintiffs argued that even though states are entitled to “special” solicitude under *Massachusetts*’ standing analysis, “the state must still meet Article III causation and redressability standards” because “the [Supreme] Court did not modify those standing requirements in *Massachusetts v. EPA*.”<sup>335</sup> They also asserted that under *Lujan*’s standing test, they only needed to show that GHGs from the refineries contributed to climate change and that the RACT standards would mitigate those harms to some degree.<sup>336</sup> While the Ninth Circuit panel had claimed that the emissions from the five refineries in Washington State were not enough to make a “meaningful” contribution to GHG emissions under *Massachusetts* and *AEP*, the plaintiffs argued that the refineries were significant sources of emissions.<sup>337</sup> In their view, the EPA’s and Washington State’s GHG limits clearly regulate those emissions and courts should use those regulations to set any cutoffs for what constitutes a significant injury for standing causation and redressability purposes.<sup>338</sup>

---

332. *Massachusetts*, 549 U.S. at 524–26 (stating that although regulating vehicle emissions would not solve the problem of global warming, such prospective regulations satisfied the redressability standard because their “meaningful contribution” would “slow or reduce” global emissions).

333. *Wash. Envtl. Council v. Bellon*, No. 12-35358 (9th Cir. Oct. 31, 2013). The court ordered the parties to submit fifteen-page briefs within twenty-one days. *Id.*

334. Brief in Support of Rehearing En Banc at 1, 12, 14–15, *Wash. Envtl. Council v. Bellon*, 741 F.3d 1075 (9th Cir. 2014) (No. 12-35323).

335. *Id.* at 13.

336. *Id.* at 6–7, 13–15.

337. *Id.* at 3–6.

338. *Id.* at 8–9 (noting that the combined emissions from the five plants make those plants Washington’s second-largest producer of GHGs and further noting that

The WSPA, the intervenor-defendant-appellant, argued that the panel decision “d[id] not present any basis for en banc review.”<sup>339</sup> To the WSPA, the panel correctly applied the Article III standing rules for causation and redressability in concluding that the plaintiffs had failed to meet those two standing tests.<sup>340</sup> The WSPA argued that the panel was correct in interpreting the *Massachusetts* decision to require that the plaintiffs satisfy the Supreme Court’s “meaningful contribution” standard and in concluding that the refineries’ emissions were too small to have any meaningful impact on global GHG emissions.<sup>341</sup> Additionally, the WSPA contended that the panel decision presented “no conflict with Supreme Court or Ninth Circuit precedent, nor any issue of ‘exceptional importance.’” Accordingly, there [were] no grounds for en banc review.”<sup>342</sup>

The brief by the defendant-appellant, Maia D. Bellon, the Director of Washington State’s Department of Ecology, was the most intriguing because she opposed en banc review.<sup>343</sup> However, she also argued that the panel should consider revising its opinion to remove or soften some dicta suggesting that private parties might never be able to file GHG suits.<sup>344</sup>

Bellon’s brief first argued that en banc review was unwarranted because the “sole purpose would be to re-weigh factual considerations by the panel” as to whether the plaintiffs’ allegations provided sufficient evidence to establish standing causation and redressability.<sup>345</sup> In contrast, her brief then suggested that the panel consider changing or eliminating dicta suggesting that private plaintiffs might never be able to prove standing in GHG suits.<sup>346</sup>

---

the quantity of their emissions are “almost [sixty] times larger than [the] EPA’s permitting threshold”).

339. Opposition to Rehearing En Banc by Western States Petroleum Ass’n at 1, *Wash. Envtl. Council*, 741 F.3d 1075 (No. 12-35323).

340. *Id.*

341. *Id.* at 8.

342. *Id.* at 1.

343. Defendant-Appellant Maia Bellon’s Brief on Whether Case Should Be Reheard En Banc at 1, *Wash. Envtl. Council*, 741 F.3d 1075 (No. 12-35323) [hereinafter Bellon Brief].

344. *Id.* at 1–2. Specifically, Bellon observed:

[T]he panel’s opinion also includes dicta suggesting that it might be difficult for private plaintiffs ever to establish causation in a climate change lawsuit. The panel’s decision rests, in part, on a concurring opinion in *Native Village of Kivalina v. Exxonmobil Corp.* Although en banc review is unwarranted, the panel may want to rehear the matter to determine whether its decision contains unnecessarily broad dicta and whether its reliance on a concurring opinion was proper.

*Id.* (citation omitted).

345. *Id.* at 4–5.

346. *Id.* at 6, 8.

While the *Massachusetts* decision had reserved “special solicitude” for state standing claims, Bellon’s brief observed that the causation analysis in that decision “is not expressly limited to states.”<sup>347</sup> Furthermore, the Bellon brief criticized the panel’s reasoning by characterizing its broad language about the appropriateness of private GHG suits as mere dicta.<sup>348</sup> She admitted that “it can sometimes be difficult to distinguish between dicta and a court’s holding” and suggested the panel could rehear to clarify this point.<sup>349</sup> Still, Bellon’s points regarding dicta implied the panel was too eager to announce broad principles about future suits rather than assume the proper judicial role of addressing the specific facts in the case.

The Bellon brief also questioned the panel’s reliance on a concurring opinion as well as its failure to clearly state that it was relying on a concurring opinion.<sup>350</sup> According to Bellon, the majority in *Kivalina* did not decide the standing question.<sup>351</sup> The brief emphasized that one of the judges simply cited lack of standing as another basis for dismissing suit.<sup>352</sup> Moreover, since “[c]oncurring opinions generally lack binding effect,” Bellon argued that the panel should rely on *Kivalina* as persuasive, not binding, authority.<sup>353</sup> Thus, she asserted that “[t]he panel may want to rehear this matter to determine whether its reliance on *Kivalina* is necessary to its conclusions.”<sup>354</sup> In this way, despite ultimately rejecting en banc review, the Bellon brief gave a low or failing grade to the broad reasoning in the panel decision.

*E. Ninth Circuit Denies Rehearing En Banc, but Three Judges Dissent and Two Panel Members Defend Their Decision*

On February 3, 2014, the Ninth Circuit denied en banc review in *Washington Environmental Council v. Bellon*.<sup>355</sup> However, three Ninth Circuit judges wrote a dissenting opinion criticizing the panel’s decision to deny private GHG plaintiffs standing and arguing that the Circuit should have granted en banc review.<sup>356</sup> In response, two

---

347. *Id.* at 7.

348. *Id.* (reasoning that the statements were not necessary to the decision).

349. *Id.* at 7–8.

350. *Id.* at 8–9.

351. *Id.* at 8.

352. *Id.*

353. *Id.*; see sources cited *supra* note 325 (explaining that concurring opinions generally lack precedential value).

354. Bellon’s Brief, *supra* note 343, at 9.

355. 741 F.3d 1075, 1076 (9th Cir. 2014).

356. *Id.* at 1079–81 (Gould, J., dissenting).



members of the original three-judge panel responded to the dissenting opinion and defended the panel decision.<sup>357</sup>

Dissenting from the denial, Judge Gould, joined by Judges Wardlaw and Paez, argued that the original panel's opinion was overly broad in interpreting *Massachusetts* as denying standing rights to all non-state GHG plaintiffs.<sup>358</sup> He also found the panel's decision was too restrictive by adopting an "unidentified threshold of emissions" test to "foreclose[] citizen suits seeking to use the Clean Air Act . . . to fight global warming."<sup>359</sup> Responding to Judge Gould's dissenting opinion, two judges who were members of the original panel, Judges Milan Smith and N. Randy Smith, concurred in the denial of rehearing en banc and explained that the panel's holding was compelled by *Lujan*.<sup>360</sup> The judges argued *Lujan* "established stringent standing requirements for private litigants seeking to challenge the government's regulation of third parties."<sup>361</sup> Furthermore, *Massachusetts* applied "relaxed standing" only to cases involving both procedural violations and suits by sovereign states; neither characteristic applied to the facts of *Washington Environmental Council*.<sup>362</sup>

### 1. Judge Gould's dissent from the denial of rehearing en banc

In his dissenting opinion, Judge Gould argued that the panel had misinterpreted *Massachusetts* by concluding that non-state entities can never bring GHG suits under the CAA and, therefore, that the Ninth Circuit erred in denying a rehearing en banc.<sup>363</sup> He explained:

*Massachusetts v. EPA*, in my view, does not mean that only states have standing for environmental challenges relating to global warming. The Supreme Court's reasoning endorsed the principle that causation and redressability exist, independent of sovereign status, when some incremental damage is sought to be avoided. Accordingly, *Massachusetts v. EPA* also confers standing upon individuals seeking to induce state action to protect the environment.<sup>364</sup>

---

357. See *id.* at 1076–79 (Smith, J., concurring) (arguing that *Lujan*'s stringent standing requirements compelled the panel to deny rehearing en banc and because *Massachusetts*' "relaxed standing" applied only to different factual circumstances).

358. *Id.* at 1079 (Gould, J., dissenting).

359. *Id.* at 1081.

360. *Id.* at 1076 (Smith, J., concurring); see *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1134–35 (9th Cir. 2013) (providing the membership of the original Ninth Circuit panel), *reh'g en banc denied*, 741 F.3d 1075.

361. *Wash. Envtl. Council*, 741 F.3d at 1075 (Smith, J., concurring).

362. *Id.* at 1077.

363. *Id.* at 1079 (Gould, J., dissenting).

364. *Id.* at 1080.

From a policy standpoint, Judge Gould argued that denying standing to non-state GHG plaintiffs would hinder efforts to combat the grave threat of global warming.<sup>365</sup> He concluded his dissent by arguing that “just as a state has Article III standing to sue the federal government to encourage federal action to stem global warming,” pursuant to the *Massachusetts* decision, “so too may individuals or environmental organizations sue states to encourage state action for the same purpose.”<sup>366</sup>

## 2. Judge Milan Smith’s rebuttal to Judge Gould and defense of the panel decision

In his opinion concurring in the denial of rehearing en banc, Judge Milan Smith explained that the panel’s holding was “compelled” by *Lujan*.<sup>367</sup> He described *Lujan* as applying more stringent standing requirements to private litigants challenging government regulation of third parties than to parties directly challenging government regulation that allegedly directly injures them.<sup>368</sup> However, while Judge Smith properly interpreted *Lujan* to apply more stringent standing requirements to private litigants challenging government regulation of third parties, most lower courts currently do not actually apply more stringent standing requirements in these cases as opposed to in cases involving parties directly challenging government regulation.<sup>369</sup> Apparently this trend has resulted from Justice Scalia’s reasoning in *Lujan* being weakened, although not overruled, by the Supreme Court’s subsequent decision in *Laidlaw*.<sup>370</sup> In this case, the Court held that the plaintiffs, who had avoided recreational activities in a river because of “reasonable concerns” about pollution the defendant had released into the river, had standing to sue under the Clean Water Act even if they could not

---

365. *Id.* at 1081.

366. *Id.*

367. *Id.* at 1076 (Smith, J., concurring).

368. *Id.* at 1076–77.

369. See, e.g., *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147–51 (9th Cir. 2000) (holding plaintiffs had standing in light of *Laidlaw* because of recreational injuries traceable to defendant’s pollution); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156–64 (4th Cir. 2000) (en banc) (same); see also Christopher Warshaw & Gregory E. Wannier, *Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 5 HARV. L. & POL’Y REV. 289, 289, 300, 302, 320 (2011) (providing an empirical analysis of 1,935 lower court cases between 1976 and 2009 showing that Justice Scalia’s two *Lujan* decisions led to more dismissals of environmentalist suits by regulated industries than by beneficiaries of regulations, but that the subsequent *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000), reversed that trend).

370. See Warshaw & Wannier, *supra* note 369, at 320; see also *supra* notes 32–33 (discussing *Laidlaw*).

prove that the pollution caused actual environmental harm.<sup>371</sup> Thus, because the Supreme Court's standing jurisprudence contains both restrictive and liberal elements,<sup>372</sup> it is possible for Judge Smith to come to a far different interpretation of that jurisprudence than Judge Gould.

Judge Smith also made a more specific argument that *Lujan* placed the burden on the plaintiffs at the summary judgment stage to demonstrate that imposing RACT requirements on the five refineries would reduce their GHG emissions and "mitigate global climate change in a way that would alleviate [the] Plaintiffs' alleged injuries."<sup>373</sup> Because Washington State introduced evidence that RACT standards are "a low bar and [that] many sources [were] . . . already meeting" that standard, the Ninth Circuit panel concluded that the plaintiffs' request for an injunction imposing RACT standards was unlikely to bring significant GHG reductions.<sup>374</sup>

Judge Smith also distinguished *Massachusetts* from *Washington Environmental Council* on two grounds. He explained the driving factors in *Massachusetts* were that "(1) the asserted injury was an alleged procedural violation, and (2) the action was brought by a sovereign state" and that "[n]either factor [was] present" in the case.<sup>375</sup> While Judge Smith accurately describes these two elements, it is not clear that they are required for standing in every GHG case. First, in *AEP*, four Supreme Court Justices recognized standing in a substantive tort suit seeking an injunction, not in a procedural suit.<sup>376</sup> Accordingly, for at least four Justices, standing in GHG suits is not limited to procedural cases involving the CAA.<sup>377</sup> Second, the Court did not squarely decide the issue of non-state standing rights in GHG

---

371. *Friends of the Earth*, 528 U.S. at 173, 181–84; see Warshaw & Wannier, *supra* note 369, at 296–97 (giving the example of one member of Friends of the Earth who would not use the North Tyger River for recreational activities because "it looked and smelled polluted" due to "Laidlaw's discharges").

372. See Warshaw & Wannier, *supra* note 369, at 296–97 (contrasting the *Lujan* and *Laidlaw* decisions and particularly noting that *Laidlaw* loosened the standards that must be met to establish injury in fact).

373. *Wash. Envtl. Council*, 741 F.3d at 1077 (Smith, J., concurring).

374. *Id.* (internal quotation marks omitted).

375. *Id.* (citation omitted).

376. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2534–35 (2011) (noting that the private plaintiffs sought injunctive relief under the law of nuisance or, in the alternative, state tort law to require the defendants to cap their GHG emissions and that four Justices found they had standing to bring the claim); see also *supra* Part III.E (analyzing the Supreme Court's decision in *AEP*, noting that it was unusual for the Court to expressly discuss its division over the standing issue, and speculating about *AEP*'s impact on future standing decisions).

377. See *Am. Elec. Power*, 131 S. Ct. at 2534–35 (accepting that private plaintiffs' claim in a state tort case).

suits in *Massachusetts* or *AEP*.<sup>378</sup> Judge Smith might be correct that those two decisions only clearly recognized state standing, but they did not as clearly bar non-state standing as the panel decision in *Washington Environmental Council* suggested.<sup>379</sup> Because it was unclear whether RACT requirements would significantly reduce GHG emissions, the panel decision may have been correct in denying standing to the plaintiffs.<sup>380</sup> However, the panel decision's language arguably was broader than necessary in suggesting that non-state plaintiffs may never bring GHG suits.<sup>381</sup>

### CONCLUSION

The *Washington Environmental Council* decision is an important case potentially barring all private GHG suits involving a limited number or amount of greenhouse gas emitters. However, it did not decide the broader question of whether private parties can challenge the EPA's national regulation of the largest GHG sources, including power plants and motor vehicles. Specifically, *Washington Environmental Council* did not resolve whether all private GHG suits are barred because the facts in case involved five state refineries as opposed to large sources of GHG emissions, like in *Massachusetts* and *AEP*. There is a significant difference between the 6% global GHGs in *Massachusetts*, the 2.5% global GHGs in *AEP*, and the roughly 5.9% GHGs for Washington State at issue in *Washington Environmental Council*.

The Ninth Circuit recently rejected en banc review of *Washington Environmental Council*. The plaintiffs-respondents argued that the panel erred in not applying the EPA's and Washington State's GHG limits for permitting and reporting, which do apply to the refineries, when it decided what level of emissions is significant enough to demonstrate standing causation and redressability.<sup>382</sup> While rejecting en banc review as inappropriate in the case, the defendant contended that the broad language in the panel's decision was mere dicta that went too far in rejecting the possibility of any private GHG

---

378. See *supra* text accompanying notes 85–89, 263–65 (discussing the *Massachusetts* and *AEP* decisions and showing their implication that only non-state actors would lack standing to bring suit).

379. See *supra* text accompanying notes 302–11 (explaining that the Ninth Circuit's decision in *Washington Environmental Council* clearly provided that private parties lacked standing because they could not meet the causality requirement).

380. See *supra* text accompanying note 313 (noting that the RACT standards were not difficult to meet).

381. See *supra* text accompanying notes 343–49 (suggesting that the court's broad language could be dicta and thus, not legally binding).

382. Brief in Support of Rehearing En Banc, *supra* note 334, at 8–10.

suits.<sup>383</sup> Furthermore, the defendant criticized the panel for relying on a concurring opinion without making clear it was doing so.<sup>384</sup> Moreover, the defendant suggested the panel was too eager to conclusively settle the issue of private GHG suits.<sup>385</sup>

It is possible that the Ninth Circuit or another lower court in a future case might reject all GHG suits by private parties, including challenges to regulations that affect significant amounts of GHGs comparable to the amounts at issue in *Massachusetts* or *AEP*. In previous articles, this Author has contended that the *Massachusetts* decision was ambiguous or vague about the extent to which state plaintiffs enjoy greater standing rights than private plaintiffs and essentially left the question of private party GHG suits open for another day.<sup>386</sup> A future lower court decision might interpret *Massachusetts* and the “some plaintiffs” language in *AEP* to bar any private party GHG suits as an impermissible generalized grievance best suited for resolution by the political branches and beyond the power of the federal courts because everyone in the world is affected by GHGs and climate change.<sup>387</sup>

There is plausible but limited evidence to suggest that Justice Kennedy likely supports standing only for state plaintiffs and not for private plaintiffs. During oral arguments in *Massachusetts*, he emphasized *Georgia v. Tennessee Copper Co.*, a case involving state *parens patriae* suits.<sup>388</sup> In *AEP*, the Court cryptically observed that four Justices followed *Massachusetts* in determining that “some” of the

---

383. Bellon's Brief, *supra* note 343, at 7; *see also supra* note 348 and accompanying text (noting that dicta does not have precedential value).

384. Bellon's Brief, *supra* note 343, at 8–9; *see also supra* notes 350–54 (asserting that because concurring decisions are non-binding authority, the panel should rehear the matter to reconsider citing a concurring opinion in a previous Ninth Circuit standing case).

385. *See supra* text accompanying notes 349–350.

386. *See* Mank, *Standing for Private Parties in Global Warming Cases*, *supra* note 1, at 871 (observing that the *Massachusetts* decision did not resolve the standing rights of private plaintiffs in GHG suits); Mank, *States Standing*, *supra* note 1, at 1733–34, 1746–47, 1755–56 (criticizing *Massachusetts* for not clarifying whether and to what extent the special treatment of state standing in the case resulted from the *parens patriae* doctrine as opposed to the special standing rights of plaintiffs seeking to vindicate procedural rights or other factors).

387. *See* Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2535 (2011) (stating that four members of the Court would find that “some plaintiffs” had standing under *Massachusetts*); *Massachusetts v. EPA*, 549 U.S. 497, 535–49 (2007) (Roberts, C.J., dissenting) (emphasizing that the Court's previous standing decisions have held that only the Congress and the President can adequately provide redress for GHG emissions issues).

388. *See* Sara Zdeb, Note, *From Georgia v. Tennessee Copper to Massachusetts v. EPA: Parens Patriae Standing for State Global-Warming Plaintiffs*, 96 GEO L.J. 1059, 1065–66 (2008) (explaining that the Court ultimately relied on language from *Tennessee Copper* in its ruling and emphasized the special role of state litigants).

plaintiffs had standing<sup>389</sup>—most likely, the state plaintiffs. Because the *Massachusetts* decision was ambiguous about the extent to which state plaintiffs enjoy greater standing rights than private plaintiffs and did not resolve the issue of whether private parties can bring GHG suits,<sup>390</sup> Justice Kennedy could reject private GHG suits without reversing the *Massachusetts* holding that states have standing to file GHG challenges to national regulations that could make a “meaningful contribution” to global GHG emissions.

Prohibiting all private GHG suits because they are generalized grievances is closer to the spirit of Chief Justice Roberts’s dissenting opinion in *Massachusetts*, but such an approach is not clearly contradictory to the *Massachusetts* decision because the Court only decided state standing rights. State governments could continue to file GHG suits pursuant to *Massachusetts*, at least for regulations involving significant amounts of GHGs comparable to the amounts at issue in *Massachusetts*. In the future, the Supreme Court will likely have to address standing in a private GHG suit involving larger amounts of GHGs than those at issue in *Washington Environmental Council* and finally resolve whether private parties may ever file GHG challenges. Unfortunately for future private plaintiffs in GHG cases, previous standing decisions hint that Justice Kennedy—the Court’s crucial swing vote in standing cases—may only support standing for states in GHG suits and would dismiss any private GHG suits.

---

389. See *Am. Elec. Power*, 131 S. Ct. at 2535 (noting the Court’s division on the standing issue). See generally Gerrard, *supra* note 11 (calling the Court’s statement of its decision on the standing issue “the most intriguing paragraph in the opinion”).

390. See *supra* note 386 and accompanying text (referencing this Author’s other works that analyze the ambiguity in the *Massachusetts* decision).

\*\*\*