

# STATE STANDING IN CLIMATE CHANGE LAWSUITS

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## I. INTRODUCTION

Until fairly recently, the federal government was largely absent on the issue of mandating climate change mitigation in the United States. During this time of primarily federal inaction, many state and local governments became policy leaders on climate change. While this trend continues, the EPA, spurred by multiple lawsuits compelling the agency to regulate greenhouse gas emissions, together with an administration more sympathetic to action on climate change, is now putting in place a national greenhouse gas regulatory framework largely using existing re-

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quirements found in the Clean Air Act.<sup>1</sup> Still, uncertainty continues in the future regulatory landscape for climate change. The EPA's newly promulgated rules regulating greenhouse gas emissions from power plants and other stationary sources are being challenged in multiple courts across the country.<sup>2</sup> Some members of Congress are seeking to undermine EPA regulation through outright prohibitions upon regulation or funding restrictions.<sup>3</sup> As a result of this uncertainty, those states inclined to push forward with policies to mitigate greenhouse gas emissions will likely continue to serve as national climate change policy leaders for some time to come.

The courts have functioned as a critical tool in the efforts of these climate-policy-leader states to further their agenda. A hallmark of climate change litigation thus far is the dominance of state and local governments as plaintiffs. Indeed, *Massachusetts v. EPA*,<sup>4</sup> the first Supreme Court decision on climate change, was brought by twelve states together with several environmental organizations.<sup>5</sup> A large number of the lawsuits brought by states are similar to that of *Massachusetts v. EPA*, in which states are seeking to compel the federal government to address climate change under current environmental statutory authorities.<sup>6</sup> However, with the instigation of climate nuisance lawsuits of *Connecticut v. American Electric Power*<sup>7</sup> and *Native Village of Kivalina v. ExxonMobil Corp.*,<sup>8</sup> such litigation now encompasses actions for injunctive relief and damages against individual sources of greenhouse gases under the common law.

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1. See, e.g., Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71) [hereinafter Tailoring Rule]; Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, 71).

2. See, e.g., Gabriel Nelson, *Texas Seeks Home-Court Edge in Bid to Block EPA's Climate Rules*, N.Y. TIMES, Dec. 20, 2010, available at <http://www.nytimes.com/gwire/2010/12/20/greenwire-texas-seeks-home-court-edge-in-bid-to-block-epa-8462.html>.

3. As of this writing, members of Congress have thus far failed in their efforts to bar EPA from exercising its authority under the Clean Air Act to regulate greenhouse gases though additional efforts are being planned. John M. Broder, *Senate Rejects Bills to Limit E.P.A.'s Emission Programs*, N.Y. TIMES, Apr. 7, 2011, at A15, available at <http://www.nytimes.com/2011/04/07/us/politics/07epa.html>.

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

5. *Id.* at 505, n.2-4.

6. For an up-to-date list and description of all climate change related lawsuits pending in the United States, see the charts maintained by Columbia Law School's Center for Climate change Law and posted at <http://www.climatecasechart.com/>. For a discussion of the trends in U.S. climate change litigation, see J.B. Ruhl & David Markell, *An Empirical Survey of Climate Change Litigation in the United States*, 40 ENVTL. L. REP. 10644 (2010) and Kirsten H. Engel, *Courts and Climate Policy: Now and in the Future*, in GREENHOUSE GOVERNANCE: ADDRESSING CLIMATE CHANGE IN AMERICA 229 (Barry G. Rabe ed., 2010).

7. 582 F.3d 309, 318 (2d Cir. 2009), *cert. granted*, 131 S. Ct. 813 (2010).

8. 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009).

A state's standing under Article III to litigate concerning climate change, either to compel federal regulation of greenhouse gases or to obtain abatement or damages from individual sources of greenhouse gases, is and will continue to be central to this state-initiated litigation. Indeed, *Massachusetts v. EPA* is primarily a decision about state standing and only secondarily a decision about the applicability of the Clean Air Act to greenhouse gas emissions. Much remains uncertain, however, with respect to the doctrinal basis of a state's standing to sue over climate change and the standard that applies. In *Massachusetts v. EPA*, the Supreme Court appeared to apply a more lax standard of Article III standing to the states in view of both Congress's authorization of such lawsuits in the Clean Air Act and the plaintiff's status as states, seeking relief from the federal government for environmental injuries originating outside their borders over which they were otherwise all but powerless to address.<sup>9</sup> It is an open question whether states are similarly entitled to this lax standard when suing private sources over their contribution to climate change under the common law, or even whether Article III, as opposed to some other doctrinal basis, such as *parens patriae*, provides the doctrinal basis for a state's standing. Finally, there is also the question as to whether the courts might apply prudential standing doctrines to bar state standing in these common law suits, regardless of the states' entitlement to standing under Article III or *parens patriae*. An important backdrop, potentially influencing to the courts' resolution of these somewhat intractable questions, is the consideration of the degree to which the court decisions regarding state standing may authorize private litigation over climate change, potentially opening up a "floodgate" of litigation.<sup>10</sup>

This Article will review the status of state standing in climate change litigation with specific attention to the confusion over the source of state standing and the test that applies.<sup>11</sup> I conclude that standing based upon *parens patriae*, or the status of a state as a sovereign, may appear attractive to the courts concerned about opening the courthouse door to climate litigation by private indi-

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9. 549 U.S. at 518 ("Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.")

10. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577-79 (1992).

11. Commentary on state standing to litigate in federal court concerning climate change includes: Kevin A. Gaynor, Benjamin S. Lippard & Margaret E. Peloso, *Challenges Plaintiffs Face in Litigating Federal Common-Law Climate Change Claims*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10845, 10845-47 (2010); Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1756-62 (2008); Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other than Global Warming*, 102 NW. U. L. REV. 1029, 1030-35 (2008).

viduals. I also suggest a rationale for *parens patriae* standing based upon the importance of the existence of a federal court forum to address states' efforts to regulate greenhouse gas emissions from out-of-state sources. Finally, I discuss the advantages and disadvantages of relying upon states to vindicate, in federal court, the interests of their citizenry in redressing harms attributable to climate change.

## II. STATE-INITIATED CLIMATE CHANGE LITIGATION IN FEDERAL COURT

### A. A Typology of State-Initiated Climate Change Cases

The litigation strategy being pursued by states in climate change litigation is consistent with the limited options faced by states as they attempt to address the global tragedy of the commons represented by climate change. According to Garret Hardin, a tragedy of the commons occurs where the individually rational choice concerning the level of exploitation of a natural resource is collectively irrational, leading to the over-exploitation of the resource and to the overall detriment of each individual exploiter.<sup>12</sup> Such overexploitation occurs because, according to the theory, individual exploiters—herders of cattle grazing in a common pasture, according to Hardin's parable—have an incentive to free ride off of other herders', efforts to refrain from an individually-optimal level of exploitation.<sup>13</sup> The result is that all herders will engage in a level of exploitation that is collectively too intense for the continued maintenance of a healthy resource.<sup>14</sup>

Where it is either not possible or it is undesirable to privatize the commons, the preferred solution to the tragedy of the commons is to restrict use of common resources such that the overall level of exploitation falls below problematic levels. This, however, requires a centralized authority able to enforce restrictions upon all of the herders. Where such a central authority does not exist or is unwilling to act, a partial solution is for a governing authority with jurisdiction over a fraction of the herders, responsible for a sizable amount of the degradation of the commons resource, to mandate that the herders reduce the intensity of their use of the commons resource. Still a third solution would be for some of the herders to voluntarily reduce the number of cattle in their own herds, perhaps responding to economic or political signals that are stronger

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12. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1244 (1968).

13. *Id.*

14. *Id.*

than those which would ordinarily compel them to free-ride. These same herders would likely also want to take any measures possible to prevent the remaining herders from adding more cattle to their herds and thereby wiping out any improvements to the commons achieved by their voluntary reductions, not to mention preventing these other herders from enriching themselves at their expense.

The litigation strategy being pursued by states as plaintiffs in climate change litigation tracks the solutions that the herders might adopt to address the problem of the overexploitation of a commons resource. The efforts of nations to develop an international treaty to reduce greenhouse gas emissions reflects the herders' most preferred strategy of deferring to the exploitation reductions ordered by a central authority.

On the other hand, the states' strategy of filing of legal actions to compel a central regulatory body, the EPA, to mandate nationwide greenhouse gas emissions reductions might be seen as a reflection of the herders' second tactic. *Massachusetts v. EPA* is the product of that approach. In the suit, twelve states, joined by several local governments and environmental organizations, sued the EPA under the Clean Air Act for rejecting a rulemaking petition which sought to compel the EPA to establish nationwide regulations of greenhouse gas emissions from cars and trucks.<sup>15</sup> Collectively, emissions from U.S. cars and trucks make up a sizable fraction of global greenhouse gas emissions.<sup>16</sup> Many other cases filed by state and local governments seek to compel greenhouse gas emission reductions nationwide, thus also reflecting this same strategy.<sup>17</sup> California and other states have filed numerous rulemaking petitions requesting EPA regulation of greenhouse gas emissions under the Clean Air Act. These include a request that the EPA regulate greenhouse gas emissions from ocean-going vessels,<sup>18</sup> from airplanes,<sup>19</sup> and from non-road vehicles and engines, which would include a large variety of outdoor power equipment, recreational vehicles, farm and construction machinery, logging

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15. *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

16. The regulations ultimately issued by EPA addressed 23% of the total U.S. greenhouse gas emissions in 2007. *EPA and NHTSA Finalize Historic National Program to Reduce Greenhouse Gases and Improve Fuel Economy for Cars and Trucks*, ENVTL. PROT. AGENCY (Apr. 5, 2010), <http://www.epa.gov/otaq/climate/regulations/420f10014.htm>.

17. See lawsuits listed under "Force Government to Act" in the Climate Case Chart, *supra* note 6.

18. Petition for Rule Making Seeking the Regulation of Greenhouse Gas Emissions from Ocean-Going Vessels, California v. Johnson (Oct. 3, 2007), available at [http://ag.ca.gov/cms\\_pdfs/press/N1474\\_Petition.pdf](http://ag.ca.gov/cms_pdfs/press/N1474_Petition.pdf).

19. Petition for Rule Making Seeking the Regulation of Greenhouse Gas Emissions from Aircraft, California v. Johnson (Dec. 4, 2007), available at [http://ag.ca.gov/cms\\_attachments/press/pdfs/n1501\\_aircraft\\_petition\\_final.pdf](http://ag.ca.gov/cms_attachments/press/pdfs/n1501_aircraft_petition_final.pdf).

equipment and mining equipment.<sup>20</sup> Should these petitions be denied, the states will likely file suit in federal court challenging the basis for that denial.

The states' effort to compel regulation by the federal government is beginning to bear fruit but its ultimate success is still uncertain. For example, EPA, under the authority of the Clean Air Act, and the Department of Transportation, under the authority of the Energy Policy Conservation Act, is now regulating greenhouse gas emissions from cars and trucks.<sup>21</sup> EPA is moving slowly to regulate the emissions from other sectors, though each of its regulations is being challenged by industry and is subject to being overturned by Congress. Given the vulnerability of this first tactic, the states might be expected to explore other alternatives to compel sizable reductions in the greenhouse gas emissions of others while seeking to reduce their own in-state emissions as well.

Thus the *American Electric Power* case might also be seen as exemplifying the third strategy: a defensive tactic to protect the integrity of the plaintiff states' own efforts to reduce their contribution to climate change by seeking sizable reductions in emissions from out-of-state sources. In the case, eight states, one city, and two land trusts are together suing six of the largest electricity-generating companies in the United States which collectively own and operate coal-fired electric power plants in twenty states.<sup>22</sup> Here the states can be seen as seeking to compel reductions of a sizable fraction of U.S. and world greenhouse gas emissions.<sup>23</sup> Together, the six electric generating companies in the United States are responsible for 25% of U.S. electric power greenhouse gas emissions, 10% of total U.S. greenhouse gas emissions, and 2.5% of world greenhouse gas emissions.<sup>24</sup> Through this one lawsuit, states would seem to be seeking to make a dent in world greenhouse gas emissions.

Reductions in emissions from out-of-state sources protect the integrity of the plaintiff states' own efforts to reduce their contribution to climate change. The plaintiff states are among the most

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20. Petition for Rulemaking Seeking the Regulation of Greenhouse Gas Emissions from Nonroad Vehicles and Engines (Jan. 29, 2008), available at [http://ag.ca.gov/cms\\_attachments/press/pdfs/n1522\\_finaldraftnonroadpetition3.pdf](http://ag.ca.gov/cms_attachments/press/pdfs/n1522_finaldraftnonroadpetition3.pdf). In this petition, California was joined by the states of Pennsylvania, Connecticut, Massachusetts, New Jersey, and Oregon.

21. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600 & 49 C.F.R. pts. 531, 533, 536, 537, 538).

22. *Connecticut v. Am. Electric Power*, 582 F.3d 309, 314 (2d Cir. 2009), cert. granted, 131 S. Ct. 813 (2010). The eight states are Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin, and the city is New York City.

23. See *id.*

24. *Id.* at 316, 347.

active on climate change of all of the U.S. states. In general, the eight plaintiff states are national leaders on climate change. For example, with the exception of Wisconsin and Iowa, the plaintiff states are among the states with the most numerous climate action programs.<sup>25</sup> Similarly, four of the plaintiff states—Connecticut, California, New Jersey, and Rhode Island—were among the top ten states in a recent ranking of states according to the degree to which their transportation policy and finance decisions are effective in reducing carbon emissions.<sup>26</sup> Perhaps most importantly, however, all eight of the plaintiff states are members of a regional cap and trade program that limits greenhouse gas emissions from the electric generating sector.<sup>27</sup>

Given that the *American Electric Power* plaintiff states are acting to reduce their own greenhouse gas emissions, it is logical that they would attempt to prevent emitters located in non-regulating states from undercutting their emissions reductions or profiting from this regulation. The latter could occur if electric power producers—located in non-regulating states and hence producing more greenhouse-gas-intensive energy, but at a cheaper cost—are able to export power to regulated states and take over the market for electricity supply. For instance, if compliance with the Regional Greenhouse Gas Initiative (RGGI) will necessitate that electric power producers located in states subject to the Initiative raise the price of electricity, electricity providers located in states that are not members of RGGI could replace this supply with the export of cheaper, more greenhouse-gas-intensive energy. There is evidence, for instance, that RGGI will result in such “leakage.” In other

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25. See Pew Center on Global Climate Change, Interactive Table of All State Initiatives (Jan. 27, 2009), available at [http://www.pewclimate.org/docUploads/AllStateInitiatives-01-27-09-a\\_0.pdf](http://www.pewclimate.org/docUploads/AllStateInitiatives-01-27-09-a_0.pdf). The Pew Center looked at each state to determine how many programs, out of 21 state climate programs, each state had. *Id.* With the exception of Iowa (12) and Wisconsin (15), each of the plaintiff states had 17 or more climate programs. *Id.*

26. Colin Peppard, *Getting Back on Track: States, Transportation Policy, and Climate Change*, Switchboard: Natural Resources Defense Council Staff Blog (Dec. 14, 2010), [http://switchboard.nrdc.org/blogs/cpeppard/getting\\_back\\_on\\_track\\_states\\_t.html](http://switchboard.nrdc.org/blogs/cpeppard/getting_back_on_track_states_t.html).

27. Connecticut, New York, New Jersey, Rhode Island, and Vermont are members of the Regional Greenhouse Gas Initiative, a fully functioning regional cap and trade program applicable to the carbon dioxide emissions of electric power companies. See Fact Sheet, Regional Greenhouse Gas Initiative, [http://www.rggi.org/docs/RGGI\\_Fact\\_Sheet.pdf](http://www.rggi.org/docs/RGGI_Fact_Sheet.pdf) (last visited May 9, 2011). California is the lead member of the Western Climate Initiative, whose stated goal is to develop a regional greenhouse gas cap and trade program for various industries, including the electric power industry, and Wisconsin and Iowa are members of the Midwest Greenhouse Gas Reduction Accord, a coalition of Midwestern states which have agreed “to establish regional greenhouse gas reduction targets, including a long-term target of 60 to 80 percent below current emissions levels, and develop a multi-sector cap-and-trade system to help meet the targets.” *Regional Initiatives*, PEW CENTER FOR GLOBAL CLIMATE CHANGE, [http://www.pewclimate.org/what\\_s\\_being\\_done/in\\_the\\_states/regional\\_initiatives.cfm](http://www.pewclimate.org/what_s_being_done/in_the_states/regional_initiatives.cfm) (last updated Feb. 10, 2010).

words, the imposition of the RGGI cap is likely to result in a shift of greenhouse gas emissions from RGGI states to non-RGGI states that are able to export more fossil-fuel intensive power into RGGI states.<sup>28</sup>

The *American Electric Power* lawsuit fits the pattern of the third type of “defensive” litigation mentioned above because the plaintiff states are each members of a coalition that is, or is seeking to reduce greenhouse gas emissions from its own in-state electric power sector.<sup>29</sup> The plaintiff states are suing to achieve the abatement of emissions from electric power producers that operate coal-fired power plants in states that are in general not subject to a regional climate initiative and are not particularly active in addressing climate change.<sup>30</sup> Thus the lawsuit might be seen as a defensive measure by states that are actively working to reduce their own contribution to global climate change. The states might be seen as turning to litigation to prevent other states, which have failed to limit their own in-state emissions, from undercutting the environmental gains of the plaintiff states who have acted to reduce their emissions.

*B. The Importance of Federal Court Jurisdiction (and thus State Standing) to State Climate Change Regulation*

It may seem self-evident that standing is critical to any climate change litigation strategy pursued by states. But it bears noting that whatever barriers are posed by standing doctrine exist only with respect to actions filed by states in federal court. States will normally have little trouble establishing standing in their own state courts, at least with respect to the enforcement of their own state laws enacted pursuant to their police powers.<sup>31</sup> Moreover,

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28. JOHN ROGERS, CHRIS JAMES & ROBIN MASLOWSKI, UNION OF CONCERNED SCIENTISTS, IMPORTING POLLUTION: COAL'S THREAT TO CLIMATE POLICY IN THE U.S. NORTHEAST 1-2 (2008) (“Yet RGGI’s very approach threatens to expand reliance on coal-based electricity produced *elsewhere*—thus offsetting its global warming reductions. That is because RGGI puts a price on emissions only from power plants within the region, making electricity from plants outside the region less expensive. That, in turn, could spur electricity suppliers in RGGI states such as Maryland to import more power from coal-producing states such as West Virginia.”). See also Adam Bumpus, *The West is the Best? Leaking Carbon from the Patchwork Quilt*, THE GREEN BLOG NETWORK, (Mar. 24, 2010), <http://greenblognetwork.blogspot.com/2010/03/untitled.html>.

29. The defendant electric power companies operate coal-fired power plants in Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, New Mexico, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. See Complaint at 45-49, *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2004) (Second Claim for Relief—State-Law Public Nuisance, ¶¶ 165 – 186).

30. *Id.*

31. See Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 398 (1995) (“When the state is enforcing its general powers as narrowed and defined by

generally more lax standards for standing prevail in state courts.<sup>32</sup> Nevertheless, the absence of specific authority for the filing of such suits makes the state's standing to do so even in state court less clear-cut than where they are seeking to enforce a state civil or criminal statute.<sup>33</sup>

Yet it is federal court jurisdiction that is critical to the states that are actively regulating in-state sources of greenhouse gases but are seeking to compel reductions in emissions originating out-of-state. In such situations, states are seeking to use litigation to pursue claims against the federal government to compel the federal government to regulate greenhouse gas emissions or against individual sources of greenhouse gas emissions located out-of-state. Hence states will inevitably wish to file in federal court as the subject matter jurisdiction of their claims will either be federal question jurisdiction or diversity jurisdiction. Thus far, the type of cases filed by states most frequently are actions to compel regulation by the EPA under an existing environmental statute.<sup>34</sup> Cases to compel federal regulation of greenhouse gases are filed pursuant to federal question jurisdiction and are thus prototypically filed in federal court.<sup>35</sup> State challenges to federal action constitute 28% of the climate cases filed thus far.<sup>36</sup> In addition, states are at the forefront of efforts to build the foundation for future regulation.

As discussed above, however, states that are reducing their own in-state emissions will logically want to reduce the ability of out-of-state emitters to erase these climate gains with their own emissions. Hence states are likely to use litigation to seek mitigation of greenhouse gas emissions from out-of-state sources. Indeed, out-of-state sources of greenhouse gas emissions are the common target of the nuisance actions filed by states thus far.<sup>37</sup> In these

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specific legislation, whether civil or criminal, the question of state 'standing' is ordinarily irrelevant.”).

32. 2 KENNETH A. MANASTER & DANIEL P. SELMI, STATE ENVIRONMENTAL L. § 14.2 (2010) (standing opinions under state law “often emphasize that standing is to be interpreted broadly rather than restrictively” and hold that the standing bar should be lowered in cases of broad public interest). *See also* *Bray v. Pioneer Irrigation Dist.*, 157 P.3d 610, 612 (Idaho 2007) (rejecting argument that no standing existed because the claimant had the same injury as all citizens based upon the court's interpretation of the statute to provide “any claimant” with standing); *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1257 (Haw. 1992) (justifying a broad view of standing in cases where the right of the public might otherwise be denied a hearing in a judicial forum).

33. *See* Woolhandler & Collins, *supra* note 31, at 398.

34. *See supra* text accompanying notes 15-31.

35. 28 U.S.C. § 1331 (2006) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

36. Columbia Ctr. for Climate Change Law, Chart of Type of Climate Cases Filed in the U.S., <http://www.arnoldporter.com/resources/documents/climate%20pie%20chart.pdf> (last visited May 9, 2011).

37. Thus, for example, with the exception of Wisconsin, all of the electrical generating plants of the defendants targeted in *Connecticut v. American Electric Power* are located in

suits, states are alleging that private out-of-state sources of greenhouse gases are contributing to the public nuisance of climate change.<sup>38</sup> Again, the cause of action is properly filed in federal court because the primary claim being made is that of the defendants' liability under the federal common law of nuisance, a claim subject to federal question jurisdiction.

In granting certiorari in *Connecticut v. American Electric Power*, the Supreme Court may rule on the continued viability of federal common law nuisance as a climate change cause of action. The industry respondents in *American Electric Power* allege that recent actions of the EPA in regulating greenhouse gas emissions from stationary sources under the federal Clean Air Act displace a claim of federal common law nuisance.<sup>39</sup> Indeed, the EPA has moved to regulate greenhouse gas emissions from motor vehicles and from large stationary sources.<sup>40</sup> Under *Milwaukee v. Illinois*, federal common law nuisance is preempted to the extent that the regulatory target is subject to federal regulation pursuant to a valid statute.<sup>41</sup> Hence the Supreme Court could well hold that EPA regulation under the Clean Air Act displaces state federal common law nuisance claims against out-of-state sources of greenhouse gases.<sup>42</sup>

Should the Court hold that EPA regulation has displaced the federal common law claims and hence that the claim is unavailing to plaintiff states, it may simply result in states filing their common law nuisance claims under state nuisance law. Indeed, in the climate change nuisance lawsuits filed thus far, the plaintiffs have alleged state nuisance as an alternative basis for liability.<sup>43</sup> Interestingly, such lawsuits are likely to be filed in federal court and hence the standard applied for standing under Article III will continue to be important, regardless of whether the Supreme Court holds, in the *American Electric Power* case, that liability for climate change based upon federal common law has been displaced.

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states other than the plaintiff states. Complaint, *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 131 S. Ct. 813 (U.S. Dec. 6, 2010).

38. *Id.*

39. *Connecticut v. Am. Electric Power*, 582 F.3d 309, 375 (2d Cir. 2009), *cert. granted*, 131 S. Ct. 813 (2010).

40. Tailoring Rule, *supra* note 1, at 31,519-20. *See also* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1).

41. 451 U.S. 304, 317-19 (1981).

42. *See North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291, 309-10 (4th Cir. 2010) (reversing district court's determination that sources were liable for polluting emissions based upon Fourth Circuit's conclusion that emissions were legally permitted under the federal Clean Air Act).

43. *See* Complaint, *supra* note 37, at 2.

The reason for reliance upon federal courts as the venue for state-law-based climate nuisance litigation is that for state climate plaintiffs, litigating in federal court will be preferable to litigating in the courts of the defendants. Under Supreme Court precedent, the law that would apply to a nuisance lawsuit filed in federal court under state law against an out-of-state defendant would be the law of the state in which the defendant source of the emissions is located.<sup>44</sup> As it would be extremely unusual that the plaintiff state would have subject matter jurisdiction to file, in its own courts, a lawsuit alleging liability under the law of a different state, the plaintiff state would be faced with the choice of filing suit either in the courts of the state in which the defendant is located or in federal court pursuant to diversity jurisdiction.<sup>45</sup> Between these two options, state plaintiffs would be expected to file suit in federal court pursuant to diversity jurisdiction upon the expectation that their claims would receive a more sympathetic hearing than they would in the state courts of the parties that they are suing.<sup>46</sup>

### III. *PARENS PATRIAE* STANDING: AN “ANSWER” TO THE PROBLEM OF THE SLIPPERY SLOPE?

The future viability of state-initiated lawsuits in federal court is likely to turn on whether the courts recognize *parens patriae* as an independent and sufficient basis for Article III standing, and are thus able to distinguish the basis for the standing of states from the basis for the standing of individuals. The reason for this is simple: basing state standing on state sovereignty avoids the “slippery slope” inherent in basing standing upon satisfaction of

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44. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 487 (1987).

45. 28 U.S.C. § 1332 (2006).

46. *See, e.g.*, *North Carolina v. Tenn. Valley Auth.*, 593 F. Supp. 2d 812 (W.D.N.C. 2009). Prior to an appellate court's ruling that state common law had been preempted by federal regulation, this is precisely the tactic that was pursued by North Carolina in attempting to obtain, through a common law nuisance lawsuit, an injunction abating the emission of conventional pollutants from Tennessee Valley Authority's out-of-state coal-fired electric utility plants. *Id.* at 815. North Carolina alleged that the plants' emissions constituted a public nuisance under the law of the states in which the plants were located. *Id.* In referring to North Carolina's complaint concerning the emissions of specific utility plants, the district court stated:

[s]pecifically, whether Widows Creek and Colbert are public nuisances in North Carolina is a matter of Alabama law; whether Paradise and Shawnee are public nuisances in North Carolina is a matter of Kentucky law; and whether Bull Run, Kingston, John Sevier, Gallatin, Johnsonville, Cumberland, and Allen are public nuisances in North Carolina is a matter of Tennessee law.

*Id.* at 829. However, the Fourth Circuit held that the district court paid only lip service to the nuisance standards of these states and instead actually applied North Carolina's statutory-based standards for air pollution to find liability. *North Carolina v. Tenn. Valley Auth.*, 615 F.3d at 306-07.

the same Article III particularized injury test that applies to individuals.<sup>47</sup> This is because, in a common law nuisance case, states are unlikely to find recourse with the more lax Article III standard applied in *Massachusetts v. EPA*. There, the more lax standard was applied in view of both the Clean Air Act's express grant of jurisdiction to sue the EPA and the state's reliance upon the federal government to address harms originating outside their boundaries.<sup>48</sup> Neither of these factors exist when a state is suing private entities for a common law nuisance. As a result, if the Court applies Article III at all, it would likely have to apply the same standard of Article III standing that would apply were an individual to sue sources of greenhouse gas emissions. Basing the standing of states suing individual sources of greenhouse gases upon *parens patriae* would enable a court to avoid this slippery slope.

Which standard—*parens patriae* or the Article III particularized injury test of *Lujan*—will apply to states in the future is unclear. In *Massachusetts v. EPA*, the Supreme Court, for all intents and purposes, punted on the issue, with the result that the lower courts have no clear guidance on this issue.

#### A. *Parens Patriae Standing and State Standing Based upon the State as an Individual*

##### 1. *Parens Patriae* Standing

While *parens patriae* is founded in the prerogative of the king to act on behalf of subjects who cannot care for themselves,<sup>49</sup> the modern origins of *parens patriae* standing can be found in the turn-of-the-century nuisance cases filed by states in federal court over interstate pollution incidents.<sup>50</sup> These cases represented a shift from the Supreme Court's previous insistence that states show a particularized injury in order to maintain a nuisance suit in federal court.<sup>51</sup> The Court in these cases anchored the standing for state plaintiffs in what it referred to as "quasi-sovereign" interest in governing those within its borders and also of demanding recognition from other sovereigns, which most frequently involves or border disputes.<sup>52</sup> Safeguarding the health and welfare of its citizens as well as the integrity of its natural resources falls

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47. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

48. See *supra* note 9.

49. See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 56-57 (1890).

50. See, e.g., *Missouri v. Illinois*, 180 U.S. 208, 244 (1901).

51. *Woolhandler & Collins*, *supra* note 31, at 446-47.

52. *Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982).

squarely in the former category of sovereign interests. Thus *parens patriae* recognizes the state's police power, the same power that authorizes states to legislate to protect the health and safety of its residents and the integrity of the land and resources within its boundaries, as a sufficient basis to confer standing to sue in federal court to protect these same interests. It is important to note that these turn-of-the-century *parens patriae* standing cases concerned nuisance, a quintessential example of the type of harm where state representation would be important to any one landowner filing suit due to the perhaps overwhelming barrier posed by free-riding.

Two decisions set the stage for *parens patriae* standing prior to *Massachusetts v. EPA*: *Missouri v. Illinois*<sup>53</sup> and *Georgia v. Tennessee Copper Co.*<sup>54</sup> In the former, Missouri sued Illinois in an attempt to prevent that state from discharging sewage into the Mississippi River over forty miles above St. Louis.<sup>55</sup> Missouri alleged that Illinois' actions constituted a public nuisance.<sup>56</sup> Although holding that Missouri had failed to present sufficient proof that Illinois's actions were the cause of any increase in typhoid cases in Missouri,<sup>57</sup> the Court upheld the standing of Missouri to sue Illinois in federal court based upon *parens patriae* standing.<sup>58</sup> The Court explained Missouri's standing as a quid pro quo for Missouri's relinquishment, when it joined the union, of its otherwise sovereign prerogative to resort to force to obtain the abatement of the nuisance activity by Illinois.<sup>59</sup> Similarly, in *Georgia v. Tennessee Copper*, the Court allowed Georgia to sue a copper smelter sited in Tennessee also under public nuisance and again the Court upheld Georgia's standing under *parens patriae*.<sup>60</sup> The Court used the similar rationale that the alternative to being able to file suit in federal court to vindicate its interests in protecting both its citizenry and the state's environment would be to resort to force.<sup>61</sup>

More recently, in *Snapp & Son, Inc. v. Puerto Rico*, the Court articulated the modern-day test for determining when a state is

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53. 180 U.S. 208 (1901).

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

55. *Missouri v. Illinois*, 180 U.S. at 208-09, 211.

56. *Id.* at 214.

57. *Id.* at 241-48.

58. *Id.* at 247-48.

59. *Id.* at 241. The court stated:

If Missouri were an independent and sovereign state all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy, we think, is found in the constitutional provisions we are considering.

*Id.*

60. *Georgia v. Tenn. Copper Co.*, 206 U.S. at 237.

61. *Id.*

suing in *parens patriae*.<sup>62</sup> Most importantly, “the State must articulate an interest apart from the interests of particular” persons and this interest must be a “quasi-sovereign interest” which must usually fall in the category of either an interest in the “health and well-being—both physical and economic—of its residents in general[,]” or within the state’s interest “in not being discriminatorily denied its rightful status within the federal system.”<sup>63</sup>

The significance of the *parens patriae* case law is that, where a state is suing in its quasi-sovereign capacity, courts have traditionally not required that the state satisfy a rigorous particularized injury test. Thus, in *Missouri v. Illinois*, for example, it was sufficient that Missouri alleged harm to the “health and comfort” of its inhabitants.<sup>64</sup> Ultimately, in a follow up lawsuit, Missouri was unable to prove that the injury it complained of was attributable to the sewage discharges by Illinois.<sup>65</sup> This failure to demonstrate that its injury was in fact attributable to the defendant’s conduct would, were the individual standing test of *Lujan* applied, most likely lead to the dismissal of Missouri’s case on standing grounds. Instead, because Missouri’s standing was established on the much more lenient basis of *parens patriae*, the lack of causal connection was considered part of the court’s consideration of the merits of Missouri’s nuisance claim.<sup>66</sup>

## 2. Standing Based upon the State as an Individual Acting in a Nonsovereign Capacity

A state might be considered to be acting in an individual capacity with respect to actions it takes for purposes other than those that pertain purely to safeguarding the health or welfare of its citizens and protecting or securing its border. Where, for instance, a state participates in a business venture or on behalf of a particular resident, as opposed to all of its residents, it is not acting in its sovereign capacity.<sup>67</sup> Similarly, though the issue is closer, where a state acts to protect the land it owns outright, the Supreme Court has stated that it considers the state to be acting in its proprietary

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62. *Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982).

63. *Id.* at 607.

64. *Missouri v. Illinois*, 180 U.S. at 241. The court stated: It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant state. But it must surely be conceded that, if the health and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them.

*Id.*

65. *Missouri v. Illinois*, 200 U.S. 496, 517-18 (1906).

66. *Id.*

67. *See Snapp*, 458 U.S. at 601-02.

capacity like any other individual landowner and not in a quasi-sovereign capacity.<sup>68</sup>

Where a state is suing outside its sovereign capacity, there appears to be little basis for departing from the standing test that would apply to individuals if they filed suit. Thus for lawsuits filed by states in their proprietary capacity, it would appear that the state would have to satisfy the particularized standard for injury-in-fact, causation, and redressability that is set forth in *Lujan v. Defenders of Wildlife*.<sup>69</sup>

*B. Massachusetts v. EPA:  
Muddying the Waters of State Standing*

In *Massachusetts v. EPA*, the Supreme Court held that the ten plaintiff states had standing to sue the EPA for unlawfully interpreting the Clean Air Act not to apply to greenhouse gas emissions that contribute to global climate change.<sup>70</sup> Nevertheless, the Court's majority opinion considerably muddied the waters of state standing doctrine by refusing to clearly choose either *parens patriae* or the particularized injury test of *Lujan* as the basis for the standing of Massachusetts and the other states. Instead, the Court conflated the two tests, using the quasi-sovereign interests of the state that were at stake in the lawsuit to satisfy parts of the *Lujan* test.<sup>71</sup>

The *Massachusetts v. EPA* Court appeared to reject *parens patriae* as an independent and wholly sufficient ground for state standing. The Court upheld Massachusetts' standing after determining that the state's interest in the lawsuit satisfied the three prongs of the *Lujan* test: injury-in-fact, causation, and, most importantly in the case given the question of whether EPA regulation would make a sufficient dent in global warming, redressability.<sup>72</sup> Furthermore, the Court characterized the question of standing as one of whether the parties have a sufficiently "personal stake" in

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68. *Id.* at 601 (The court stated that "[t]wo kinds of nonsovereign interests are to be distinguished. First, like other associations and private parties, a State is bound to have a variety of proprietary interests. A State may, for example, own land or participate in a business venture.") (emphasis added). This categorization appears overbroad. Often a state owns land, not for some administrative purpose or for the benefit of state employees (such as state-owned office buildings), but to enhance the health and well being of its residents. Thus, for example, a state establishes a state-owned public park to provide recreational and aesthetic opportunities to its residents and hence arguably should be able to file suit against a threat to the integrity of that park on the basis of *parens patriae* standing.

69. 504 U.S. 555 (1992).

70. *Massachusetts v. EPA*, 549 U.S. 497, 498 (2007).

71. See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 334-40 (2d Cir. 2009) (describing how the Supreme Court conflated the two bases for standing).

72. *Massachusetts v. EPA*, 549 U.S. at 517, 521-26.

the outcome of the case that the “concrete adverseness” needed to enable the court to decide the case can be assured.<sup>73</sup> The ability of the “injury in fact” test to meet the need for concrete adverseness appears to have been important to Justice Kennedy’s decision to join the *Lujan* majority, and thus must be considered critical to the injury-in-fact test.<sup>74</sup>

Nevertheless, the Court clearly relied upon *parens patriae* standing in reaching its conclusion that Massachusetts had standing to sue the EPA. The Court analogized Massachusetts’ interest in the suit to that of states in prior cases that satisfied standing through a *parens patriae* analysis.<sup>75</sup> Thus the Court stated that “[j]ust as Georgia’s independent interest ‘in all the earth and air within its domain’ [in *Georgia v. Tennessee Copper*] supported federal jurisdiction a century ago, so too does Massachusetts’ well-founded desire to preserve its sovereign territory today.”<sup>76</sup> The Court furthermore used the quid pro quo rationale for *parens patriae* standing—that affording states standing in federal court based upon the state’s quasi-sovereign interests was the trade-off made to encourage states to enter the union and therefore give up their rights to protect these interests through diplomacy or force.<sup>77</sup> The Court further indicated that Massachusetts’ proprietary interests—which would otherwise appear to be the trigger for the applicability of the *Lujan* test—simply reinforced the Court’s conclusion, based upon the strength of the Commonwealth’s sovereign interest, that Massachusetts had a sufficiently concrete interest in the lawsuit to support standing.<sup>78</sup> Finally, the Court stated that “Massachusetts’ stake in protecting its quasi-sovereign interests,” together with Congress’s bestowal of a procedural right to sue under the Clean Air Act, justified its conclusion that “the Commonwealth is entitled to special solicitude in our standing analysis.”<sup>79</sup>

In sum, in finding that Massachusetts had standing, the Court relied on both *Lujan* as well as prior state standing decisions resting on *parens patriae*. As a result, it is hard to disagree with the Second Circuit’s assessment that the Supreme Court’s recent

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73. *Id.* at 517 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

74. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurrence).

75. *Massachusetts v. EPA*, 549 U.S. at 519.

76. *Id.*

77. *Id.*

78. *See id.* (“That Massachusetts does in fact own a great deal of the ‘territory alleged to be affected’ only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power.”).

79. *Id.* at 519-20.

treatment of standing “arguably muddled state proprietary and *parens patriae* standing.”<sup>80</sup>

*C. Climate Plaintiffs and the Requirements for  
Parens Patriae Standing*

The Supreme Court need not have muddled the jurisprudence of state standing in climate change lawsuits. Rather than arriving at Massachusetts’ standing through the overlapping application of the tests for standing based upon the Commonwealth’s quasi-sovereign and proprietary interests, the Court could have simply held that Massachusetts had standing under the *parens patriae* doctrine.<sup>81</sup> This would have infinitely simplified matters for later state plaintiffs, such as the states in *American Electric Power*. The reasons are three-fold: Massachusetts and other climate plaintiffs are seeking to address the potential injuries that affect all of the state’s population as well as its natural resources; the relative insignificance of the injury sustained by individuals virtually guarantees that individuals will not be able to obtain complete, much less meaningful, relief through the filing of court actions;<sup>82</sup> and state litigation over climate change is an outgrowth of the state’s sovereign interest in addressing its own contribution to a global commons issue.

The first two reasons are not difficult to fathom. First, as a global phenomenon, climate change affects all of the earth and thus necessarily all of a state’s territory. According to recent scientific reports, climate change is already affecting the health and well-being of the entire U.S. population as well as the nation’s ecosystems.<sup>83</sup> Second, individuals might use the class action mecha-

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80. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 337 (2d Cir. 2009).

81. The Court’s insistence upon using Article III, as opposed to *parens patriae*, as the framework for its standing analysis cannot be attributed to the Court’s adherence to a broad reading of *Massachusetts v. Mellon*, 262 U.S. 447 (1923) in which the Court held that a state did not have standing to assert a quasi-sovereign interest against the federal government. To the contrary, in *Massachusetts v. EPA*, the Court explicitly narrowed *Mellon* to its facts: cases in which a state seeks to protect its citizens from the application of federal law, as opposed to cases such as that brought by Massachusetts against EPA, in which a state asserts its rights under a federal statute. 549 U.S. at 520 n.17. *See also* Mank, *supra* note 11, at 1770.

82. *See Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). Although, according to the Supreme Court in *Snapp*, the capacity of individuals to vindicate their harms through a court action is one of the prongs of the *parens patriae* test, lower courts have criticized the inclusion of this element, arguing that the vindication of a state’s quasi-sovereign rights should not be dependent upon the availability of relief for the individual resident. *See Puerto Rico ex rel. Quiros v. Bramkamp*, 654 F.2d 212, 217 (2d Cir. 1981).

83. *See* GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES, U.S. GLOBAL CHANGE RESEARCH PROGRAM (Thomas R. Karl, Jerry M. Melillo & Thomas C. Peterson eds., 2009).

nism to aggregate the magnitude of their climate-change-related injuries. However, the vast discrepancy between the relatively small harm sustained by any one individual and the costs and impacts associated with emissions cutbacks of the amounts necessary to make a dent in climate change, not to mention the multitude of defendants who would need to be sued, both domestically and internationally, clearly renders it impossible for an individual to obtain meaningful relief.

Courts and commentators have overlooked the sovereignty interest behind a state's pursuit of climate litigation. According to this sovereignty interest, climate litigation is intimately related to the state's exercise of its police powers to reduce the greenhouse gas emissions of in-state emitters. As discussed in Part I.A. above, litigation by the state against out-of-state contributors in an effort to achieve similar mitigation actions by such out-of-state contributors is to be expected. Such efforts can be seen as an effort to stop the leakage, from the regulating state to non-regulating states, of various environmental and economic benefits associated with regulation. Thus the ability to sue out-of-state sources is arguably an important incentive for states to unilaterally reduce their own contribution to a commons degradation problem such as global climate change. Because litigation against out-of-state sources of commons degradation is integral to a state's exercise of its own police powers to address a commons problem such as climate change, standing of states in federal court to litigate against out-of-state contributors should be seen as a manifestation of a state's sovereignty interests.

#### *D. Parens Patriae and the Slippery Slope Problem*

The Court's leading authority on the standing of states to litigate disputes over climate change, *Massachusetts v. EPA*, is internally self-contradictory. The Court upheld the states' standing under Article III, but in part upon the basis of the states' status as sovereigns—a factor that would otherwise support *parens patriae* standing. By finding state standing based in part upon unique aspects of states, the Court was able to preserve a role for the federal courts in ensuring compliance with laws related to climate change and, at the same time, protect the federal courts from being overwhelmed with a flood of lawsuits. The analysis adopted by the Court may not hold up in the long term because it conflates proprietary and *parens patriae* grounds for standing and does not provide clear guidance for lower courts in the future.

A more principled method of recognizing state standing in climate change lawsuits that avoids the slippery slope that could

compel recognition of the standing claims of individuals for climate change harms would be to simply base state standing upon *parens patriae*. Such an approach recognizes the real environmental harm attributable to climate change as sufficient for standing purposes, but limits the litigation based upon this harm to actions by representative state governments. It thus does not open the doors to suits by individuals, but nor does it close them. Whether harm to individuals from climate change meets the test for standing can wait for the development of a better understanding of the impacts of climate change on the individual level and for the further development of the *Lujan* test in the lower courts.

It is difficult to know whether the Court purposefully conflated the Article III and *parens patriae* tests in order to ensure that its decision upholding state standing would not open the courts to climate lawsuits by individual citizens. Faced with opening the courthouse doors to all climate plaintiffs, states as well as individuals, and shutting them altogether, it is quite possible that the Supreme Court would choose the latter option. In any case, we are left with a precedent that effectively allows states to litigate over climate injuries but leaves uncertain the ability of individuals to do so.

#### IV. THE ADVANTAGES AND PITFALLS OF RELYING UPON STATES TO VINDICATE THE INTERESTS OF PRIVATE INDIVIDUALS IN ADDRESSING CLIMATE CHANGE IN FEDERAL COURT ACTIONS

Although this Article suggests a doctrinal reformulation that will place state standing on the surer ground of *parens patriae*, this reformulation does nothing to alter the status quo, established in *Massachusetts v. EPA*, of relying upon states to vindicate the public interest in redressing harms attributable to climate change. Granted, nothing about the current status of state standing law or the reformulation here proposed precludes standing by individual claimants. Instead, the status quo and the proposed reformulation chart alternative paths for distinguishing the basis for state standing from the somewhat higher burden that individuals face in establishing individual standing under the *Lujan* test.

The major benefit of the status quo is that mentioned above in Part III: reliance upon states as plaintiffs is likely the most realistic arrangement for ensuring that interest in redressing the harms of climate change receives a hearing in federal court. Restricting the actions to those filed by states limits the possible number of suits and thereby makes it more likely that the courthouse door will remain open to at least some claims and not be

shut entirely on the pretext of protecting the courts from a potential flood of litigation.

A second benefit is attributable to the filtering of climate change lawsuits through the litigating arm of state government. State litigating authority will reside either with a state department of justice within the executive branch or with an independently-elected state attorney general. Both offices are accountable to the state electorate, either through the governor or directly, in the case of an attorney general elected by the state's voters. Such filtering should ideally serve as a democratic and public interest check upon the climate lawsuits that are filed, ensuring that they vindicate a broader public interest, as opposed to the narrow self-interest of a small number of plaintiffs. Given the generally high standards for professionalism and legal education that prevail in state government legal offices, filtering climate lawsuits through state government should serve as a check upon the filing of badly-conceived lawsuits with an inadequate legal or factual foundation. This would result in a savings to judicial resources that might otherwise be wasted on lawsuits with a poor legal or factual foundation.

Yet a third benefit is that which follows from the vantage point of state government which may be able to bring a stronger case for the interrelated harms related to climate change across an entire ecosystem, as opposed to a discrete parcel of property owned by a single person, for example. Thus a state's broader authority would enable it to seek redress for the harms of climate change to an entire watershed, as opposed to a single parcel of property in that watershed.

Along with the advantages of state representation of private individuals' interests in redressing harms from climate change in federal court also come certain disadvantages. Chief among these disadvantages is the possibility that the state's litigation decisions do not reflect the public interest, but instead reflect the more narrow industrial interests, those with the most to lose from state-initiated lawsuits based upon climate change harms. In such a case, reliance upon state government to file climate change lawsuits undermines the public interest in such litigation.

Suppose, for example, the state refuses to seek federal court review of an EPA decision not to regulate greenhouse gas emissions from military bases because the state houses a large military base and the former head of the base is now a powerful member of the state senate. The public interest might well be served by a state-initiated lawsuit seeking to compel EPA to regulate the emissions from military bases and a private litigant might have an

incentive to file such a suit, but the powerful senator may block any state effort to file suit in the name of the state.

## V. CONCLUSION

Despite recent EPA actions to regulate greenhouse gas emissions, states must still be considered the policy leaders in climate change. While much state climate policymaking consists of programs, initiatives, procurement guidelines, legislation, and rules, states have also been the initiators of climate-change-related litigation. These lawsuits can be seen as an outgrowth of the states' efforts to address the commons aspects of the problem of climate change. This pushes the states to seek to compel the federal government to mandate emissions reductions and also to seek to reduce the emissions of large out-of-state sources of greenhouse gases. The latter tactic can be understood as an effort both to reduce climate change impacts and also to remove the disincentive for other states to regulate greenhouse gases due to the prospect that their industries will be able to undercut and hence take over the market share previously possessed by industries now regulated in climate-regulating states.

These two types of lawsuits will be filed by states in federal court where the state's standing under Article III continues to be an issue. This Article has argued that the Supreme Court has muddied the standard applicable to states in an effort to lower, and hence distinguish, state standing from the standing standard that would apply to private individuals as plaintiffs. This Article suggests an alternative method of distinguishing the standing of states from that of private plaintiffs that is doctrinally straightforward: relying upon the doctrine of *parens patriae*. Finally, to the extent the Court maintains a lower bar to state standing than to the standing of private individuals seeking to redress harms resulting from climate change, states may be the only entities that can bring such suits in federal court. Currently the industry petitioners in the *Connecticut v. American Electric Power* case, backed by the Obama Administration, are seeking to chip away at state standing in climate change lawsuits by arguing that state standing is untenable in climate nuisance suits given the broad nature of the relief sought.<sup>84</sup> The Court should resist this effort because it

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84. See Brief for Tennessee Valley Authority as Respondent Supporting Petitioners, *Am. Elec. Power v. Connecticut*, 131 S. Ct. 813 (2010) (No. 10-174), available at [http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/10\\_174\\_brief\\_update/s/10-174\\_PetitionerTVARespondent.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/10_174_brief_update/s/10-174_PetitionerTVARespondent.authcheckdam.pdf).

further undermines the capacity of the states to vindicate climate injuries of the general public.