

7-3-2016

## Article III Standing for Private Plaintiffs Challenging Greenhouse Gas Regulations

Bradford C. Mank

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### Recommended Citation

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# Article III Standing for Private Plaintiffs Challenging Greenhouse Gas Regulations

BRADFORD C. MANK\*

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\* © 2016 Bradford C. Mank (Do Not Quote or Cite Without Express Permission). 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 In June 2015, I presented an early version of this article to my faculty colleagues at a summer workshop and received valuable suggestions, including Michael Solimine. All errors or omissions are my responsibility. This article is one of a series of explorations of standing and climate change litigation. The other pieces are (1) *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*]; (2) *Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?*, 34 COLUM. J. ENVTL. L. 1 (2009) [hereinafter Mank, *Future Generations*]; (3) *Reading the Standing Tea Leaves in American Electric Power v. Connecticut*, 46 UNIV. RICH. L. REV. 543 (2012) [hereinafter Mank, *Tea Leaves*]; (4) *Standing for Private Parties in Global Warming Cases: Traceable Standing Causation Does Not Require Proximate Causation*, 2012 MICH. ST. L. REV. 869 [hereinafter Mank, *Private Parties*]; (5) *No Article III Standing for Private Plaintiffs Challenging State Greenhouse Gas Regulations: The Ninth Circuit's Decision in Wash. Envtl. Council v. Bellon*, 63 AM. U. L. REV. 1525 (2014) [hereinafter Mank, *WEC*].

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#### ABSTRACT

An important unresolved question is whether non-state plaintiffs have standing under Article III of the U.S. Constitution to sue in federal courts in climate change cases. In *Massachusetts v. EPA*, the Supreme Court held a state government could sue the U.S. government to address climate change issues, and suggested, but did not decide, that private litigants might have lesser rights than states. In *Washington Environmental Council v. Bellon*, the Ninth Circuit held that private groups did not have standing to challenge Washington State’s failure to regulate greenhouse gas (GHG) emissions from five oil refineries, and implied that private plaintiffs may never bring climate change suits because such suits are generalized grievances and the *Massachusetts* exception for GHG suits applies only to states. However, dissenting from the Ninth Circuit’s denial of a rehearing en banc, three judges argued that the panel’s opinion was overly broad in interpreting the *Massachusetts* decision to deny standing rights to all non-state GHG plaintiffs. In recent district court decisions, two different federal judges concluded that private plaintiffs may have Article III standing to challenge the government’s regulation of climate change or greenhouse gases. In *Center for Biological Diversity v. EPA*, the Western District of Washington held the plaintiff suffered concrete standing injuries from the defendant EPA’s approval of Washington’s and Oregon’s decisions not to

identify any waters experiencing ocean acidification as impaired under the Clean Water Act (CWA). In distinguishing the *Washington Environmental Council* decision, the district court concluded that the plaintiffs demonstrated local GHG impacts, and local mitigation efforts could partially redress the injuries to their members. In *Murray Energy Corporation v. Gina McCarthy, Administrator of EPA*, the Northern District of West Virginia concluded that the plaintiffs sufficiently established that the EPA violated its duty under the Clean Air Act (CAA) to examine the employment impacts of its enforcement and regulations under the Act on employment in the coal mining industry to have standing. The *Murray* decision's focus on employment injuries could be used to provide standing in a challenge to GHG regulations. While there is an argument that expanding standing to non-state GHG plaintiffs could flood the federal courts with too many suits, courts can manage the number of climate change suits by requiring a meaningful demonstration of a connection between GHG emissions and harms to the plaintiffs, and by giving substantial deference to reasonable government regulatory policies in this area.

## I. INTRODUCTION

An important unresolved question is whether non-state plaintiffs, including private parties and political subdivisions of a state, have standing under Article III of the U.S. Constitution to file suit in the federal courts in cases involving climate change and greenhouse gases (GHGs).<sup>1</sup> In *Massachusetts v. EPA*, the Supreme Court held that a state government, the Commonwealth of Massachusetts, had Article III standing to sue the defendant U.S. Environmental Protection Agency (EPA) for its failure to regulate GHG emissions from motor vehicles because states are “entitled to special solicitude in our standing analysis.”<sup>2</sup> *Massachusetts* did not directly address whether non-state parties have similar standing rights to bring climate change suits against the federal government or large private GHG emitters, but implied that private parties might have lesser standing rights when it

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1. The Supreme Court has distinguished between state plaintiffs and non-state plaintiffs, including private parties and political subdivisions of a state, regarding whether they “may invoke the federal common law of nuisance to abate out-of-state pollution.” *Am. Elec. Power Co. v. Connecticut (AEP)*, 564 U.S. 410, 422 (2011).

2. 549 U.S. 497, 518–21 (2007); see Charles H. Haake & Raymond B. Ludwizewski, *Standing Up for Industry Standing in Environmental Regulatory Challenges*, 42 B.C. ENVTL. AFF. L. REV. 305, 318–19 (2015) (discussing the *Massachusetts* decision and its implications); Mank, *WEC*, *supra* note \* (same), at 1528; see *infra* Section III.A.

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 v. Defenders of Wildlife*], a private individual.”<sup>3</sup>

In *Washington Environmental Council v. Bellon (WEC)*, the Ninth Circuit held that two private non-profit groups did not have standing under Article III to sue in federal court to challenge Washington State’s failure to regulate GHG emissions from five oil refineries in that state because the plaintiffs failed to allege that the emissions were significant enough to make a “meaningful contribution” to global GHG levels.<sup>4</sup> The Ninth Circuit suggested that private plaintiffs may never bring climate change suits because such suits are generalized grievances and clearly stated that the *Massachusetts* liberalized approach for standing in GHG suits applies only to states and not to non-state parties.<sup>5</sup> Dissenting from the Ninth Circuit’s denial of the plaintiffs’ request for a rehearing en banc, three judges argued that the three-judge panel’s opinion was overly broad in interpreting the *Massachusetts* decision to deny standing rights to all non-state GHG plaintiffs.<sup>6</sup> This Author has questioned the Ninth Circuit’s implication that non-state plaintiffs may never have standing to bring climate change suits because *Massachusetts* did not clearly decide the question of standing in private climate change suits and the plaintiffs in *WEC* were only challenging the greenhouse gas emissions of five refineries in one state; a non-state suit challenging the U.S. Environmental Protection Agency’s national regulation of GHG emissions might meet Article III standing requirements.<sup>7</sup>

In recent district court decisions, two different federal judges suggested that private plaintiffs may have Article III standing to challenge the government’s regulation of climate change or greenhouse gases. In *Center for Biological Diversity v. EPA (CBD)*, the U.S. District Court for the Western District of Washington held members of the plaintiff Center for Biological Diversity (CBD) suffered concrete standing injuries caused by the defendant EPA’s approval of Washington’s and Oregon’s decisions not to identify any waters experiencing ocean acidification as impaired under

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3. *Massachusetts*, 549 U.S. at 518 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)); see Haake & Ludwizewski, *supra* note 2, at 319–20; Mank, *WEC*, *supra* note \*, at 1528; see *infra* Section III.A.

4. *Wash. Envtl. Council v. Bellon (WEC)*, 732 F.3d 1131, 1146 (9th Cir. 2013), *reh’g en banc denied*, *Wash. Envtl. Council v. Bellon* 741 F.3d 1075 (9th Cir. 2014); see *infra* Section IV.B.

5. *WEC*, 732 F.3d at 1144–46; Haake & Ludwizewski, *supra* note 2, at 320; Mank, *WEC*, *supra* note \*, at 1572, 1583; see *infra* Section IV.B.

6. *Wash. Envtl. Council*, 741 F.3d 1079–81 (9th Cir. 2014) (en banc) (Gould, J., dissenting from the denial of rehearing en banc); Mank, *WEC*, *supra* note \*, at 1580–83; see *infra* Section IV.C.

7. Mank, *WEC*, *supra* note \*, at 1576, 1582–85.

the Clean Water Act (CWA),<sup>8</sup> where the members alleged that their recreational opportunities to catch shellfish in the two states' coastlines and estuaries were diminishing.<sup>9</sup> In distinguishing the Ninth Circuit's *WEC* decision, the district court concluded that the plaintiffs met the overlapping causation and redressability requirements for standing because the EPA's actions adversely affected regional drivers of acidification in the two states, and local mitigation efforts could partially redress the injuries to their members.<sup>10</sup> By focusing on local and regional impacts of acidification, the district court was able to recognize standing for a private GHG suit despite the *WEC* decision's presumptive foreclosure of non-state suits involving only global injuries.<sup>11</sup>

In *Murray Energy Corporation v. Gina McCarthy, Administrator of EPA*, the U. S. District Court for the Northern District of West Virginia concluded that the plaintiffs, Murray Energy Corporation and its various subsidiaries or affiliated companies (Murray), sufficiently established that the EPA violated its duty under the Clean Air Act (CAA) to examine the impacts of its enforcement and regulations on employment in the coal mining industry for the plaintiffs' workforce for standing.<sup>12</sup> By focusing on the employment impacts of the EPA's CAA regulations, the *Murray* decision concluded that a regulated industry had Article III standing to challenge the EPA's alleged failure to consider the employment impacts of certain past CAA regulations.<sup>13</sup> The *Murray* decision's focus on employment injuries could be used to provide standing in a challenge to GHG regulations, especially for entities regulated under the Clean Air Act or similar statutes that require a federal agency to consider the employment or economic impacts of environmental regulations.

Arguably, expanding standing to non-state GHG plaintiffs could flood the federal courts with too many suits.<sup>14</sup> In his dissenting opinion in *Massachusetts*, Chief Justice Roberts disagreed with the majority's view that states were entitled to a more lenient standing test in climate change suits,

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8. 33 U.S.C. §§ 1251–1387 (2012).

9. *Ctr. for Biological Diversity v. EPA*, 90 F. Supp. 3d 1177, 1186–97 (W.D. Wash. 2015).

10. *Id.* at 1189–97.

11. *See id.* at 1190, 1192; *see infra* Section V.

12. No. 5:14–CV–39, 2015 WL 1438036 \*6 (N.D. W. Va. Mar. 27, 2015) (discussing EPA's duty to consider employment impacts of its Clean Air Act regulations under 42 U.S.C. § 7621).

13. *Id.*; *see infra* Section VI.

14. *See infra* Sections II.B and Conclusion.

but he also suggested that limiting GHG suits to state plaintiffs would limit the harm compared to allowing suits by other plaintiffs.<sup>15</sup> While there is an argument that expanding standing to non-state GHG plaintiffs could flood the federal courts with too many suits, courts can manage the number of climate change suits by requiring a meaningful demonstration of a connection between GHG emissions and harms to the plaintiffs, and by giving substantial deference to reasonable government regulatory policies.<sup>16</sup>

Part II discusses the basic principles of constitutional Article III standing.<sup>17</sup> Part III examines how the *Massachusetts* decision addressed state standing, the implications of that decision for non-state GHG suits, and how the Supreme Court's divided decision in *American Electric Power Co. v. Connecticut* ("AEP"),<sup>18</sup> failed to clarify the relationship between state and non-state standing.<sup>19</sup> Part IV explores the Ninth Circuit's decision in *Washington Environmental Council* and explains why that decision's rejection of private GHG suits was overly broad.<sup>20</sup> Part V discusses the *CBD* decision's use of local and regional water pollution issues to distinguish the decision in *WEC*.<sup>21</sup> Part VI examines how the district court's decision in *Murray* could enable regulated parties to use employment impacts to challenge CAA regulation of GHGs.<sup>22</sup> The Conclusion argues that courts should be more lenient in deciding the preliminary issue of standing in borderline cases to give plaintiffs the opportunity to present their best case of harm from a defendant's GHG emissions, but that courts in deciding the merits should require plaintiffs to prove by a preponderance of the evidence that a defendant's emissions specifically harmed the plaintiff.<sup>23</sup>

## II. INTRODUCTION TO ARTICLE III STANDING<sup>24</sup>

Although the Constitution does not expressly require that each plaintiff suing in a federal court prove standing, the Supreme Court has interpreted Article III's limitation of judicial authority to actual "Cases" and

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15. See *Massachusetts v. EPA*, 549 U.S. 497, 547–49 (2007) (Roberts, C.J., dissenting); see *infra* Sections II.B and Conclusion.

16. See *infra* Conclusion.

17. See *infra* Section II.

18. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011).

19. See *infra* Section III.

20. See *infra* Section IV.

21. See *infra* Section V.

22. See *infra* Section VI.

23. See *infra* Conclusion.

24. The discussion of standing in Section II relies upon my earlier standing articles cited in footnote 1.

“Controversies” as imposing constitutional standing requirements.<sup>25</sup> The Supreme Court has established a three-part test for constitutional Article III standing 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—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>26</sup> For purposes of this Article, it is notable that the traceable causation standard for standing requires less proof than the proximate causation standard typically used in deciding a tort case or an environmental case on the merits.<sup>27</sup>

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25. 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; *see* *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 . . .”); *see generally* 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).

26. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (second, third, and fourth alterations in original) (citations omitted) (internal quotation marks omitted).

27. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391 n.6 (2014) (explaining distinction between fairly traceable causation for standing and proving proximate causation on the merits); *see also* *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997) (same); Mank, *Private Parties*, *supra* note \*, at 922–27 (same). However, the standard for what is “fairly traceable” standing causation is somewhat uncertain even if courts should treat standing causation as less than merits causation. Note, *Causation In Environmental Law: Lessons From Toxic Torts*, 128 HARV. L. REV. 2256, 2264–65, 2271–77 (2015) (discussing uncertainties of standing causation and arguing that standing causation should be less than merits causation). *But see* Luke Meier, *Using Tort Law to Understand the Causation Prong of Standing*, 80 FORDHAM L. REV. 1241, 1245–46, 1297–99 (2011)



A plaintiff bears the burden of proof for all three standing elements.<sup>28</sup> Accordingly, for a federal court to have jurisdiction over a suit, at least one plaintiff must prove he has standing for each form of relief sought.<sup>29</sup> Federal courts must dismiss a case for lack of jurisdiction if no plaintiff meets the Article III standing requirements.<sup>30</sup>

As indicated above, standing requirements are based on core constitutional principles inferred from Article III’s delineation of the judicial authority of federal courts. For instance, standing principles prohibit advisory opinions as unconstitutional because such opinions are not based on an actual “case” or “controversy.”<sup>31</sup> Additionally, standing requirements are derived from fundamental separation of powers principles inferred from the Constitution’s three-branch form of government, which includes 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>32</sup> Different members of the Supreme Court have disagreed, however, concerning the degree to which separation of powers principles limit Congress’s authority to authorize standing to sue in federal courts for private citizen suits challenging executive branch decisions.<sup>33</sup> For example, many environmental statutes have citizen suit provisions

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(arguing courts should change standing causation standard to proximate cause, so that standing law can serve a “gatekeeping function”).

28. *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.

29. *See DaimlerChrysler*, 547 U.S. at 351–52 (“[A] plaintiff must demonstrate standing separately for each form of relief sought.”) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)).

30. *See id.* at 340–41 (emphasizing the importance of the case or controversy requirement); *Laidlaw*, 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).

31. *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.’ . . . ‘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.’”) (citations omitted).

32. *DaimlerChrysler*, 547 U.S. at 341 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984), *partially abrogated on different grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014)).

33. *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 580 (Kennedy, J., concurring) (“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.”), *and 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”).

allowing any “person” or “citizen” to sue polluters who commit certain legal violations or the Administrator of EPA if she fails to perform a mandatory duty; these provisions typically do not differentiate states from others.<sup>34</sup>

### III. MASSACHUSETTS V. EPA AND AMERICAN ELECTRIC POWER: STATE STANDING<sup>35</sup>

In *Massachusetts*, the Supreme Court held that the Commonwealth of Massachusetts had standing to sue the EPA for failing to regulate GHGs from new motor vehicles that allegedly cause climate change.<sup>36</sup> Importantly, the Court recognized for the first time that states have greater standing rights in some circumstances than non-state litigants.<sup>37</sup> However, the Court’s reasoning that the Commonwealth met the three-part standing test for injury, causation and redressability arguably could be used by a private plaintiff who alleges similar injuries from rising sea levels to demonstrate that his allegations about harm from climate change also meet Article III standing principles.<sup>38</sup>

Chief Justice Roberts’ dissenting opinion in *Massachusetts* argued that states do not have greater standing rights than other litigants;<sup>39</sup> this argument possibly helps non-state litigants to some extent by de-emphasizing the differences between the standing rights of non-state and state parties.<sup>40</sup> On the other hand, his argument that the generalized injuries resulting from climate change are better addressed through the political process than the judiciary would probably bar all climate change suits.<sup>41</sup> Chief Justice Roberts also indirectly touched on whether limiting GHG

34. See, e.g., 33 U.S.C. § 1365 (2012) (stating “any citizen” may challenge certain Clean Water Act violations); 42 U.S.C. § 7604 (2012) (stating “any person” may challenge certain Clean Air Act violations).

35. The discussion of *Massachusetts v. EPA* and state standing in Part II is based on my earlier articles, *supra* note \*, and especially Mank, *Private Parties*, *supra* note \*, at 880–88 and Mank, *WEC*, *supra* note \*, at 1536–45.

36. *Massachusetts v. EPA*, 549 U.S. 497, 521, 526 (2007); Mank, *WEC*, *supra* note \*, at 1536.

37. *Massachusetts*, 549 U.S. at 518–20; Mank, *WEC*, *supra* note \*, at 1536–38.

38. Mank, *WEC*, *supra* note \*, at 1541.

39. *Massachusetts*, 549 U.S. at 536–40 (Roberts, C.J., dissenting); Mank, *WEC*, *supra* note \*, at 1542–45.

40. See Mank, *WEC*, *supra* note \*, at 1542–44.

41. *Massachusetts*, 549 U.S. at 535, 546–47 (Roberts, C.J., dissenting); Mank, *WEC*, *supra* note \*, at 1536, 1542–45.

suits to state plaintiffs would prevent GHG suits from overwhelming the federal courts.<sup>42</sup>

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

1. *The Special Standing Rights of States*

The *Massachusetts* decision invoked the *parens patriae* doctrine as a justification for giving greater standing rights to states, and its reliance on that doctrine to establish standing implicitly weakens the standing arguments of non-state litigants.<sup>43</sup> The *parens patriae* doctrine has origins in English common law doctrine regarding the authority of the English King to act as a guardian for incompetent persons such as minors, the mentally ill, and mentally limited persons.<sup>44</sup> Beginning in the early twentieth century, federal courts have allowed states to sue as *parens patriae* to protect their quasi-sovereign interests in the health, welfare, and natural resources of their citizens.<sup>45</sup>

Citing the *parens patriae* doctrine, Justice Stevens in his *Massachusetts* decision stated that “the special position and interest of Massachusetts” was significant in determining its standing rights.<sup>46</sup> He stated 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>47</sup> Justice Stevens relied upon the Court’s 1907 decision in *Georgia v. Tennessee Copper*, which recognized Georgia’s right to sue in federal court on behalf of its citizens to protect them from air pollution from another state because of Georgia’s quasi-sovereign interest in the state’s natural resources and the health of its citizens.<sup>48</sup> Additionally, he noted that the Court had for many years “recognized that States are not normal litigants for the purposes of invoking federal jurisdiction.”<sup>49</sup> Accordingly, Justice Stevens determined in the *Massachusetts* decision that, “[j]ust as Georgia’s independent interest ‘in all the earth and air within its domain’ supported federal jurisdiction

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42. *Massachusetts*, 549 U.S. at 548.

43. *Id.* at 518–20 (majority opinion); Mank, *WEC*, *supra* note \*, at 1536–38.

44. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel. Barez*, 458 U.S. 592, 600 (1982); Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195, 195 (1978) (discussing development of *parens patriae* doctrine in English common law to allow English King to act as the guardian for children and mentally incompetent persons); Mank, *States Standing*, *supra* note \*, at 1756–57.

45. *Massachusetts*, 549 U.S. at 518–19; *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907); Mank, *States Standing*, *supra* note \*, at 1757–59.

46. *Massachusetts*, 549 U.S. at 518; Mank, *WEC*, *supra* note \*, at 1537.

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

48. *Id.* at 518–19 (citing *Tenn. Copper Co.*, 206 U.S. at 237); Mank, *WEC*, *supra* note \*, at 1537.

49. *Massachusetts*, 549 U.S. at 518; Mank, *WEC*, *supra* note \*, at 1537.

a century ago, so too does Massachusetts' well-founded desire to preserve its sovereign territory today."<sup>50</sup> Furthermore, he observed that Massachusetts ownership of a significant extent of the coastline allegedly affected by climate change bolstered the case for recognizing standing in Article III courts.<sup>51</sup>

Further explaining the relevance of the *parens patriae* doctrine to the question of state standing, Justice Stevens explained that states had standing to protect their quasi-sovereign interest in the health and welfare of their citizens because they had surrendered three important sovereign powers to the federal government: (1) states may no longer use military force to resolve differences with other states; (2) the Constitution prohibits states from negotiating treaties with foreign governments; and (3) federal laws may sometimes preempt state laws.<sup>52</sup> Because states had transferred these three sovereign powers to the federal government, the Court invoked the *parens patriae* doctrine to preserve a special place for the states in a federal system of government by recognizing that states can file suit in federal court to protect quasi-sovereign interests in the health, welfare, and natural resources of their citizens.<sup>53</sup>

Justice Stevens joined the *parens patriae* argument for standing rights for states with a procedural rights argument based on statutory language in the Clean Air Act (CAA) that Massachusetts had the right to sue because the Act required the EPA to use the federal government's sovereign powers to protect states, among others, from vehicle emissions "which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."<sup>54</sup> Relatedly, the *Massachusetts* decision observed that Congress in the Act had "recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious."<sup>55</sup> Combining these procedural and

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50. *Massachusetts*, 549 U.S. at 518–19 (quoting *Tenn. Copper Co.*, 206 U.S. at 237); Mank, *WEC*, *supra* note \*, at 1537.

51. *Massachusetts*, 549 U.S. at 519 (quoting *Tenn. Copper Co.*, 206 U.S. at 237); Mank, *WEC*, *supra* note \*, at 1537.

52. *Massachusetts*, 549 U.S. at 519; Mank, *WEC*, *supra* note \*, at 1537–38.

53. *Massachusetts*, 549 U.S. at 519–20; Mank, *WEC*, *supra* note \*, at 1538.

54. *Massachusetts*, 549 U.S. at 519–20 (quoting 42 U.S.C. § 7521(a)(1) (2006)); *see also* Haake & Ludwizewski, *supra* note 2, at 319 (observing that state standing in *Massachusetts* rested upon both procedural statutory right and quasi-sovereign rights); Mank, *WEC*, *supra* note \*, at 1538.

55. *Massachusetts*, 549 U.S. at 520 (citing 42 U.S.C. § 7607(b)(1) (2012)); *see also* Mank, *WEC*, *supra* note \*, at 1538.

*parens patriae* justifications for standing, Justice Stevens concluded, “[g]iven that procedural right and Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”<sup>56</sup> However, Chief Justice Roberts’s dissenting opinion correctly observed that in the CAA provisions cited by the majority “Congress treated public and private litigants exactly the same” so that there was no basis for giving greater statutory or procedural rights to states than private plaintiffs.<sup>57</sup>

The *Massachusetts* decision failed to clarify to what extent the Court’s recognition of special state standing rights resulted from the *parens patriae* doctrine as opposed to statutory or procedural rights in the CAA.<sup>58</sup> Because the *Massachusetts* decision rested upon multiple factors and not just the special *parens patriae* standing rights of states, it is difficult to evaluate how the *Massachusetts* decision might affect the standing of non-state parties in climate change suits.<sup>59</sup> As is discussed in Part IV, judges on the Ninth Circuit in *WEC* disagreed about the impact of the *Massachusetts* decision on private party standing in a GHG suit.<sup>60</sup>

## 2. Massachusetts *and Standing Tests for Injury, Causation, and Redressability*

Although declaring that states are entitled to a more lenient standing test under the *parens patriae* doctrine and possibly the CAA as well, the Court also indicated that the Commonwealth had established Article III standing test for injury, causation, and redressability.<sup>61</sup> The Court’s discussion of how Massachusetts met these three standing tests might also allow some private plaintiffs to prove standing.<sup>62</sup> Concerning the injury part of the standing test, the Court concluded that climate change had caused rising sea levels that had already harmed Massachusetts’ coastline and posed potentially more dangerous harms in the future.<sup>63</sup> Rejecting the

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56. *Massachusetts*, 549 U.S. at 520; *see also* Mank, *WEC*, *supra* note \*, at 1538.

57. *Massachusetts*, 549 U.S. at 536–37 (Roberts, C.J., dissenting).

58. Mank, *States Standing*, *supra* note \*, 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); Mank, *WEC*, *supra* note \*, at 1538–39, 1541–42.

59. Mank, *WEC*, *supra* note \*, at 1538–39, 1541–42.

60. *See infra* Sections IV.B and IV.C (discussing panel decision, dissenting opinion and concurring opinion).

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

62. *See* Section III.A.2.

63. *Massachusetts*, 549 U.S. at 521–23; Mank, *Future Generations*, *supra* note \*, at 71–73.

view in Chief Justice Roberts's dissenting opinion that no plaintiff has standing to challenge global harms creating a generalized grievance for humanity,<sup>64</sup> Justice Stevens stated, "that these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation."<sup>65</sup> Distinguishing the Commonwealth from other litigants because Massachusetts "owns a substantial portion of the state's coastal property," the Court determined that "[the Commonwealth] has alleged a particularized injury in its capacity as a landowner" even if many others have suffered similar injuries.<sup>66</sup>

Addressing the causation part of the standing test, the Court observed that "EPA does not dispute the existence of a causal connection between manmade [GHG] emissions and global warming."<sup>67</sup> Because EPA conceded that man-made GHG emissions cause climate change, Justice Stevens concluded that "[a]t a minimum, therefore, EPA's refusal to regulate such emissions 'contributes' to Massachusetts' injuries."<sup>68</sup> The Court rejected EPA's causation argument that a suit was inappropriate because other countries such as China could not regulate under the CAA because it "rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum."<sup>69</sup> Justice Stevens noted that agencies and legislatures "do not generally resolve massive problems in one fell regulatory swoop."<sup>70</sup> He reasoned, "[t]hat a first step might be tentative does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law."<sup>71</sup> Moreover, the Court determined that "reducing domestic automobile emissions is hardly a tentative step" because "the United States transportation sector emits an enormous quantity of carbon dioxide into the atmosphere . . . more than 1.7 billion metric tons in 1999 alone."<sup>72</sup> Because domestic automobile emissions account for more than 6% of worldwide carbon dioxide emissions, the Court held that "U.S. motor-vehicle emissions make

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64. See *supra* Section III.B.

65. *Massachusetts*, 549 U.S. at 522 ("Where 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))).

66. *Id.*

67. *Id.* at 523.

68. *Id.*

69. *Id.* at 524.

70. *Id.*

71. *Id.*

72. *Id.*

a *meaningful contribution* to greenhouse gas concentrations and hence, according to petitioners, to global warming.”<sup>73</sup> As this Article will discuss in Part IV, the Ninth Circuit in *WEC* emphasized the “meaningful contribution” language in *Massachusetts* as an essential test for determining which GHG suits can establish sufficient standing causation to sue in federal courts.<sup>74</sup>

Lastly, the Court rejected the EPA’s argument that the plaintiffs could not satisfy the redressability portion of the standing test because federal courts could not remedy GHG emissions from other countries.<sup>75</sup> The Court concluded that the EPA had a duty under the CAA to reduce future harms to Massachusetts even if it could not prevent the majority of harms from GHG emissions: “While 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 EPA has a duty to take steps to *slow or reduce* it.”<sup>76</sup> Responding to EPA’s argument that its regulation of GHG emissions from new vehicles would have little impact because of increasing emissions from developing countries such as China and India, the Court stated: “A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.”<sup>77</sup> Furthermore, the Court suggested that EPA had a duty to prevent catastrophic harms to future generations: “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 EPA’s denial of their rulemaking petition.”<sup>78</sup> As this Article will discuss in Part III, the Ninth Circuit in *WEC* interpreted the *Massachusetts* decision’s approach to the redressability standing test to require that a plaintiff’s proposed remedy significantly “slow or reduce” climate change and not to encompass any remedy that might only marginally reduce GHGs to a small degree.<sup>79</sup>

Despite its declaration that states are entitled to “special solicitude” in deciding their standing in federal courts, the *Massachusetts* decision’s discussion of the injury, causation and redressability standing elements did not offer clear grounds for distinguishing between the standing rights of state and non-state plaintiffs.<sup>80</sup> For instance, a private or municipal land owner could endure similar injuries from rising sea levels on its coastal

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73. *Id.* at 524–25 (emphasis added).

74. *See WEC*, 732 F.3d 1131, 1145–46 (9th Cir. 2013); *see infra* Section IV.B.

75. *Massachusetts*, 549 U.S. at 517, 525–26.

76. *Id.* at 525.

77. *Id.* at 525–26.

78. *Id.* at 526.

79. *See WEC*, 732 F.3d 1131, 1146–47 (9th Cir. 2013); *see infra* Section IV.B.

80. Mank, *WEC*, *supra* note \*, at 1541.

property as the Commonwealth of Massachusetts.<sup>81</sup> Although the Court did observe that the Commonwealth of Massachusetts “owns a substantial portion of the state’s coastal property,”<sup>82</sup> there is no sound reason in standing doctrine to treat an injury to a large amount of land differently from a similar injury to a smaller amount of land as long as both injuries are imminent and concrete.<sup>83</sup> The traceable causation and redressability issues in climate change cases related to the fact that most emissions arise from outside the U.S. are arguably similar whether the plaintiffs are states or non-state parties.<sup>84</sup> Accordingly, the *Massachusetts* decision’s discussion of the injury, causation and redressability standing elements did not demonstrate good reasons for distinguishing between the standing rights of state and other types of plaintiffs.

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

In his dissenting opinion, Chief Justice Roberts reasoned that the global issue of climate change was a nonjusticiable general grievance that should be decided by the political branches and not by federal courts.<sup>85</sup> Also, he concluded that the Court should not apply a more lenient standing test for states because neither the CAA nor the *parens patriae* doctrine justified treating state plaintiffs differently from non-state litigants.<sup>86</sup> While implying that states and private parties have roughly equal standing rights,<sup>87</sup> Justice Roberts’ dissenting opinion essentially rejected the idea of GHG litigation by either private parties or states because climate change is a generalized political grievance better addressed by the political branches rather than Article III courts.<sup>88</sup>

Chief Justice Roberts acknowledged that the tests for “what is ‘fairly’ traceable or ‘likely’ to be redressed” were “subject to some debate.”<sup>89</sup>

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81. *Id.*

82. *Massachusetts*, 549 U.S. at 522.

83. Mank, *WEC*, *supra* note \*, at 1541.

84. *Id.*

85. *Massachusetts*, 549 U.S. at 535, 548–49 (Roberts, C.J., dissenting) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)); *see also* Mank, *WEC*, *supra* note \*, at 1542, 1544.

86. *Massachusetts*, 549 U.S. at 536–40; Mank, *WEC*, *supra* note \*, at 1542–43.

87. *Massachusetts*, 549 U.S. at 536–40.; Mank, *WEC*, *supra* note \*, at 1542–44.

88. *See Massachusetts*, 549 U.S. at 535, 548–49; Mank, *WEC*, *supra* note \*, at 1545.

89. *Massachusetts*, 549 U.S. at 547.



However, he contended that a too loose approach to standing causation and redressability would lead to federal courts intruding on the role of the political branches.<sup>90</sup> He compared the majority decision with the Court's heavily criticized 1973 decision in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,<sup>91</sup> which found standing causation between a proposed increase in railroad rates, a potential increased use of non-recycled goods because of the proposed rate increase, and, finally, a possible increase in litter in parks because of a potential increased use of natural resources resulting from the proposed rate increase.<sup>92</sup> Chief Justice Roberts reasoned:

Over time, SCRAP became emblematic not of the looseness of Article III standing requirements, but of how utterly manipulable they are if not taken seriously as a matter of judicial self-restraint. SCRAP made standing seem a lawyer's game, rather than a fundamental limitation ensuring that courts function as courts and not intrude on the politically accountable branches. Today's decision is SCRAP for a new generation.<sup>93</sup>

He then suggested that the majority had constrained standing to state plaintiffs to limit the potential flood of litigation that might result from the Court's relaxed approach to standing causation and redressability.<sup>94</sup> Chief Justice Roberts explained: "How else to explain its need to devise a new doctrine of state standing to support its result? The good news is that the Court's 'special solicitude' for Massachusetts limits the future applicability of the diluted standing requirements applied in this case."<sup>95</sup> Nevertheless, he disagreed with the majority because its standing doctrine allowing some climate change suits "transgress[ed]" the proper role of federal courts by allowing them to decide cases more appropriately resolved by the political branches.<sup>96</sup> While he argued that neither states nor private parties should have standing because climate change is a political issue unsuited for judicial resolution,<sup>97</sup> Chief Justice Roberts implied that limiting standing in GHG suits to state plaintiffs would limit the harm of such suits compared to allowing all plaintiffs to sue.<sup>98</sup> However, this Article's conclusion will show that federal courts can put meaningful limits on GHG suits by non-state parties.<sup>99</sup>

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90. *Id.* at 547–49.

91. 412 U.S. 669 (1973).

92. *Massachusetts*, 549 U.S. at 547–48 (Roberts, C.J., dissenting).

93. *Id.* at 548.

94. *Id.* at 546–48.

95. *Id.* at 548.

96. *Id.* at 548–49.

97. *Id.* at 535–49.

98. *Id.* at 548.

99. *See infra* Conclusion.

C. Connecticut v. American Electric Power Co.<sup>100</sup>

Since its *Massachusetts* decision, the Supreme Court has had only one opportunity to consider the question of the standing of non-state parties in climate change suits, but it avoided directly answering the question in that case. In *American Electric Power Co. v. Connecticut* (*AEP*),<sup>101</sup> the Court, by an equally divided vote of four to four, affirmed a Second Circuit decision holding that both state and private plaintiffs had standing in a tort suit seeking GHG reductions from the five largest utility emitters of carbon dioxide in the United States.<sup>102</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 EPA’s refusal to regulate [GHG] emissions . . . and, further, that no other threshold obstacle bars review.”<sup>103</sup> The Court did not explain the identity of the “some plaintiffs,” but commentators have speculated that the four justices affirming the Second Circuit’s decision on standing could only agree that the state plaintiffs had standing.<sup>104</sup> *AEP* is a puzzling decision because both state and non-state plaintiffs were involved in the case, but the Supreme Court never explicated whether non-state plaintiffs may have standing in a climate change suit.<sup>105</sup>

1. The Lower Courts’ Decisions in *AEP*

In 2004, two groups of plaintiffs filed separate suits in the U.S. District Court for the Southern District of New York alleging that five defendant electric power companies were creating a public nuisance by operating fossil-fuel burning electric power plants in the United States that emitted large amounts of carbon dioxide that significantly contributed to global

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100. The discussion of *Connecticut v. American Electric Power Co.* is based upon my prior articles. See Mank, *Tea Leaves*, *supra* note \*, Mank, *Private Parties*, *supra* note \*, at 888–98; Mank, *WEC*, *supra* note \*, at 1546–57.

101. *AEP*, 564 U.S. 410 (2011).

102. See *id.* 416–420; Mank, *Private Parties*, *supra* note \*, at 873, 894; Mank, *WEC*, *supra* note \*, at 1528, 1553–57; *infra* Section IV.C.

103. *Id.* at 420 (emphasis added) (citation omitted); Mank, *Private Parties*, *supra* note \*, at 873, 894; Mank, *WEC*, *supra* note \*, at 1528–29, 1553.

104. Mank, *Private Parties*, *supra* note \*, at 873, 897–98; Mank, *Tea Leaves*, *supra* note \*, at 591–92; Mank, *WEC*, *supra* note \*, at 1529, 1554–57; *infra* Section IV.C.2.

105. Mank, *Private Parties*, *supra* note \*, at 873, 897–98; Mank, *Tea Leaves*, *supra* note \*, at 591–92, 599; Mank, *WEC*, *supra* note \*, at 1529, 1556–57; *infra* Section IV.C.2.

climate change.<sup>106</sup> Eight States<sup>107</sup> filed the first complaint (“states plaintiffs”), and were joined by New York City, a political subdivision of a state.<sup>108</sup> Three private nonprofit land trusts<sup>109</sup> filed the second complaint (land trust plaintiffs).<sup>110</sup> The defendants were four private companies<sup>111</sup> and the Tennessee Valley Authority (TVA), a federally owned corporation that operates fossil-fuel electric power plants in several states.<sup>112</sup> According to the complaints, the defendants “are the five largest emitters of carbon dioxide in the United States.”<sup>113</sup> At the time of the complaint, the five utilities annually emitted 650 million tons of carbon dioxide, which represented 25% of emissions from the U.S. electric power sector, 10% of emissions from all U.S. human activities, and 2.5% of all human emissions worldwide.<sup>114</sup>

In their complaints, both groups of plaintiffs claimed that the defendants’ carbon-dioxide emissions exacerbated global climate change and accordingly violated either the federal common law of interstate nuisance, or, in the alternative, state tort law.<sup>115</sup> The states plaintiffs alleged that the defendants’ GHG emissions were harming their public lands, infrastructure, and the health of their citizens.<sup>116</sup> The land trust plaintiffs alleged that the defendants’ activities worsened climate change and, therefore, would destroy habitats for animals and rare species of trees and plants on land these plaintiffs owned or conserved.<sup>117</sup> Both groups of plaintiffs sought essentially identical 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>118</sup>

In 2005, the District Court for the Southern District of New York dismissed both suits as presenting non-justiciable political questions

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106. *AEP*, 564 U.S. at 418; Mank, *WEC*, *supra* note \*, at 1546.

107. California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin were the original state plaintiffs, although New Jersey and Wisconsin withdrew from the case by the time it came before the Supreme Court. *AEP*, 564 U.S. at 418 n.3; Mank, *WEC*, *supra* note \*, at 1546 n.122.

108. *AEP*, 564 U.S. at 418.

109. *Id.* at 418 n.4.

110. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 267–68 & nn.2–3 (S.D.N.Y. 2005), *rev’d*, 582 F.3d 309, 393 (2d Cir. 2009), *rev’d and remanded*, *AEP*, 564 U.S. at 410, 429 (2011).

111. American Electric Power Company, Inc. (and a wholly owned subsidiary), Southern Company, Xcel Energy Inc., and Cinergy Corporation, which is now merged into Duke Energy Corporation. *AEP*, 564 U.S. at 418 n.5; Mank, *WEC*, *supra* note \*, at 1546.

112. *AEP*, 564 U.S. at 418.

113. *Id.*

114. *Id.*; Mank, *WEC*, *supra* note \*, at 1546.

115. *AEP*, 564 U.S. at 418; Mank, *WEC*, *supra* note \*, at 1547.

116. *AEP*, 564 U.S. at 418; Mank, *WEC*, *supra* note \*, at 1547.

117. *AEP*, 564 U.S. at 418–19.; Mank, *WEC*, *supra* note \*, at 1547.

118. *AEP*, 564 U.S. at 419; Mank, *WEC*, *supra* note \*, at 1547.

because the decision whether to grant injunctive relief raised complex policy issues that are more appropriately resolved by the executive and legislative branches of government than the courts.<sup>119</sup> However, the U.S. Court of Appeals for the Second Circuit vacated the decision of the district court.<sup>120</sup> The case was argued before the Second Circuit in 2006, but the court of appeals did not decide the case until 2009.<sup>121</sup> The Second Circuit probably delayed its decision until the Supreme Court decided *Massachusetts* because the Second Circuit's opinion extensively relied upon the *Massachusetts* decision in its analysis.<sup>122</sup> Furthermore, Judge Sonia Sotomayor was a member of the original three-judge panel of the Second Circuit until she was elevated to the Supreme Court by President Obama's nomination and Senate confirmation in August 2009.<sup>123</sup> The two remaining members of the original panel decided the case on September 21, 2009 pursuant to a Second Circuit rule on that issue.<sup>124</sup>

Initially considering the threshold jurisdiction questions, the Second Circuit held that the suits were not barred by the political question doctrine,<sup>125</sup> and that all of the plaintiffs' complaints met Article III standing requirements.<sup>126</sup> The court of appeals concluded that the political question doctrine raised by the district court and the defendants did not bar the plaintiffs' suit because the action 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>127</sup> Assessing the merits of the case, the Second Circuit held that all the plaintiffs had stated a claim pursuant to "the federal common law of nuisance."<sup>128</sup>

The district court's decision explicitly declined to address the defendants' standing arguments because it concluded that the standing issues were "intertwined" with the merits and because it held that the regulation of

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119. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005); Mank, *WEC*, *supra* note \*, at 1547–48.

120. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 315 (2d Cir. 2009).

121. *Id.* at 310; Mank, *WEC*, *supra* note \*, at 1548.

122. *Am. Elec. Power Co.*, 582 F.3d at 336–38; Mank, *WEC*, *supra* note \*, at 1548.

123. *Am. Elec. Power Co.*, 582 F.3d at 314 n.\*; Mank, *WEC*, *supra* note \*, at 1548.

124. *Am. Elec. Power Co.*, 582 F.3d at 310, 314 n.\*; Mank, *WEC*, *supra* note \*, at 1548.

125. *Am. Elec. Power Co.*, 582 F.3d at 332; Mank, *WEC*, *supra* note \*, at 1549.

126. *Am. Elec. Power Co.*, 582 F.3d at 349; Mank, *WEC*, *supra* note \*, at 1549.

127. *Am. Elec. Power Co.*, 582 F.3d at 332; Mank, *WEC*, *supra* note \*, at 1549.

128. *Am. Elec. Power Co.*, 582 F.3d at 371; *see also* Mank, *WEC*, *supra* note \*, at 1549.

GHG emissions was a political question better suited for decision by the political branches than the courts.<sup>129</sup> Because it reversed the district court's dismissal of the case on political question grounds, the Second Circuit addressed whether the plaintiffs had standing to sue.<sup>130</sup> After suggesting that state standing in the *Massachusetts* decision may have been based on multiple grounds, the court of appeals concluded that the state plaintiffs had standing under both a *parens patriae* theory of standing and the three-part Article III standing test.<sup>131</sup>

Additionally, the Second Circuit examined whether the states and land trusts plaintiffs had Article III standing in their proprietary capacity as property owners.<sup>132</sup> The court of appeals applied the three-part Article III standing test.<sup>133</sup> For the standing test for injury, the Second Circuit determined that the state plaintiffs had properly alleged current injury by showing increased temperatures resulting from rising levels of carbon dioxide had reduced the size of the California snowpack and thus reduced the amount of fresh water in that state.<sup>134</sup> Also, similar to the reasoning in the *Massachusetts* decision, the court of appeals concluded that the state plaintiffs adequately alleged future injury to their coastal lands from rising sea levels caused by climate change, despite the defendants' argument that such injuries were not imminent.<sup>135</sup> For similar reasons, the Second Circuit determined that the land trust plaintiffs had proven future harm to their properties from rising sea levels resulting from increasing levels of carbon dioxide caused by human activities, especially burning fossil fuels.<sup>136</sup> Employing the approach to standing causation and redressability in the *Massachusetts* decision, the Second Circuit concluded that the defendants, as the five largest utility sources of GHGs in the U.S., were significant contributors to climate change harms; therefore, their emissions were sufficient to establish traceable causation and injury for Article III standing purposes, although a majority of global GHG emissions come from other sources.<sup>137</sup>

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129. *Am. Elec. Power Co.*, 582 F.3d at 332 (quoting *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 271 n.6 (S.D.N.Y. 2005)); Mank, *WEC*, *supra* note \*, at 1550.

130. *Am. Elec. Power Co.*, 582 F.3d at 315, 333; Mank, *WEC*, *supra* note \*, at 1550.

131. *Am. Elec. Power Co.*, 582 F.3d at 334–39; Mank, *WEC*, *supra* note \*, at 1550.

132. *Am. Elec. Power Co.*, 582 F.3d at 339–40; Mank, *WEC*, *supra* note \*, at 1550.

133. *Am. Elec. Power Co.*, 582 F.3d at 340–49; Mank, *WEC*, *supra* note \*, at 1550.

134. *Am. Elec. Power Co.*, 582 F.3d at 341–42; Mank, *WEC*, *supra* note \*, at 1550.

135. *Am. Elec. Power Co.*, 582 F.3d at 342–44; Mank, *WEC*, *supra* note \*, at 1550; *see Massachusetts v. EPA*, 549 U.S. 497, 521–23 (2007).

136. *Am. Elec. Power Co.*, 582 F.3d at 342–44; Mank, *WEC*, *supra* note \*, at 1551.

137. *Am. Elec. Power Co.*, 582 F.3d at 345–47; Mank, *WEC*, *supra* note \*, at 1551; *see Massachusetts*, 549 U.S. at 523–25.

Addressing standing redressability, the defendants contended that the plaintiffs had failed to show that their proposed remedy of reducing carbon dioxide emissions from the defendants' electric power plants was likely to prevent global warming.<sup>138</sup> The Second Circuit, however, concluded that the *Massachusetts* decision had rejected arguments similar to the defendants' claims regarding redressability.<sup>139</sup> Based on the analysis in *Massachusetts*, the court of appeals determined that the plaintiffs had demonstrated that it was likely that a court decision in their favor ordering reductions in carbon dioxide emissions from the defendants' power plants would slow or reduce the pace of global climate change even if it would not stop climate change entirely.<sup>140</sup>

Based on the reasoning in the *Massachusetts* decision, the Second Circuit's conclusion that the states plaintiffs had standing was plausible in light of the similarities in the injuries, causation and redressability in both cases.<sup>141</sup> The Second Circuit did not specifically decide whether New York City, a municipal plaintiff, had standing because only one plaintiff among the states plaintiffs needed to have standing for a suit to proceed.<sup>142</sup> More debatable was the Second Circuit's holding that the private land trust plaintiffs had standing because the *Massachusetts* decision had avoided addressing the standing rights of the private plaintiffs in that case and even implied that states have greater standing rights than non-state parties.<sup>143</sup> The Second Circuit arguably should have avoided the contentious question of standing for the non-state plaintiffs because the injunctive remedies sought by the states and private land trust plaintiffs were the same.<sup>144</sup> The Second Circuit possibly treated the standing rights of the private and state plaintiffs as roughly similar; however, the court of appeals never clearly

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138. *Am. Elec. Power Co.*, 582 F.3d at 348; Mank, *WEC*, *supra* note \*, at 1551.

139. *Am. Elec. Power Co.*, 582 F.3d at 348 (citing *Massachusetts*, 549 U.S. at 525); Mank, *WEC*, *supra* note \*, at 1551.

140. *Id.* at 348–49 (citing *Massachusetts*, 549 U.S. 525–26); Mank, *WEC*, *supra* note \*, at 1551–52.

141. Mank, *WEC*, *supra* note \*, at 1552.

142. *Am. Elec. Power Co.*, 582 F.3d at 339 n.17 (citing *Rumsfeld v. Forum for Acad. & Int'l Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)).

143. Mank, *WEC*, *supra* note \*, at 1552; *see Massachusetts*, 549 U.S. at 518.

144. Jonathan H. Adler, *The Supreme Court Disposes of a Nuisance Suit*: *American Electric Power v. Connecticut*, 2010–2011 CATO SUP. CT. REV. 295, 304–05, 312 n.79 (arguing that the Second Circuit in *AEP* should not have addressed standing of private parties); Mank, *WEC*, *supra* note \*, at 1552.

compared the standing rights of the states and private trust parties.<sup>145</sup> By contrast, as Part IV will discuss, the Ninth Circuit’s decision in *WEC* contended that non-state plaintiffs do not possess the same standing rights in climate change suits as the state plaintiff in *Massachusetts*.<sup>146</sup>

## 2. *The Supreme Court’s Standing Decision in AEP*

In almost every decision in which it has a tie vote, the Supreme Court states only that “The judgment is affirmed by an equally divided Court.”<sup>147</sup> The Supreme Court normally invokes that formulaic explanation because an equally divided vote by the Court just affirms the decision below without setting precedent for lower courts outside that circuit.<sup>148</sup> In the *AEP* decision, however, the Court deviated from this norm by providing a limited explanation of how it divided on the standing and other jurisdictional issues, although the decision did not announce the identities of the justices who voted for or against standing.<sup>149</sup> The Court declared:

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 EPA’s refusal to regulate [GHG] emissions, 549 U. S., at 520–526; and, further, that no other threshold obstacle bars review. Four members of the Court, adhering to a dissenting opinion in *Massachusetts*, 549 U. S., at 535, 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>150</sup>

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145. Mank, *WEC*, *supra* note \*, at 1552; *see Am. Elec. Power Co.*, 582 F.3d at 342, 344–45, 347–49.

146. Mank, *WEC*, *supra* note \*, at 1552–53; *see infra* Section IV.

147. *Flores-Villar v. United States*, 564 U.S. 210 (2011) (per curiam); Mank, *WEC*, *supra* note \*, at 1553; *see also* *Neil v. Biggers*, 409 U.S. 188, 191–92 (1972) (observing that the Court has affirmed decisions by equally divided votes since the early 1800s and explicating that an affirmance by equally divided Supreme Court does not have precedential significance).

148. *Biggers*, 409 U.S. at 191–92; Mank, *WEC*, *supra* note \*, at 1553; *see* *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 110–13 (1868) (discussing principle in American and English law that no affirmative precedent should be based on a decision 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 4–4 on the right to sue issue, that part of the Second Circuit decision was left intact, but without setting a nationwide precedent.”); *see also* Michael B. Gerrard, ‘*American Electric Power*’ Leaves Open Many Questions for Climate Litigation, N.Y. L.J., July 14, 2011, [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) (stating that the standing portion of the *AEP* case “did not set precedent in the technical sense”).

149. *AEP*, 564 U.S. 410, 420 (2011); Mank, *WEC*, *supra* note \*, at 1553.

150. *AEP*, 564 U.S. at 420 (footnote and citation omitted).

While not binding as a decision for the lower courts outside the Second Circuit,<sup>151</sup> the *AEP* decision's four to four affirmance of the standing decision possibly provides clues to how the Court might rule in future standing cases involving climate change, at least until the Court's membership changes because of future retirements or presidential appointments to the Court.<sup>152</sup>

To guess which justices voted in favor or against standing in *AEP*, the best guide is how the justices had voted in the *Massachusetts* decision.<sup>153</sup> Three of the five justices who voted in favor of state standing in the *Massachusetts* decision<sup>154</sup> remained members of the Court when *AEP* was decided; most commentators have presumed that Justices Kennedy, Ginsburg, and Breyer voted in favor of standing in *AEP*, consistent with their approval of state standing in the *Massachusetts* decision.<sup>155</sup> Four Justices dissented in the *Massachusetts* decision against state standing; Chief Justice Roberts; and Justices Scalia, Thomas, and Alito.<sup>156</sup> These four justices remained on the Court at the time of the *AEP* decision,<sup>157</sup> and the most likely assumption is that these four justices voted against standing in the *AEP* case as they had in the *Massachusetts* decision.<sup>158</sup>

At the time of the *AEP* decision, Justices Stevens and Souter had retired from the Court and Justices Kagan and Sotomayor respectively had replaced them.<sup>159</sup> Justice Elena Kagan was the only member of the Court who voted in *AEP*, but was not a member of the Court when *Massachusetts*

151. See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 315 (2d Cir. 2009); Mank, *WEC*, *supra* note \*, at 1554.

152. Mank, *WEC*, *supra* note \*, at 1554–57.

153. *Id.* at 1554–55.

154. *Massachusetts v. EPA*, 549 U.S. 497, 501, 526 (2007) (listing Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer in majority opinion agreeing with standing for the Commonwealth of Massachusetts); see *Members of the Supreme Court of the United States*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/about/members.aspx> [<https://perma.cc/4YGT-3LVX>] (last updated Mar. 31, 2016).

155. Gerrard, *supra* note 148 (“Though unnamed in the opinion, clearly the four justices who find standing, and no other obstacles to review, are [Justices] Ginsburg, Breyer, Kagan, and Kennedy.”); Mank, *WEC*, *supra* note \*, at 1554.

156. *Massachusetts*, 549 U.S. 497, 535 (2007) (Roberts, C.J., dissenting).

157. See *Members of the Supreme Court of the United States*, *supra* note 154.

158. See Gerrard, *supra* note 148 (“The four who disagree [that there is standing in the *AEP* decision] are Roberts, Scalia, Thomas, and Alito.”); Mank, *WEC*, *supra* note \*, at 1554.

159. See *Members of the Supreme Court of the United States*, *supra* note 154 (providing the dates for when Justices served and who they replaced).



was decided.<sup>160</sup> Commentators have presumed that she voted in *AEP* with Justices Kennedy, Ginsburg, and Breyer in part because it was unlikely that any of the dissenting justices in the *Massachusetts* decision changed their views about standing in the *AEP* decision.<sup>161</sup> Also, in her limited tenure on the Court, she has usually adopted a broad view of standing for plaintiffs.<sup>162</sup> Moreover, she has most frequently voted with Justices Ginsburg and Breyer.<sup>163</sup> Justice Sotomayor recused herself from voting in the *AEP* decision, but one may speculate that, based on her usually liberal interpretation of standing for plaintiffs<sup>164</sup> and her propensity to vote with the other justices appointed by Democratic Presidents,<sup>165</sup> that she would vote for state standing in cases similar to *Massachusetts* or *AEP*; however, one could not be certain until she actually votes in a GHG or state standing case.<sup>166</sup>

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160. Mank, *WEC*, *supra* note \*, at 1554; *see AEP*, 564 U.S. 410, 429 (noting that Justice Sotomayor did not participate in the *AEP* decision).

161. Mank, *WEC*, *supra* note \*, at 1554–55 & n.187 (arguing that experience judges do not often change their views on important issues and that these four justices have continued to apply a narrow approach to standing in cases such as *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013)).

162. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2681, 2685–89 (2013) (indicating that Justice Kagan joined Justice Kennedy’s majority opinion, which concluded that the requirement of adversarial parties was a flexible prudential requirement); *Clapper*, 133 S. Ct. at 1159–65 (Breyer, J., dissenting) (noting that Justice Kagan joined Justice Breyer’s dissenting opinion, which argued for liberal probabilistic standing and rejected the majority opinion’s narrow “certainly impending” test); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 147–48 (2011) (Kagan, J., dissenting) (arguing that taxpayers had standing to challenge Arizona’s tuition tax credit); Mank, *WEC*, *supra* note \*, at 1555.

163. During the Supreme Court’s 2010–2011 term, Justice Kagan voted with Justices Ginsburg and Breyer in 91% and 87% of all cases respectively. KEDAR BHATIA, FINAL STAT PACK FOR OCTOBER TERM 2010, SCOTUSblog at 19 (2011) [hereinafter 2010 STAT PACK], [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) [https://perma.cc/Q42M-86RJ]. In the 2014–2015 term, Justice Kagan voted with Justices Ginsburg and Breyer in 94% and 93% of all cases respectively. KEDAR BHATIA, FINAL STAT PACK FOR OCTOBER TERM 2014, SCOTUSblog at 28 (2015) [hereinafter 2014 STAT PACK], [http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB\\_agreement-highlow\\_OT14.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB_agreement-highlow_OT14.pdf) [https://perma.cc/DW4X-9KTM].

164. *See* Adler, *supra* note 144, at 313; Mank, *WEC*, *supra* note \*, at 1555.

165. Robert Barnes, *Justices Who Will Shape Supreme Court’s Future Are Matching Pairs*, Wash. Post (June 28, 2011), [https://www.washingtonpost.com/politics/justices-who-will-shape-supreme-courts-future-are-matching-pairs/2011/06/28/AGOaNopH\\_story.html](https://www.washingtonpost.com/politics/justices-who-will-shape-supreme-courts-future-are-matching-pairs/2011/06/28/AGOaNopH_story.html) [https://perma.cc/LRS5-BKRH] (observing that Justice Sotomayor has consistently voted with liberal Justices Breyer and Ginsburg); Mank, *WEC*, *supra* note \*, at 1555; *see also* 2010 STAT PACK, *supra* note 163, 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) and 2014 STAT PACK, *supra* note 163, at 28 (reporting that, between liberal Justices Breyer, Ginsburg, Sotomayor, and Kagan, Justices Kagan and Sotomayor agreed the least number of times during the 2014–2015 term—at 91% of the time).

166. Mank, *Tea Leaves*, *supra* note \*, at 593–95 (predicting that Justice Sotomayor would vote in favor of state standing in climate change cases); Mank, *WEC*, *supra* note \*,

Four justices in the *AEP* decision determined that at least “some” of the plaintiffs met Article III standing requirements in light of *Massachusetts*.<sup>167</sup> The “some plaintiffs” mentioned by the *AEP* decision were most likely the states plaintiffs because the *Massachusetts* decision only endorsed standing rights for *states* to bring suits involving climate change.<sup>168</sup> The Ninth Circuit’s decision in *WEC* inferred that the “some” plaintiffs in *AEP* were likely only the state plaintiffs.<sup>169</sup>

What is unclear is whether a majority of the Court would grant similar standing rights to private or non-state plaintiffs in climate change cases as it has for states in *Massachusetts*.<sup>170</sup> It is uncertain whether the four justices who voted for standing in *AEP* would also support standing for private or non-state plaintiffs in a climate change case.<sup>171</sup> During the oral argument in *Massachusetts*, Justice Kennedy stated that the *Tennessee Copper* decision was the “best case” for the plaintiffs.<sup>172</sup> If his remarks at that oral argument reflect his views on standing, Justice Kennedy appears to support special state standing rights under a *parens patriae* doctrine that does not apply to non-state plaintiffs.<sup>173</sup> Professor Gerrard speculates that when the language in the *AEP* opinion stating that “[f]our members of the Court would hold that at least some plaintiffs have Article III standing under *Massachusetts*”<sup>174</sup> is “considered in conjunction with *Massachusetts*,” that one might infer that “Justice Kennedy believes that only states would have standing. Thus, there might be a 5–4 majority against any kinds of GHG nuisance claims (and maybe other kinds of GHG claims) by non-states.”<sup>175</sup> Until the Supreme Court addresses a GHG or climate change

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at 1555–56 (same); Dru Stevenson & Sonny Eckhart, *Standing as Channeling in the Administrative Age*, 53 B.C. L. REV. 1357, 1382 (2012) (same).

167. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 420 (2011).

168. *See* Adler, *supra* note 144, at 309–10 (suggesting the four justices in *AEP* who stated that at least “some plaintiffs” had standing, were most likely referring to the states’ plaintiffs); Gerrard, *supra* note 148 (same); Mank, *WEC*, *supra* note \*, at 1556 (same).

169. *See* Mank, *WEC*, *supra* note \*, at 1572, 1581–84; *infra* Section IV.

170. Mank, *WEC*, *supra* note \*, at 1556–57.

171. *Id.* at 1557.

172. Transcript of Oral Argument at 14–15, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05–1120).

173. Mank, *States Standing*, *supra* note \*, at 1738–40 (“It seems most likely that Justice Kennedy suggested that the majority rely on *Tennessee Copper*” and hence *parens patriae* state standing); Mank, *WEC*, *supra* note \*, at 1557 (same).

174. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 420 (2011).

175. Gerrard, *supra* note 148; *see also* Mank, *WEC*, *supra* note \*, at 1529, 1557, 1567, 1585 (discussing Professor Gerrard’s view that Justice Kennedy may only support

standing case involving only non-state plaintiffs, commentators will just have to speculate about how the Court would decide the standing question.

#### IV. THE NINTH CIRCUIT'S DECISION IN *WASHINGTON ENVIRONMENTAL COUNCIL*

The Ninth Circuit's decision in *WEC* is consistent with Professor Gerrard's view that the Supreme Court in the *Massachusetts* and the *AEP* decisions clearly acknowledged the standing of only state plaintiffs in GHG suits and implicitly applied a more stringent standing test on the private plaintiffs seeking to regulate GHGs.<sup>176</sup> Because the *Massachusetts* decision did not assert clear standards for distinguishing between the standing rights of states and private parties, it is difficult to decide whether the Ninth Circuit's narrow approach to private party standing rights in *WEC* is consistent with *Massachusetts*.<sup>177</sup> Beyond the difference between having private and state litigants respectively in the two cases, a possibly distinguishing difference between *WEC* and *Massachusetts* is that the amount of GHGs involved in the former case had a far less significant impact on global emissions than in the latter case, and that difference could be used to deny standing rights to either state or non-state parties.<sup>178</sup>

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

In *WEC*, the two plaintiffs, the Washington Environmental Council and the Sierra Club, filed suit in the U.S. District Court for the Western District of Washington against the three directors of, in their official capacities, respectively, the Washington State Department of Ecology (Ecology), the Northwest Clean Air Agency (NWCAA), and the Puget Sound Clean Air Agency (PSCAA) under the federal CAA.<sup>179</sup> The Plaintiffs alleged that the three agencies were not enforcing Washington's State Implementation Plan (SIP) pursuant to the CAA, which they contended requires the agencies to establish reasonably available control technology (RACT) standards for GHG emissions and apply those standards to every substantial oil refinery in the state.<sup>180</sup> Additionally, the plaintiffs asserted that the five oil refineries

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standing for states in GHG suits and not for any other type of plaintiff). For Professor Gerard's biography, see *Michael B. Gerrard*, COLUMBIA LAW SCH., [http://www.law.columbia.edu/fac/Michael\\_Gerrard](http://www.law.columbia.edu/fac/Michael_Gerrard) [https://perma.cc/7BEP-AQEZ] (last visited Apr. 21, 2016).

176. See *infra* Section IV.

177. See *infra* Section IV.

178. See *infra* Section IV and Conclusion.

179. *Wash. Env'tl. Council v. Sturdevant*, 834 F. Supp. 2d 1209, 1211 (W.D. Wash. 2011); Mank, *WEC*, *supra* note \*, at 1567.

180. *Sturdevant*, 834 F. Supp. 2d at 1211; Mank, *WEC*, *supra* note \*, at 1567–68.

operating in Washington State are responsible for a significant amount of the state's total GHG emissions.<sup>181</sup> The Western States Petroleum Association (WSPA), of which all five of these oil refineries are members, entered an appearance as Intervenor–Defendants.<sup>182</sup> The plaintiffs and WSPA filed cross-motions for summary judgment, and the three state agencies filed a motion to dismiss.<sup>183</sup>

In granting the plaintiffs' motion for summary judgment, the district court concluded that "the Agencies are obligated to establish RACT for GHG emissions under the RACT provision."<sup>184</sup> The district court only briefly discussed Article III standing when it denied the defendants' motion to strike the plaintiffs' standing declarations.<sup>185</sup> The District Court observed that those declarations had been "submitted for the purpose of satisfying Article III and jurisprudential standing requirements."<sup>186</sup> Implicitly, the District Court apparently determined that the plaintiffs' declarations had met Article III standing requirements, but the Court did not explain its reasoning on the standing issue.<sup>187</sup>

#### *B. The Ninth Circuit's Decision in Washington Environmental Council*

Because the defendants did not challenge the plaintiffs' statement of injuries alleging that increased GHGs from humans burning fossil fuels causes a "greenhouse effect" that then causes reduced snowpack and increased forest fires, the Ninth Circuit in *WEC* assumed, without deciding the standing injury question, that the plaintiffs' allegation that the defendants' failure to set a RACT standard for GHGs had injured some of their members

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181. *Sturdevant*, 834 F. Supp. 2d at 1211; Mank, *WEC*, *supra* note \*, at 1568.

182. *Sturdevant*, 834 F. Supp. 2d at 1211; Mank, *WEC*, *supra* note \*, at 1568.

183. *Sturdevant*, 834 F. Supp. 2d at 1212; Mank, *WEC*, *supra* note \*, at 1568.

184. *Sturdevant*, 834 F. Supp. 2d at 1212; *see generally id.* at 1213–20 (explaining why state agencies must establish RACT 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"); Mank, *WEC*, *supra* note \*, at 1568.

185. *Sturdevant*, 834 F. Supp. 2d at 1219–20; Mank, *WEC*, *supra* note \*, at 1568–69.

186. *Sturdevant*, 834 F. Supp. 2d at 1220 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)) for the Supreme Court's three-part standing test); Mank, *WEC*, *supra* note \*, at 1568–69.

187. Mank, *WEC*, *supra* note \*, at 1569.

was sufficient to establish an injury in fact for Article III standing.<sup>188</sup> The court of appeals, however, held that the plaintiffs “failed to satisfy the causality and redressability requirements to establish Article III standing.”<sup>189</sup> Accordingly, the Ninth Circuit “vacate[d] the district court’s order on the parties’ dispositive motions and remand with instructions that the action be dismissed for lack of subject matter jurisdiction.”<sup>190</sup>

Initially, the Ninth Circuit agreed with WSPA “that the chain of causality between Defendants’ alleged misconduct and their injuries is too attenuated.”<sup>191</sup> The court reasoned that the plaintiffs have the burden of establishing that their injuries are “causally linked or ‘fairly traceable’ to the Agencies’ alleged misconduct” rather than the result of GHG emissions from third parties not before the court.<sup>192</sup> Despite assuming that GHG emissions may cause serious harms, the Ninth Circuit explained that the plaintiffs had failed to prove a causal connection between the defendants’ failure to set RACT standards and the alleged harms to the plaintiffs.<sup>193</sup> Because the plaintiffs did not explain how the absence of RACT controls at five refineries located in Washington State caused specific injuries to the plaintiffs’ members, the Ninth Circuit determined that the plaintiffs had “failed to satisfy their evidentiary burden of showing causality at the summary judgment stage.”<sup>194</sup>

In a broad assertion that could prevent future non-state plaintiffs from proving standing in GHG suits against regional or local projects, the Ninth Circuit concluded, in what is arguably dicta, that it is difficult to prove standing causation between local sources of GHGs and the global or regional climate change impacts.<sup>195</sup> The Ninth Circuit reasoned:

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188. Wash. Envtl. Council v. Bellon, 732 F.3d 1131, 1140–41 (9th Cir. 2013); Mank, *WEC*, *supra* note \*, at 1569.

189. *WEC*, 732 F.3d at 1135, 1141, 1147; Mank, *WEC*, *supra* note \*, at 1569; *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/> [https://perma.cc/KA22-DMZB].

190. *WEC*, 732 F.3d at 1135 (footnote omitted); Mank, *WEC*, *supra* note \*, at 1569.

191. *WEC*, 732 F.3d at 1141; Mank, *WEC*, *supra* note \*, at 1569–70.

192. *WEC*, 732 F.3d at 1141; Mank, *WEC*, *supra* note \*, at 1570.

193. *WEC*, 732 F.3d at 1142; Mank, *WEC*, *supra* note \*, at 1570.

194. *WEC*, 732 F.3d at 1142–43; Mank, *WEC*, *supra* note \*, at 1570. In a footnote, the Ninth Circuit distinguished the Second Circuit’s finding of standing causation in *Connecticut v. American Electric Power* “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.” *WEC*, 732 F.3d at 1143 n.6; Mank, *WEC*, *supra* note \*, at 1570 n.291.

195. *WEC*, 732 F.3d at 1143; Mank, *WEC*, *supra* note \*, at 1570.

Indeed, attempting to establish a causal nexus in this case may be a particularly challenging task. This is so because there is a natural disjunction between Plaintiffs' localized injuries and the greenhouse effect. 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 measuring the relationship between a certain GHG emission source and localized climate impacts in a given region.<sup>196</sup>

Because the plaintiffs could not “quantify a causal link” between GHG emissions from the five Washington State refineries and global climate change in that state or “anywhere else,” the Ninth Circuit determined that the plaintiffs had failed to prove standing causation.<sup>197</sup> Future scientific developments, however, may allow plaintiffs to prove how a particular GHG source affects local or regional areas, and, therefore, undermine the Ninth Circuit's apparent assumption that localized impacts from GHGs are too difficult to prove.<sup>198</sup> As Part V will discuss, the district court's decision in *CBD* considered the local impacts of GHGs to establish standing just two years after the Ninth Circuit had predicted that plaintiffs would generally be unable to connect GHG emissions to local environmental impacts.<sup>199</sup>

Notably, with reasoning that could affect future climate suits by non-state plaintiffs, the Ninth Circuit rejected the plaintiffs' argument that the relaxed standing approach for state plaintiffs in the *Massachusetts* decision was relevant in their case.<sup>200</sup> The court of appeals reasoned, “In contrast to *Massachusetts v. EPA*, the present case neither implicates a procedural right nor involves a sovereign state. Rather, Plaintiffs are private organizations, and therefore cannot avail themselves of the ‘special solicitude’ extended to

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196. *WEC*, 732 F.3d at 1143; Mank, *WEC*, *supra* note \*, at 1570–71.

197. *WEC*, 732 F.3d at 1143–44 (internal quotation marks omitted); Mank, *WEC*, *supra* note \*, at 1571.

198. *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/> [<https://perma.cc/JGG3-G7GM>] (“In order to understand the local impacts of a climate change, I need to address the question of how I can calculate the regional response from a global change perspective. This is called ‘downscaling’. Regional and local climate aspects are computed, based on different climate models, statistical analyses, empirical data, and assumptions. The choice of calculation method varies from case to case, and depends on what I want to know and how I think a local climate change will affect me.”); Mank, *WEC*, *supra* note \*, at 1571.

199. *See infra* Section V.

200. *WEC*, 732 F.3d at 1144–45; Mank, *WEC*, *supra* note \*, at 1572.

Massachusetts by the Supreme Court.”<sup>201</sup> Additionally, the Ninth Circuit explained, “But even if we assume that Plaintiffs’ members are entitled to a comparable relaxed standard, the extension of *Massachusetts* to the present circumstances would not be tenable.”<sup>202</sup> The court of appeals limited the scope of *Massachusetts* by emphasizing language in that decision describing the proposed regulation of GHG emissions from U.S. motor vehicles at issue in that case. The Supreme Court stated that the emissions at issue in *Massachusetts* made a “meaningful contribution” to global GHG levels because American motor vehicles contributed 6% of world anthropogenic carbon dioxide emissions.<sup>203</sup> On the other hand, the Ninth Circuit concluded that the GHG emissions in its case did not make a “meaningful contribution” to global GHG emissions because the five Washington State refineries at issue only emitted 5.94 million metric tons of carbon dioxide equivalents or 5.9% of one state’s GHG emissions, and the plaintiffs had failed to address to what extent those emissions affected national or global GHG emissions.<sup>204</sup>

In a footnote, the Ninth Circuit distinguished the Supreme Court’s standing reasoning in *AEP*.<sup>205</sup> The *WEC* decision observed that the four Justices in *AEP* who thought that the standing analysis in *Massachusetts* applied to the facts in its case stated that “at least some” of the plaintiffs in *AEP* had standing and that “some” language might include only the eight state plaintiffs and not any of the private plaintiffs in *AEP*.<sup>206</sup> Because *AEP* only clearly implied that the state plaintiffs in its case had standing, the Ninth Circuit suggested that the *AEP* decision offered no support to the private plaintiffs in its case.<sup>207</sup> Also, the Ninth Circuit indicated that the GHG emissions involved in *AEP* were far greater than those at stake in the *WEC* decision because the “*AEP* plaintiffs alleged 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>208</sup> On the other hand, the Ninth Circuit observed that the *WEC* plaintiffs “fail[ed] to provide any allegation or evidence of

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201. *WEC*, 732 F.3d at 1145.

202. *Id.*

203. *Id.* (quoting *Massachusetts*, 549 U.S. at 524); Mank, *WEC*, *supra* note \*, at 1572.

204. *WEC*, 732 F.3d. at 1145–46; Mank, *WEC*, *supra* note \*, at 1572.

205. *WEC*, 732 F.3d. at 1146 n.8; Mank, *WEC*, *supra* note \*, at 1572–73.

206. *WEC*, 732 F.3d at 1146 n.8 (quoting *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 420 (2011)); Mank, *WEC*, *supra* note \*, at 1572–73 & n.309.

207. *WEC*, 732 F.3d at 1146 n.8; Mank, *WEC*, *supra* note \*, at 1572–73 & n.309.

208. *WEC*, 732 F.3d at 1146 n.8 (citing *AEP*, 564 U.S. at 416–18); Mank, *WEC*, *supra* note \*, at 1573.

[the impact of the five Washington State refineries at issue in the case on] global GHG levels at the summary judgment stage.”<sup>209</sup>

Furthermore, the *WEC* decision determined that the plaintiffs could not prove redressability “for many of the same reasons they fail to meet the causality requirement.”<sup>210</sup> The Ninth Circuit reasoned that any possible reduction of GHG emissions from imposing RACT standards on refineries in Washington State “would likely not result in meaningful greenhouse gas reductions because RACT is a low bar and many sources are likely already meeting or exceeding RACT.”<sup>211</sup> Additionally, the court of appeals decision suggested that even the complete elimination of all GHG emissions from Washington refineries would result in “scientifically indiscernible” reductions in global GHG levels.<sup>212</sup> Accordingly, for these various reasons, the Ninth Circuit concluded that the private plaintiffs in its case were not entitled to the relaxed redressability standards that the *Massachusetts* decision had applied to state plaintiffs.<sup>213</sup>

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

The Ninth Circuit denied en banc review in *WEC*.<sup>214</sup> Dissenting from the denial of rehearing en banc, however, three court of appeals judges argued that the panel’s opinion was overly broad in interpreting the *Massachusetts* decision to deny standing rights to all non-state GHG plaintiffs and 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>215</sup> Responding to the dissenting opinion, two judges who were members of the original three-judge panel defended the panel decision.<sup>216</sup>

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209. *WEC*, 732 F.3d at 1146 n.8 (citing *AEP*, 564 U.S. at 416–18); Mank, *WEC*, *supra* note \*, at 1573.

210. *WEC*, 732 F.3d at 1146–47; Mank, *WEC*, *supra* note \*, at 1573.

211. *WEC*, 732 F.3d at 1146; Mank, *WEC*, *supra* note \*, at 1573.

212. *WEC*, 732 F.3d at 1146–47; Mank, *WEC*, *supra* note \*, at 1573.

213. *WEC*, 732 F.3d at 1147; Mank, *WEC*, *supra* note \*, at 1573.

214. *See* Wash. Envtl. Council v. Bellon, 741 F.3d 1075, 1076 (9th Cir. 2014) (en banc); Mank, *WEC*, *supra* note \*, at 1579–83.

215. *Wash. Envtl. Council*, 741 F.3d at 1079–81 (Gould, J., dissenting); Mank, *WEC*, *supra* note \*, at 1579–81.

216. *Wash. Envtl. Council*, 741 F.3d at 1076–79 (Smith, J., concurring); Mank, *WEC*, *supra* note \*, at 1579–83.



### 1. Judge Gould's Dissenting Opinion from the Denial of Rehearing En Banc

In his dissenting opinion, Judge Ronald M. Gould argued that the panel had improperly interpreted *Massachusetts* by suggesting that non-state entities can never bring GHG suits under the CAA and, accordingly, that the Ninth Circuit erred in denying a rehearing en banc.<sup>217</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>218</sup>

Based on an environmental policy analysis, Judge Gould maintained that denying standing to non-state plaintiffs in climate change suits would impede litigation aiming to address the serious problem of global warming.<sup>219</sup> He reasoned 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>220</sup>

### 2. Judge Smith Rebuts Judge Gould and Defends the Panel Decision

In his opinion concurring in the denial of rehearing en banc, Judge Milan Smith argued that the panel decision's standing analysis was required by the Supreme Court's decision in *Lujan*,<sup>221</sup> which applied 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>222</sup> However, even if Judge Smith correctly interpreted *Lujan* to apply more stringent standing requirements to private litigants challenging government regulation of third parties, Christopher Warshaw and Gregory E. Wannier, in a quantitative analysis of 1,935 lower court opinions, have shown that most lower courts currently do not actually apply more stringent standing requirements to

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217. *Wash. Env'tl. Council*, 741 F.3d at 1079 (Gould, J., dissenting); Mank, *WEC*, *supra* note \*, at 1580.

218. *Wash. Env'tl. Council*, 741 F.3d at 1080; Mank, *WEC*, *supra* note \*, at 1580.

219. *Wash. Env'tl. Council*, 741 F.3d at 1081; Mank, *WEC*, *supra* note \*, at 1581.

220. *Wash. Env'tl. Council*, 741 F.3d at 1081; Mank, *WEC*, *supra* note \*, at 1581.

221. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992).

222. *Wash. Env'tl. Council*, 741 F.3d at 1076–77 (Smith, J., concurring); Mank, *WEC*, *supra* note \*, at 1581.

private litigants challenging government regulation of third parties than to parties challenging government regulation that allegedly directly injures them.<sup>223</sup> They show<sup>224</sup> that Justice Scalia's reasoning in *Lujan* was weakened, although not overruled, by the Supreme Court's subsequent decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc. (Laidlaw)*,<sup>225</sup> which held that plaintiffs that avoid recreational activities in a river because of "reasonable concerns" about pollution released by the defendant into the river have standing to sue under the Clean Water Act even if they cannot prove that the pollution has caused actual environmental harm.<sup>226</sup> Because the Supreme Court's standing jurisprudence contains both stringent and liberal decisions,<sup>227</sup> it was plausible for Judge Smith to reach a significantly different interpretation of standing case law than Judge Gould.<sup>228</sup>

Judge Smith contrasted standing in the *Massachusetts* decision from its denial in the *WEC* case based on two reasons.<sup>229</sup> He explained that the *Massachusetts* decision applied a more lenient standing analysis because "(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 *WEC* case.<sup>230</sup> Although Judge Smith accurately describes two standing principles in the *Massachusetts* decision, it is not clear that those two elements are required for standing in every climate change suit.

223. 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* decision because of recreational injuries traceable to defendant's pollution); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 159–64 (4th Cir. 2000) (en banc); 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, 303, 319 (2011) (containing an empirical analysis of 1935 lower court cases, and asserting that Justice Scalia's two *Lujan* decisions led to more dismissal of environmentalist citizen suits, but that subsequent *Laidlaw* decision reversed that trend); Mank, *WEC*, *supra* note \*, at 1581 & n.369.

224. See generally Warshaw & Wannier, *supra* note 223, at 289–322 (contrasting *Lujan* and *Laidlaw*).

225. 528 U.S. 167 (2000).

226. *Id.* at 181–86; Mank, *WEC*, *supra* note \*, at 1581–82; see generally Warshaw & Wannier, *supra* note 223, at 289–322 (contrasting *Lujan* and *Laidlaw*).

227. See generally Warshaw & Wannier, *supra* note 223, at 289–322 (contrasting *Lujan* and *Laidlaw*); Bradford C. Mank, *Judge Posner's "Practical" Theory of Standing*, 50 HOUS. L. REV. 71 (2012) (contrasting standing approaches of Justices Scalia, Breyer and Judge Posner); Mank, *WEC*, *supra* note \*, at 1581–82.

228. Mank, *WEC*, *supra* note \*, at 1581–82.

229. *Wash. Emtl. Council v. Bellon*, 721 F.3d 1075, 1077 (9th Cir. 2014).

230. Mank, *WEC*, *supra* note \*, at 1581–82 (emphasis added).

First, in *AEP*, four Supreme Court justices recognized standing in a substantive tort suit seeking an injunction and not a procedural suit.<sup>231</sup> Second, neither the *Massachusetts* decision nor the *AEP* decision clearly decided the issue of non-state standing rights in GHG suits.<sup>232</sup> The panel decision's language was broader than necessary in implying that non-state plaintiffs may never bring climate change suits.<sup>233</sup> The *WEC* decision did not resolve whether all private GHG suits are barred because the facts in that case involving five state refineries are distinguishable from cases involving national regulation of large sources of GHG emissions, as in *Massachusetts*, or tort suits involving the largest GHG emitters in the United States, as in *AEP*.<sup>234</sup> A court theoretically could grant standing to a non-state plaintiff alleging that a group of defendants has injured them by emitting large amounts of GHGs or that the government, through a lack of regulation of significant GHG emissions, has caused a significant impact to the global environment that injures the plaintiffs in a concrete manner.<sup>235</sup> Two recent district court decisions have shown how local impacts from GHG emissions or government regulation might provide standing for non-state parties.<sup>236</sup>

#### V. CENTER FOR *BIOLOGICAL DIVERSITY* V. EPA

In *CBD*, the district court held that members of the plaintiff CBD suffered concrete standing injuries from the defendant EPA's approval of Washington's and Oregon's decisions not to identify any waters experiencing ocean acidification as impaired under the Clean Water Act (CWA).<sup>237</sup> The case involved the water quality problem of ocean acidification and its effects on aquatic life in the coastal and estuarine waters of the states of Washington and Oregon.<sup>238</sup> Ocean acidification is a long-term decrease in the pH of the earth's oceans caused by both natural phenomena, such as upwelling of deep ocean water and freshwater inputs from rivers, and anthropogenic factors such as nutrient deposits from agricultural runoff, carbon deposits from storm water runoff and industrial pollution, and local emissions of nitrogen and sulfur oxides.<sup>239</sup> However, the leading cause of acidification is combustion of fossil fuels resulting in carbon

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231. See *supra* Sections III.D and III.E; Mank, *WEC*, *supra* note \*, at 1582.

232. See Mank, *WEC*, *supra* note \*, at 1582–83.

233. *Id.* at 1583–85.

234. *Id.*

235. *Id.*

236. See *infra* Sections V and VI.

237. Ctr. for Biological Diversity v. EPA, 90 F. Supp. 3d 1177, 1187–88 (W.D. Wash. 2015).

238. *Id.* at 1181.

239. *Id.* at 1182.

dioxide (CO<sub>2</sub>) emissions that increase atmospheric CO<sub>2</sub>.<sup>240</sup> Seawater absorbs some of the excess CO<sub>2</sub> in the atmosphere, which leads to a series of chemical reactions that make the seawater more acidic.<sup>241</sup> Some scientists estimate that anthropogenic sources of atmospheric carbon dioxide have increased the acidity of average open-ocean surface waters by about 30%.<sup>242</sup>

The increasing acidification of the oceans affects marine organisms, and especially shellfish whose shells and skeletons are composed of calcium carbonate.<sup>243</sup> The same chemical reactions that increase the acidity of the ocean reduce the concentration of carbonate ions that shellfish rely on to build shells.<sup>244</sup> Furthermore, the reduction of precipitated carbonate ions decreases the saturation states of important biominerals, corrodes their chemical structures, and dissolves the shells of small crustaceans and immature shellfish.<sup>245</sup> Because shellfish provide habitats, shelter, or food for other marine plants and animals, ocean acidification also threatens other marine species and the broader marine environment.<sup>246</sup> The CBD's members alleged that their recreational opportunities to catch shellfish in the two states' coastlines and estuaries were diminishing as a result of GHG emissions that cause ocean acidification, and the two states' failure to regulate their waters affected by acidification.<sup>247</sup>

The Clean Water Act requires each state to set water quality standards for all waters within its boundaries.<sup>248</sup> In particular, Section 303(d) of the Act mandates that every two years each state must generate a list of impaired water bodies for which existing pollution controls are insufficient to meet the water quality standards applicable to the water body.<sup>249</sup> Pursuant to Section 303(d), states must submit their impaired waters lists to the EPA for approval.<sup>250</sup> If it disapproves of a state Section 303(d) list, the EPA must identify the waters that should have been listed as impaired within 30 days.<sup>251</sup> After a state or the EPA lists a water body as impaired, the state must

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240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 1187–88, 1195.

248. *Id.* at 1182–83.

249. *Id.* at 1183 (discussing 33 U.S.C. § 1313(d) (2012); 40 CFR § 130.7(d)(1) (2014)).

250. *Id.* (discussing 33 U.S.C. § 1313(d); 40 CFR § 130.7(d)(1)).

251. *Id.* (discussing 33 U.S.C. § 1313(d); 40 CFR § 130.7(d)(1)).

establish a total maximum daily load (TMDL) of each pollutant that the water body can receive and still meet water quality standards.<sup>252</sup> In 2010, the EPA issued a memorandum instructing states to list waters not meeting water quality standards because of ocean acidification on their 2012 Section 303(d) lists.<sup>253</sup>

Neither Washington State nor Oregon in their submitted Section 303(d) lists included any coastal or estuarine waters impaired by ocean acidification.<sup>254</sup> During the appropriate notice and comment periods, the plaintiff submitted comments and scientific studies to Washington, Oregon, and the EPA arguing that Washington's and Oregon's water quality standards were violated as a result of due to ocean acidification, and, therefore, that the EPA should disapprove the two state's Section 303(d) lists to the extent the lists failed to identify waters harmed by acidification.<sup>255</sup> In the U.S. District Court for the Western District of Washington, CBD challenged the EPA's approval of Washington's and Oregon's 303(d) lists as arbitrary and capricious because the lists did not identify any coastal waters as impaired by ocean acidification.<sup>256</sup>

The EPA and the plaintiff filed cross motions for summary judgment on the merits of whether the EPA's approval of Washington's and Oregon's 303(d) lists was arbitrary and capricious because the lists did not identify any coastal waters as impaired by ocean acidification.<sup>257</sup> Additionally, the Western States Petroleum Association and American Petroleum Institute (collectively, API) in its amicus curiae brief questioned the Article III standing of the plaintiff, and the district court explicitly recognized that it had "an independent duty to assure that standing exists, irrespective of whether the parties challenge it."<sup>258</sup> To prove that the plaintiff had standing through injuries suffered by its members, the CBD submitted declarations from several of its members addressing specific aesthetic and recreational injuries they were suffering or will suffer due to ocean acidification, especially from diminishing numbers of shellfish in waters in Washington State or Oregon they regularly visited.<sup>259</sup>

The district court concluded that the allegations in these declarations qualified as the type of aesthetic and recreational injuries recognized by the

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252. *Id.* (discussing 33 U.S.C. § 1313(d); 40 CFR § 130.7(d)(1)).

253. *Id.*

254. *Id.* at 1184.

255. *Id.* at 1185.

256. *Id.*

257. *Id.* at 1181–82.

258. *Id.* (quoting *Wash. Env'tl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013)).

259. *Id.* at 1187.

Supreme Court in *Laidlaw*.<sup>260</sup> Furthermore, the court determined that these alleged harms spanned a sample set of beaches and coastline that is geographically representative of Washington's and Oregon's coastlines and estuaries, and, therefore satisfied the Ninth Circuit's requirement that a plaintiff seeking state-wide environmental relief establish that a representative number of areas were adversely affected by the government's action.<sup>261</sup> Also, the API did not challenge the CBD's assertions of standing injury, but only whether they had demonstrated standing causation and redressability.<sup>262</sup> The court held that the plaintiff had alleged specific facts demonstrating a concrete and imminent standing injury in fact.<sup>263</sup>

Next, the district court addressed in depth the contested question of whether CBD had proven the overlapping requirements of causation and redressability.<sup>264</sup> The API argued that the *WEC* decision "preclude[d] CBD from establishing that the EPA's approval of the 303(d) lists caused its members' injuries and that a favorable ruling would redress those injuries" because the Ninth Circuit's decision had found that "climate change was the cumulative result of greenhouse gas emissions from numerous independent sources intermingling on a global scale," and, therefore, plaintiffs in general cannot demonstrate "that their localized injuries were either fairly traceable to or redressable by EPA's failure to require greenhouse gas emission limits" on local GHG sources identified in a plaintiff's complaint.<sup>265</sup> In particular, "API reasons that, because CBD cannot point to a mechanism under the Clean Water Act that addresses global carbon emissions in an appreciable way, and because the record lacks evidence regarding the effect of local carbon emissions on local ocean acidification, [the *WEC* decision] precludes CBD from showing causation and redressability."<sup>266</sup> In response to these arguments, the plaintiff "contends that regional human-caused drivers exacerbate ocean acidification along Washington's and Oregon's coasts, and that local pollution controls can reduce the input from these drivers."<sup>267</sup> Accordingly, "CBD maintains that, if its suit to add acidified-impaired waters to the states' 303(d) lists is successful, these local measures could be

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260. *Id.* at 1188 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000)).

261. *Id.*

262. *Id.* at 1193.

263. *Id.* at 1188.

264. *Id.* at 1189–96.

265. *Id.* at 1190.

266. *Id.*

267. *Id.*

employed to implement the applicable TMDLs, thereby alleviating its members' injuries."<sup>268</sup>

The district court agreed with the plaintiff that “causation and redressability are two sides of the same coin: CBD’s members’ injuries are traceable to EPA’s conduct and redressable by a favorable ruling to the extent that coastal waters improperly not identified as acidified-impaired are influenced by sources that can be mitigated by local actions.”<sup>269</sup> In distinguishing the *WEC* decision, the district court concluded that the plaintiffs met the overlapping causation and redressability requirements for standing because the EPA’s actions adversely affected regional drivers of acidification in the two states, not just global factors that are difficult to measure, and local mitigation efforts could partially redress the injuries to their members.<sup>270</sup> The district court rejected API’s argument that the CBD’s evidence was insufficient because “the relative contributions of global and regional anthropogenic sources to local ocean acidification remain unclear, and therefore it is uncertain that reductions by local mitigation techniques will be sufficient to ameliorate harm to shellfish and other marine animals;” the court instead concluded that “CBD, however, need not establish causation and redressability with ‘scientific certainty.’”<sup>271</sup> Relying on the *Massachusetts* decision, the district court concluded that a plaintiff can meet the causation and redressability standing requirements by showing that a defendant’s actions exacerbate the causation effects of climate change and that a proposed remedy will incrementally improve those impacts.<sup>272</sup> The court determined that CBD had presented sufficient evidence that “local drivers of ocean acidification can have disproportionate and biologically significant effects on local Pacific Northwest waters,” and that the plaintiff had identified several mitigation measures that could reduce those local drivers in specific coastal and estuarine waters in Oregon and Washington State.<sup>273</sup> The district court concluded:

By connecting local anthropogenic causes to the regions visited by its members and identifying potential local mitigation techniques, CBD has set forth “specific facts” establishing a plausible connection between CBD’s members’ injuries and EPA’s decision to approve the states’ 303(d) lists without including acidification-impaired waters . . . . The connection is neither abstract nor hypothetical . . . . Those same “specific facts” show that the connection between CBD’s members’ injuries and the requested relief—a designation of impaired coastal waters or a

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268. *Id.*

269. *Id.*

270. *Id.* at 1190.

271. *Id.* at 1190.

272. *Id.*

273. *Id.* at 1194–95.

remand for EPA to reconsider the 303(d) lists—is likely rather than merely “speculative.”<sup>274</sup>

By focusing on local and regional impacts of acidification, the district court was able to recognize standing for a private GHG suit despite the *WEC* decision’s foreclosure of private suits involving only global injuries.<sup>275</sup>

On the merits, the district court held that the plaintiff had failed to prove that the EPA’s approval of Washington’s and Oregon’s 303(d) lists was arbitrary and capricious because the lists did not identify any coastal waters as impaired by ocean acidification.<sup>276</sup> Following relevant Supreme Court and Ninth Circuit precedent, the court emphasized that an agency’s interpretation of scientific data is entitled to considerable deference under the arbitrary and capricious judicial review standard in 5 U.S.C. § 706(2)(A) of the Administrative Procedure Act (APA) if an agency provides a reasonable explanation for its decision, even if a reviewing court would prefer a different decision.<sup>277</sup> The “arbitrary and capricious” standard in Section 706(2)(A)<sup>278</sup> is a default standard of judicial review under the APA that applies to most agency decisions that can be classified as informal adjudications or rulemakings.<sup>279</sup> The district court explained that courts are supposed to defer to an agency if a challenged decision is plausibly reasonable:

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274. *Id.* at 1195.

275. *See id.* at 1189–96.

276. *Id.* at 1216–17.

277. *Id.* at 1197 (discussing “arbitrary and capricious” judicial review standard in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012)); *see* 5 U.S.C. § 706(2)(A) (stating a court must set aside agency’s action if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”); *see generally* *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–14 (2009) (discussing “narrow” and deferential arbitrary and capricious judicial review standard in the Administrative Procedure Act); *Motor Vehicle Mfr. Ass’n v. State Farm Ins.*, 463 U.S. 29, 42–44 (1983); Emily Hammond Mezell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 739–42 (2011) (arguing that the “reasonableness” of an agency decision is the key to whether the agency’s decision will survive arbitrary and capricious judicial review).

278. 5 U.S.C. § 706(2)(A) (stating a court must set aside an agency’s action if it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).

279. Mezell, *supra* note 277, at 739–40 (“[S]ubsection [706(2)](A) serves as a catch-all standard that generally applies . . . to review of informal adjudication and rulemaking.”). By contrast, subsection 706(2)(E) applies a substantial evidence judicial review standard “only to ‘formal’ rulemaking and adjudication—that is, proceedings that produce a closed, trial-like record.” *Id.*



The arbitrary and capricious standard is “highly deferential, presume[s] the agency action to be valid and requires affirming the agency action if a reasonable basis exists for its decision.” The reviewing court may not substitute its judgment for that of the agency; rather, the agency’s decision must be affirmed if the agency has articulated a “rational connection between the facts found and the choice made.” The court’s deference to the agency’s judgment “is highest when reviewing an agency’s technical analyses and judgments involving the evaluation of complex scientific data within the agency’s technical expertise.”<sup>280</sup>

The Supreme Court has agreed that an agency’s determination of complicated and uncertain scientific questions is entitled to greater deference by reviewing courts as long as the agency provides a plausible and reasonable explanation of its interpretation of contested scientific issues.<sup>281</sup> After deferentially reviewing the appropriate scientific data in the administrative record about whether there was evidence that ocean acidification was currently causing harm to shellfish in the relevant Oregon and Washington waters,<sup>282</sup> the district court held: “Because EPA’s approval of Washington’s and Oregon’s Section 303(d) lists is plausible in light of the evidence and EPA reasonably concluded that Washington and Oregon assembled and evaluated all existing and readily available water quality data, EPA is entitled to summary judgment in its favor.”<sup>283</sup> Notably, the district court ruled against the plaintiffs on the merits despite finding sufficient injury to sustain Article III standing;<sup>284</sup> a court’s preliminary finding that a plaintiff meets the test for standing jurisdiction by no means guarantees that the court will find in favor of the plaintiff on the merits.<sup>285</sup>

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280. *Ctr. for Biological Diversity v. EPA*, 90 F. Supp. 3d 1177, 1197 (W.D. Wash. 2015) (citations omitted).

281. *Baltimore Gas & Elec. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983) (observing that when a court reviews an agency’s scientific determinations “within its area of special expertise, at the frontiers of science False a reviewing court must generally be at its most deferential.”). *But see* Meazell, *supra* note 277, at 736–38, 752, 756–64, 784 (2011) (criticizing the Supreme Court’s special deference to an agency’s scientific expertise in *Baltimore Gas* and arguing agencies sometimes “cloak their policy choices in the seemingly unassailable mantle of science” to gain more deferential judicial review).

282. *See Ctr. for Biological Diversity*, 90 F. Supp. 3d at 1194, 1197.

283. *Id.* at 1217.

284. *Compare id.* at 1196 (finding standing for plaintiffs) *with id.* at 1217 (holding that EPA is entitled to summary judgment).

285. *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152–54 (1970) (recognizing that Article III standing is a preliminary issue that courts should separate from whether a plaintiff is likely to succeed on the merits); Mank, *Private Parties*, *supra* note \*, at 919–22; *see infra* note 289 and accompanying text.

VI. *MURRAY ENERGY CORPORATION V. GINA MCCARTHY,  
ADMINISTRATOR OF EPA*

A common thread linking the *Massachusetts*, *WEC* and *CBD* decisions were plaintiffs seeking more stringent governmental regulation of GHG emissions.<sup>286</sup> By contrast, in *Murray*, the plaintiffs sued the EPA for the agency's alleged failure to consider the employment impacts of its CAA regulations in the coal industry as an indirect challenge to the agency's alleged overregulation of the industry under the statute.<sup>287</sup> The district court in *Murray* concluded that the plaintiffs had alleged sufficient facts that the EPA had a duty to consider the employment impacts of its CAA regulations to establish standing, and therefore denied the agency's motion to dismiss on standing grounds.<sup>288</sup>

In *Lujan v. Defenders of Wildlife*, the Court stated that parties that are directly regulated by the government are entitled to a more lenient standing analysis in challenging that regulation than plaintiffs such public interest groups challenging the government's alleged under-regulation or non-regulation of third parties.<sup>289</sup> Thus, under *Lujan*, when the government directly regulates GHG emissions of industry, the regulated industry should have standing to challenge those regulations.<sup>290</sup> However, standing for industries affected by GHG regulations can become more complicated if

286. See *supra* Sections III, IV and V.

287. *Murray Energy Corp. v. McCarthy*, 2015 WL 1438036 \*1, \*3–5 (N.D. W. Va. Mar. 27, 2015) (observing that plaintiffs and defendants disagreed as to whether EPA's consideration of the employment impacts of its regulations would actually affect employment in the coal industry).

288. *Id.* at \*9. The EPA had previously filed a Motion to Dismiss the Complaint, asserting that the district court lacked subject matter jurisdiction to hear the case. *Id.* at \*1. On September 16, 2014, the court "denied the Motion and found, as a matter of law, that the EPA had a non-discretionary duty to undertake an ongoing evaluation of job losses and that this Court had and has subject matter jurisdiction to hear the case." *Id.* On December 23, 2014, the EPA filed its Motion to Dismiss Due to Lack of Article III Standing, which the court denied on March 27, 2015. *Id.* at \*2, \*9.

289. 504 U.S. 555, 561–62 (1992) (stating defendants who are directly regulated by government usually have standing to sue, but that third-parties challenging the government's alleged failure to regulate have a greater burden to prove standing); Mank, *WEC*, *supra* note \*, at 1581 (discussing *Lujan's* distinction between presumption standing for regulated parties and its more stringent standing case for plaintiffs seeking the regulation of third parties by the government). But see Haake & Ludwiszewski, *supra* note 2, at 312, 317–18, 322 (arguing that standing for regulated parties was presumed for many years until recent D.C. Circuit cases undermined that presumption, and that *Lujan* placed a heavier burden on advocacy groups seeking regulation of third parties).

290. See Haake & Ludwiszewski, *supra* note 2, at 312, 317–18, 322.

a regulation only indirectly affects an industry.<sup>291</sup> For example, hypothetically, what if the EPA issued regulations encouraging the use of natural gas, renewable energy or nuclear power that indirectly affected the coal industry, or regulations that required cleaner air or less pollution from power plants that disproportionately affected coal burning plants?<sup>292</sup> In *Murray*, the plaintiffs and defendant disagreed regarding whether the EPA's alleged failure to consider the employment impacts of its CAA regulations would actually affect employment in the coal industry, and, thus, whether the agency's purported failure to evaluate employment impacts was too indirect a cause to justify standing for the coal industry plaintiffs.<sup>293</sup>

While regulated industry in theory enjoys clear standing rights pursuant to *Lujan*, the Court arguably weakened *Lujan*'s distinction between lenient standing for regulated parties and more stringent standing for parties seeking government regulation of third parties in *Laidlaw*.<sup>294</sup> *Laidlaw* recognized standing for environmental plaintiffs who avoid recreational or aesthetic activities because of "reasonable concerns" about pollution even if they cannot prove actual harm to themselves or the environment.<sup>295</sup> Warsaw and Wannier's article demonstrated that, because of *Laidlaw*, most lower courts currently do not actually apply more stringent standing requirements to private litigants challenging government regulation of third parties than to litigants directly challenging government regulation that allegedly directly injures them.<sup>296</sup> Other commentators have agreed that *Laidlaw* applied a more lenient approach to standing for environmental plaintiffs than *Lujan*.<sup>297</sup>

Indeed, some industry lawyers have contended that federal courts sometimes apply stricter standing requirements to regulated industry plaintiffs than to environmental plaintiffs.<sup>298</sup> Charles H. Haake and Raymond B. Ludwiszewski argue that several recent D.C. Circuit Court

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291. *Id.* at 308–09, 322, 340–46.

292. *See generally id.* (arguing courts do not always recognizing standing for industry plaintiffs who challenge regulations that have indirect economic impacts on their businesses).

293. *See supra* note 287 and accompanying text.

294. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC) Inc.*, 528 U.S. 167, 181–86 (2000).

295. *Id.*; Warsaw & Wannier, *supra* note 223, at 297, 300, 303 (providing an empirical analysis of 1935 lower court cases which found that Justice Scalia's two *Lujan* decisions led to more dismissal of environmentalist citizen suits, but that subsequent *Laidlaw* decision reversed that trend); Mank, *WEC*, *supra* note \*, at 1523, 1581–82 (contrasting *Lujan* and *Laidlaw*).

296. *See generally* Warsaw & Wannier, *supra* note 223, at 289–322; Mank, *WEC*, *supra* note \*, at 1581–82 (discussing Warsaw & Wannier).

297. Haake & Ludwiszewski, *supra* note 2, at 315–17; Robert V. Percival & Joanna B. Goger, *Escaping the Common Law's Shadow: Standing in the Light of Laidlaw*, 12 DUKE ENVTL. L. & POL'Y FORUM 119, 141–54 (2001).

298. Haake & Ludwiszewski, *supra* note 2, at 308–09, 322, 340–46.

of Appeals decisions have tended to apply a lenient approach to standing injury when environmental plaintiffs assert aesthetic or health injuries, but have applied a strict approach to standing for industry plaintiffs requiring them to document direct, concrete economic injuries.<sup>299</sup> They argue that if federal courts are willing to entertain environmental plaintiff suits based on vague aesthetic harms, those same courts should also consider more indirect economic harms to industry plaintiffs such as increased costs of litigation or changed marketing practices based on increased costs of new regulations.<sup>300</sup> If Haake and Ludwiszewski are correct to any extent about a recent bias against the standing of industry plaintiffs, the decision in *Murray* is arguably a corrective decision that provides a lenient standing test for economic injuries suffered by energy firms regulated under the Clean Air Act.<sup>301</sup>

In *Murray*, a West Virginia district court concluded that several coal mining firms had standing despite the arguably indirect employment impacts of the CAA regulations and that they affected a large number of individuals.<sup>302</sup> The court observed, “[t]he fact that the failure to perform employment evaluations may affect a large number of persons or entities is not fatal to the plaintiffs’ standing” as long as they have “a personal stake in the outcome of the controversy.”<sup>303</sup> The *Murray* decision cited cases that recognized standing injury where an agency action indirectly caused economic losses,<sup>304</sup> and concluded that the EPA’s alleged failure to consider the employment impacts of its CAA regulations on the coal industry was sufficient for standing causation in its case despite the complexities of assessing which regulations may have affected such employment.<sup>305</sup> The court explained:

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299. *Id.* at 308–09, 322, 340–46.

300. *Id.* at 305, 340–41.

301. *Murray Energy Corp. v. McCarthy*, 2015 WL 1438036 \*1, \*1–9 (N.D. W. Va. Mar. 27, 2015) (discussing EPA’s duty to consider employment impacts of its Clean Air Act regulations under 42 U.S.C. § 7621 (2012)).

302. *Id.* at \*4–9.

303. *Id.* at \*4 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

304. *Id.* at \*4. The court cited to both *White Oak Realty, LLC v. U.S. Army Corps of Eng’rs*, 2014 WL 4387317 (E.D. La. Sept. 4, 2014), and *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 1003 (5th Cir. 1981) for the proposition that “economic injury from business competition created as an indirect consequence of agency action can serve as the required ‘injury in fact,’ . . .” *Id.* at \*4.

305. *Murray Energy Corp.*, 2015 WL 1438036 at \*6.

In this case, the plaintiffs have alleged that the actions of the EPA have had a coercive effect on the power generating industry, essentially forcing them to discontinue the use of coal. This Court finds these allegations sufficient to show that the injuries claimed by the plaintiffs are fairly traceable to the actions of the EPA. While the EPA argues that such would only be traceable to the earlier actions of the EPA rather than the failure of the EPA to conduct employment evaluations, this Court cannot agree. The claimed injuries, while in part traceable to the prior actions of the EPA, may also be fairly traceable to the failure of the EPA to conduct the evaluations. Congress' purpose in enacting the requirement for the evaluations was to provide information which could lead the EPA or Congress to amend the prior EPA actions.<sup>306</sup>

The *Murray* decision concluded that an injunction ordering the EPA to perform the requested employment studies would redress the plaintiffs' alleged injuries—even if the alleged failure to conduct such evaluations was not the sole cause of economic losses in the industry.<sup>307</sup>

Furthermore, the district court concluded that the plaintiffs were entitled to a more relaxed standing analysis under the *Lujan* and the *Massachusetts* decisions because they asserted a procedural injury based upon “the fact that the EPA has failed to conduct the employment evaluations.”<sup>308</sup> The *Murray* decision explained:

In *Massachusetts v. EPA*, . . . the Supreme Court stated that “a litigant to whom Congress has accorded a procedural right to protect his concrete interests,—here, the right to challenge agency action unlawfully withheld—can assert that right without meeting all the normal standards for redressability and immediacy. When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.”<sup>309</sup>

The district court rejected the EPA's argument that procedural standing was limited to violated procedures that are “a prerequisite to a final agency action.”<sup>310</sup> Instead, the *Murray* decision concluded: “The denial of the benefit of the evaluations required by [42] U.S.C. § 7621 is sufficient to support procedural standing.”<sup>311</sup> Finally, the district court determined that the plaintiffs had “informational standing” based upon the government's failure to provide the plaintiffs with employment evaluations that the agency was required to provide under the statute, relying upon Supreme

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306. *Id.*  
307. *Id.*  
308. *Id.* at \*6–8.  
309. *Id.* at \*6.  
310. *Id.* at \*8.  
311. *Id.*

Court decisions holding that the deprivation of information that a statute requires the government to provide is sufficient for Article III standing.<sup>312</sup>

As it recognized, the district court's conclusion that the coal firms have standing based on the EPA's alleged failure to consider employment impacts of its regulations on the coal industry does not necessarily mean that the court will uphold the plaintiffs' arguments on the merits,<sup>313</sup> although the court did conclude that "[t]he statute requires the EPA to gather certain information and conduct evaluations, which it has refused to do."<sup>314</sup> The EPA contends that its existing agency regulatory impact analyses and other studies for its utility air toxics rule already satisfy any possible requirement under the Clean Air Act to review the jobs impacts of its rules.<sup>315</sup> However, the plaintiffs argue that existing EPA economic studies are insufficient under Section 321(a) of the statute.<sup>316</sup> Regardless of whether the EPA or the coal firms win on the merits, standing is a preliminary decision that simply requires some concrete injury to the plaintiff from a challenged action, some traceable causation between the challenged action and that injury, and the likelihood that a favorable decision by an Article III court would remedy that injury; a plaintiff need not demonstrate that it is likely to win on the merits to have Article III standing.<sup>317</sup>

## VII. CONCLUSION

In his dissenting opinion in *Massachusetts*, Chief Justice Roberts indirectly raised the question of whether recognizing standing for non-state parties in climate change suits would open the floodgates to too many

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312. *Id.* at \*8–9; see generally Bradford C. Mank, *Informational Standing After Summers*, 39 B.C. ENVTL. AFF. L. REV. 1, 15–20, 27–33 (2011) (discussing cases involving informational standing).

313. *Id.* at \*5 (quoting *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 113 (D.C. Cir. 1990)) (“We note at the outset that the standing determination must not be confused with our assessment of whether the party could succeed on the merits.”).

314. *Id.* at \*9.

315. *Coal Firms Reject EPA Claim Of Studies Satisfying Air Law ‘Jobs’ Review*, INSIDE EPA WKLY. REP. (Inside Wash. Publishers, Arlington, Va.) May 5, 2015, at 2 (discussing this dispute in *Murray* at summary judgment).

316. *Id.*

317. *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 158 (1970) (recognizing that Article III standing is a preliminary issue that courts should separate from whether a plaintiff is likely to succeed on the merits); *Murray Energy Corp. v. McCarthy*, 2015 WL 1438036 at \*5; Mank, *Private Parties*, *supra* note \*, at 919–22; Note, *supra* note 27, at 2256, 2258, 2270–77; see also Gene R. Nichol, *Rethinking Standing*, 72 CAL. L. REV. 68, 74 (1984) (arguing *Data Processing* separated standing from merits).

suits.<sup>318</sup> He observed, “[t]he good news is that the Court’s ‘special solicitude’ for Massachusetts limits the future applicability of the diluted standing requirements applied in this case.”<sup>319</sup> Even Ninth Circuit Judge Gould, who strongly supports climate change suits, acknowledged that federal courts might have to impose prudential limits on suits involving global pollution problems if such suits became too numerous.<sup>320</sup> Because the Supreme Court has recently limited the ability of federal courts to deny standing for prudential reasons unrelated to Article III standing,<sup>321</sup> courts must limit climate suits either through stringent standing criteria, or by limiting suits on the merits, which this Article favors.<sup>322</sup> Courts should recognize that the traceable causation standard for standing requires less proof than the proximate causation standard normally used in deciding a tort case or an environmental case on the merits, and, accordingly, recognize standing even in cases a judge believes will likely fail on the merits.<sup>323</sup>

Courts should allow standing for some non-state parties in climate change suits, but courts should be more skeptical about allowing such plaintiffs to win on the merits because Chief Justice Roberts’ dissenting opinion in *Massachusetts* was correct. That the political branches are usually better suited to addressing the complex economic and social issues in reducing GHG emissions, such as limiting fossil fuel consumption and transitioning to renewable energy.<sup>324</sup> Commentators have divided regarding whether courts are capable of resolving climate change tort or public

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318. *Massachusetts v. EPA*, 549 U.S. 497, 547–48 (2007) (Roberts, C.J., dissenting); *infra* Sections III.B and Conclusion.

319. *Massachusetts*, 549 U.S. at 547–48.

320. *Covington v. Jefferson Cty.*, 358 F.3d 626, 654–55, 655 n.12 (9th Cir. 2004) (Gould, J., concurring) (acknowledging federal courts might need to set prudential limits on global pollution suits if such suits would overwhelm capacity of the courts); Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1, 4–45 (2005). For Judge Gould’s general support for climate change suits see *Wash. Envtl. Council v. Bellon*, 741 F.3d 1075, 1079–81 (9th Cir. 2014) (Gould, J., dissenting); *supra* Section IV.C.1.

321. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386–88, 1387 n.3 (2014); Bradford C. Mank, *Prudential Standing Doctrine Abolished or Waiting for a Comeback?: Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 18 U. PA. J. CONST. L. 213, 215–17 (discussing partial demise of prudential standing in *Lexmark*).

322. Note, *supra* note 27, at 2276–77 (acknowledging climate change suits could flood courts, but arguing courts should be lenient in deciding standing and more strict on merits).

323. *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997) (stating traceable standing causation is different from proximate causation); Mank, *Private Parties*, *supra* note \*, at 919–27. *But see* Meier, *supra* note 27, at 1245–46, 1297–99 (arguing courts should change the standing causation standard to a proximate cause standard, so that standing law would “serve a gatekeeping function”).

324. *Massachusetts v. EPA*, 549 U.S. 497, 535, 548–49 (2007) (Roberts, C.J., dissenting); *infra* Sections III.B and Conclusion.

nuisance suits.<sup>325</sup> Even some proponents of climate suits have acknowledged that such suits are designed more to “prod” the political branches to take action than have judges resolve the merits.<sup>326</sup> As in the *Massachusetts* decision, courts are better suited to addressing whether the Executive Branch has a statutory duty to address climate change issues pursuant to a particular statute than as judges attempting to resolving policy questions themselves.<sup>327</sup> The *CBD* decision demonstrated—and the *Murray* decision explicitly acknowledged—that a court’s initial determination that a plaintiff has established Article III standing jurisdiction does not preclude a court from ruling against the plaintiff on the merits.<sup>328</sup> Notably, in *CBD*, the district court found that the plaintiffs had demonstrated enough evidence of localized impacts on shellfish from GHG emissions to establish standing, but, on the merits, the court deferred to the EPA’s conclusion that there was not enough evidence of such impacts to force Oregon and Washington State to list such waters as impaired under Section 303 of the CWA.<sup>329</sup> In borderline GHG cases, courts should allow standing so plaintiffs can attempt to prove their case, but courts should not hesitate to rule against a plaintiff on the merits if it cannot prove by a preponderance of the evidence that a defendant caused it harm.<sup>330</sup>

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325. Compare Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 WASH. L. REV. 197 (2010) (favoring climate change tort suits), and Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENVTL. L. 1 (2011), with Richard A. Epstein, *Beware of Prods and Pleas: A Defense of the Conventional Views on Tort and Administrative Law in the Context of Global Warming*, 121 YALE L.J. ONLINE 317 (2011), <http://www.yalelawjournal.org/forum/beware-of-prods-and-pleas-a-defense-of-the-conventional-views-on-tort-and-administrative-law-in-the-context-of-global-warming> [<https://perma.cc/8Z4E-6JYZ>] (criticizing climate change tort suits), and Donald G. Gifford, *The Constitutional Bounding of Adjudication: A Fuller(ian) Explanation for the Supreme Court’s Mass Tort Jurisprudence*, 44 ARIZ. ST. L.J. 1109, 1112 (2012).

326. Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 355 (2011).

327. *Massachusetts*, 549 U.S. at 535 (“Because greenhouse gases fit well within the Clean Air Act’s capacious definition of ‘air pollutant,’ we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles.”).

328. *Ass’n of Data Processing Serv. Orgs. vs. Camp*, 397 U.S. 150, 152–53 (1970) (recognizing that Article III standing is a preliminary issue that courts should separate from whether a plaintiff is likely to succeed on the merits); Mank, *Private Parties*, *supra* note \*, at 919–22; *see supra* Sections V and VI; *see Note, supra* note 27, at 2276–77.

329. *See supra* Section V.

330. *Note, supra* note 27, at 2276–77.



Some commentators have questioned whether federal courts subtly manipulate their standing analysis to avoid troublesome cases or, on the other hand, to address the merits when standing is not justified.<sup>331</sup> Despite inevitable time pressures on federal judges, a court should not artificially deny standing simply to avoid difficult merit questions.<sup>332</sup> Following the *CBD* decision as a model, federal courts could grant standing in a climate change case if a non-state party demonstrates some specific localized impacts from GHG emissions, but courts should give significant deference to a agency's reasonable policy decision not to regulate GHG emissions, or decline to allow the type of complex public nuisance action raised in *AEP* because climate change suits on the merits raise too many policy choices better resolved by the political branches.<sup>333</sup> Chief Justice Roberts' argument that the political branches are better suited to deciding global climate change cases than the courts could be used at the merits stage rather than in deciding standing.<sup>334</sup> If courts are skeptical in deciding in favor of climate plaintiffs on the merits, they will not have to overly restrict standing because prospective plaintiffs will, on average, avoid suits that they cannot ultimately win on the merits.<sup>335</sup>

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331. Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1106–07 (2015) (suggesting judges may alter standing decisions based on their views of the merits); David LaRoss, *Despite Judge's Call, Courts Unlikely To Clarify Key Industry 'Standing' Test*, INSIDE EPA WKLY. REP. (Inside Wash. Publishers, Arlington, Va.), May 30, 2014, at 2 (noting that the D.C. Circuit sees “a lot of administrative [law] cases, and they don't want to deal with the merits of them all the time. . . . In a difficult case where they don't want to reach the merits, they can just say ‘let's deal with this on standing.’”). Because of its discretionary certiorari authority to deny review of cases, the Supreme Court may not face the same pressure as lower federal courts to manipulate standing doctrine to avoid deciding cases. Richard H. Fallon, Jr., *How to Make Sense of Supreme Court Standing Cases—A Plea for the Right Kind of Realism*, 23 WM. & MARY BILL RTS. J. 105, 125 (2014).

332. Mank, *Private Parties*, *supra* note \*, at 920.

333. *See supra* Sections III.C and V.

334. *See supra* Section III.C.

335. Note, *supra* note 27, at 2276–77 (arguing courts should allow standing in borderline GHG cases to give plaintiffs chance to prove their case, but on the merits should rule against plaintiffs who cannot prove they suffered harm from a defendant).