Supreme Court, U.S.
FILED
SEP 3 - 2010
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No. 10-174

In The
Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,

Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether States and private parties have standing to seek judicially fashioned emissions caps on four private utility companies for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system.

Separation of powers is an essential feature of the American constitutional system and is necessary for the preservation of individual liberty. *Clinton v. New York*, 524 U.S. 417, 450 (1998) ("Separation of

[1] Pursuant to Supreme Court Rule 37.2, letters indicating MSLF's intent to file this amicus curiae brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. The parties have consented to the filing of this brief. Finally, pursuant to Supreme Court Rule 37.6, MSLF affirms that no counsel for a party authored this brief in whole or in part and that no party, person, or entity made a monetary contribution specifically for the preparation or submission of this brief.

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powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty.") (Kennedy, J., concurring); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("The ultimate purpose of . . . separation of powers is to protect the liberty and security of the governed."); *Morrison v. Olson*, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting) ("While the separation of powers may prevent [the Judiciary] from righting every wrong, it does so in order to ensure that we do not lose liberty.").

The Article III requirement of standing is an essential part of the separation of powers. *Allen v. Wright,* 468 U.S. 737, 752 (1984) ("[T]he law of Article III standing is built on a single basic idea – the idea of separation of powers"). "To permit a complainant who has no concrete injury to require a court to rule" on important questions of national importance "would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 222 (1974); *see also United States v. Richardson,* 418 U.S. 166, 192 (1974) (Powell, J., concurring) ("[W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest

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suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens.").

In the instant case, a two-judge panel of the Second Circuit, relying on this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), ruled that eight States, a municipality, and three non-profit land trusts had Article III standing to bring common law tort claims against Petitioners for the purported consequences of global climate change. If this decision is allowed to stand, it would open the floodgates to federal court litigation with respect to an issue of national and global importance that should be addressed by the politically accountable branches of the federal government. Therefore, MSLF respectfully submits this amicus curiae brief in support of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Fearing the uncertain future effects from elevated levels of carbon dioxide in the atmosphere, eight States, three private land trusts, and a municipality (collectively "States") seek to hold four private utility companies ("Petitioners") jointly and severally liable for an ongoing phenomenon, *i.e.*, global climate change. *See generally*, Pet. App. 8a-11a. The States argue that Petitioners' carbon dioxide emissions contribute to atmospheric levels of greenhouse gases ("GHGs"), which contribute to global climate change, which, in turn, will allegedly cause various injuries someday.

Pet. App. 10a-11a. Future injuries alleged by the States include beach erosion, marsh and aquifer salinization caused by rising sea levels, impairment of shipping and recreation in the Great Lakes region caused by declining lake levels, and, more generally, destruction of ecosystems and reduced biodiversity. *Id.* The States themselves are uncertain as to when these alleged injuries would occur but suggest that they might occur sometime within the next 10 to 100 years. Pet. App. 10a-11a.

The district court dismissed the claims as presenting non-justiciable political questions. *Connecticut v. American Electric Power, Inc.*, 406 F.Supp.2d 265, 274 (S.D. N.Y. 2005). In so doing, the district court reasoned that, because climate change is a global phenomenon attributed to global GHG emissions, resolution of the claims would necessarily involve a number of "policy determination[s]," which the Framers intended would be made by the representative Branches. *Id.* at 272. In light of this conclusion, the district court found it unnecessary to address whether the States had standing to bring their claims. *Id.* at 271 n.6.

On appeal, a two-judge panel of the Second Circuit reversed. *Connecticut v. American Electric Power, Inc.*, 582 F.3d 309 (2nd Cir. 2009). As to standing, the panel ruled that the States had both *parens patriae* and proprietary standing in their quasi-sovereign and proprietary capacities, respectively. *Id.* at 392. In so doing, the panel noted that this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007),

"arguably muddled state proprietary and *parens patriae* standing." *Id.* at 337. Nonetheless, the panel purportedly followed *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) ("*Snapp*"), to conclude that the States had *parens patriae* standing to protect their quasi-sovereign interests. *Connecticut,* 582 F.3d at 338-39.

Importantly, the panel recognized that this Court's decision in *Massachusetts* had "called into question" whether *Snapp*'s *parens patriae* test satisfied Article III. *Connecticut*, 582 F.3d at 336; *see also*, *Massachusetts,* 548 U.S. at 539 (Roberts, C.J., dissenting) (Criticizing the majority for "tak[ing] what has always been regarded as a necessary condition for *parens patriae* standing – a quasi-sovereign interest – and convert[ing] it into a sufficient showing for purposes of Article III."). Thus, the panel asked two questions: "What is the role of Article III *parens patriae* standing in relation to the test set out in [*Lujan v. Defenders of Wildlife*, 504 U.S. 555, (1992)]?" and "Must a state asserting *parens patriae* standing satisfy both the *Snapp* and *Lujan* tests?" *Connecticut*, 582 F.3d at 338. The panel conveniently avoided answering these important questions because it determined that the States had proprietary standing under *Lujan*. *Connecticut*, 582 F.3d at 339-49. In so doing, the panel purportedly applied *Lujan*'s well-known "injury-causation-redressability" test. *Connecticut*, 582 F.3d at 339-40. Although the States did not have a purported procedural right that was of critical importance in *Massachusetts,* the Second Circuit still

applied *Massachusetts*'s relaxed injury-causation-redressability requirements to conclude that States had standing to seek injunctive relief with respect to Petitioners' purported contribution to global climate change. *Connecticut*, 582 F.3d at 339-49.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE TENSION BETWEEN *MASSACHUSETTS* AND *LUJAN*.

I. *LUJAN* REAFFIRMED THE "IMMUTABLE" REQUIREMENTS OF ARTICLE III STANDING.

In *Lujan,* environmental groups brought an action, under the citizen-suit provision of the Endangered Species Act, 16 U.S.C. §1540(g), challenging the Secretary of the Interior's regulations that required other agencies to consult only with respect to federally funded projects in the United States and on the highs seas.[2] 504 U.S. at 558-59. In holding that the environmental groups lacked standing, this Court reaffirmed that the "irreducible constitutional minimum" of standing contains three requirements:

[2] The citizen-suit provision provides, in relevant part, that "any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter." 16 U.S.C. § 1540(g)(1)(A).

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

504 U.S. at 560-61 (1992) (citations, quotations, ellipses, brackets, and footnotes omitted). Importantly, these "immutable" requirements of Article III standing may not be modified or abrogated by either the federal judiciary or Congress.[3] *Bennett*, 520 U.S.

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[3] In addition to these immutable requirements, this Court also adheres "to a set of prudential principles that bear on the question of standing." *Valley Forge Christian College v. Americans United for Separation of Church and States*, 454 U.S. 464, 471-72 (1982). "Like their constitutional counterparts, these judicially self-imposed limits on the exercise of federal jurisdiction are founded in concern about the proper – and properly limited – role of the courts in a democratic society[.]" *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quotations omitted). One important prudential principal is the "rule barring adjudication of generalized grievances more appropriately addressed in the representative branches. . . ." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen*, 468 U.S. at 751). As aptly demonstrated by Federal Respondent, the States' claims in the instant case are nothing more than generalized

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at 162; *Raines v. Byrd,* 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.") (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)).

In affirming these immutable requirements, this Court recognized a possible narrow exception, *i.e.*, where a plaintiff is "seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest . . . (*e.g.* the procedural requirement of a hearing prior to the denial of their license application . . .)." *Lujan,* 504 U.S. at 572. Under such circumstances, this Court suggested that a plaintiff could establish standing "without meeting all the normal standards for redressability and immediacy."[4] *Lujan*, 504 U.S. at 572 n.7. The basis for

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grievances that are more appropriately addressed in the representative Branches. Brief for the Tennessee Valley Authority In Support Of Petitioners, at 11-22.

[4] Importantly, this Court did not relax the causation requirement. To the contrary, a plaintiff still must show that the impairment of the concrete interest is fairly traceable to the procedural violation. *Lujan*, 504 U.S. at 572 n.8; *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664-65 (D.C. Cir. 1996) (en banc) ("[T]he Court has never freed a plaintiff alleging a procedural violation from showing a causal connection between the government action that supposedly required the disregarded procedure and some reasonably increased risk of injury to its particularized interest. . . . To demonstrate standing . . . a procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is *substantially probable* that the procedural breach will cause the

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the relaxed requirements of redressability and immediacy is to ensure the federal government's compliance with the procedural requirements established by either the Constitution or Congress to protect an individual's particularized concrete interest from impairment. *Lujan,* 504 U.S. at 572. Without the threat of impairment to a particularized concrete interest, an individual plaintiff would be able to raise purely public rights, *i.e.*, generalized grievances. *Id.* at 573-78. This, in turn, would allow individuals to usurp the President's most important constitutional duty, *i.e.*, to "take care that the Laws be faithfully executed, Art. II, § 3." *Id.* at 577. Based upon these separation of powers considerations and the lack of injury and redressability, this Court ruled that the environmental groups lacked Article III standing. *Lujan*, 504 U.S. at 563-78.

II. *MASSACHUSETTS* IS IN TENSION WITH *LUJAN.*

In *Massachusetts,* this Court held that that Massachusetts had standing to challenge the Environmental Protection Agency's ("EPA") denial of a rulemaking petition seeking to regulate GHG emissions from new motor vehicles under the Clean Air Act. 549 U.S. at 526. That "Congress ha[d] authorized this type of challenge" in the CAA was "of critical

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essential injury to the plaintiff's own interest.") (emphasis added).

importance" to this Court's standing analysis.[5] *Id.* at 516. Recognizing that a plaintiff normally must meet the immutable requirements of standing, *id.* at 517, this Court relied on the purported procedural right in the CAA to find that Massachusetts did not have to meet the normal requirements for redressability and immediacy. *Id.* at 517-18. ("[A] litigant to whom Congress has 'accorded a procedural right . . . can assert that right without meeting all the normal standards for redressability and immediacy[.]'") (quoting *Lujan*, 504 U.S. at 572, n.7).

Next, this Court noted that the party seeking review was "a sovereign State and not, as it was in [*Lujan*], a private individual." *Id.* at 518. In this Court's view, this was "of considerable relevance," for "States are not normal litigants for the purposes of invoking federal jurisdiction" because they have a "desire to preserve [their] sovereign territory. . . ." *Id.* Thus, this Court 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." *Id.* at 520 (emphasis added). Inexplicably, this Court then proceeded to analyze Massachusetts's standing as a

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[5] The provision of the CAA referred to by this Court provides, in relevant part: "A petition for review of action of the Administrator in promulgating any . . . standard under section 7521 of this title . . . or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607(b)(1).

proprietor under *Lujan*. *Massachusetts,* 549 U.S. at 521-26.

This Court found injury based upon alleged rising sea levels that had begun to and would continue to encroach on Massachusetts's coastal land. *Id.* at 522. This Court then found that this injury was fairly traceable to the EPA's refusal to regulate GHG emissions from new motor vehicles because those emissions "contributed" to the injury. *Id.* at 523. Finally, this Court found redressability existed because, if the EPA regulated emissions from new motor vehicles, global warming may be slowed or reduced.[6] *Id.* at 524.

The conflicts between *Massachusetts* and *Lujan* are numerous, but four are of utmost importance. First, *Massachusetts* greatly expands *Lujan's* narrow relaxing of the immutable requirements of Article III standing for procedural rights. In *Lujan*, this Court mentioned this exception in making a distinction

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[6] It is "not at all clear how the Court's 'special solicitude' for Massachusetts as a State" affects the Court's standing analysis, *id.* at 540 (Roberts, C.J., dissenting), especially considering the fusion of proprietary standing, *parens patriae* standing, and the procedural-right exception. For example, "[t]he Court asserts that Massachusetts is entitled to 'special solicitude' due to its 'quasi-sovereign interests,' . . . but then applies . . . Article III standing test to the asserted injury of the Commonwealth's loss of coastal property." *Id.* at 539 (Roberts, C.J., dissenting) (citations omitted). State ownership of property, however, has historically been recognized as a " 'non-sovereign interest[.]' " *Id.* at 539 (Roberts, C.J., dissenting) (quoting *Snapp*, 458 U.S. at 601).

between "[those who] are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest . . . ," *Lujan*, 503 U.S. at 572, and putative plaintiffs who had not suffered an injury but had been given a right of review by Congress. *Id.* Tellingly, in *Massachusetts* the purported "procedural right" conferred by the CAA, 42 U.S.C. § 7607(b)(1), which formed the basis for this Court's holding, is simply a judicial review provision. It is not a procedural safeguard designed to protect a particularized concrete interest. *See Lujan,* 504 U.S. at 572 (noting that such a procedural safeguard would be the procedural requirement for a hearing prior to the denial of a license application). The similarity between the citizen-suit provision in *Lujan* and the judicial review provision in *Massachusetts* yet the differing outcomes demonstrates the tension between the two cases. Indeed, *Lujan* had already explicitly rejected the idea that a simple judicial review provision could confer Article III standing. 504 U.S. at 571-78.

Second, *Massachusetts* essentially eliminated the causation requirement, at least where a procedural right is involved. *Lujan* demands that the plaintiff show that the complained of injury be "fairly traceable" to the defendant's conduct and not "'the result of the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)); *see also Fla. Audubon Soc'y*, 94 F.3d at

663 (The plaintiff must show that "it is substantially probable . . . that the challenged acts of the defendant, not of some absent third party, will cause the particularized injury of the plaintiff."). The more attenuated the causal chain between the challenged conduct and the asserted injury, the less likely the plaintiff will be able to establish causation. *Allen*, 468 U.S. at 757-58.

In *Massachusetts,* this Court found causation based upon the following syllogism:

- Man-made GHG emissions contribute to global warming;
- Global warming and the concomitant rising of sea levels have caused Massachusetts to lose a portion of its coastline, and future increases in global temperatures would cause it to lose more;
- A minute portion of global warming is attributable to GHG emissions from new motor vehicles sold in the United States;
- The EPA's failure to regulate those emissions have caused total GHG emissions to be higher than they would have been with such regulation; and
- Therefore, Massachusetts's injury is "fairly traceable" to the EPA's failure to regulate GHG emissions from new motor vehicles sold in the United States.

See Massachusetts, 549 U.S. at 542-43 (Roberts, C.J., dissenting).

This attenuated causal chain is inconsistent with *Lujan*'s requirement that the plaintiff's injury not be the result of the independent action of some third party. 504 U.S. at 560. Indeed, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (quoting *Allen*, 468 U.S. at 758). It stretches credulity to suggest that Massachusetts's asserted injury is "fairly traceable" to the EPA failure to regulate GHG emissions from new motor vehicles. *See Massachusetts,* 549 U.S. at 544 (Roberts, C.J., dissenting) (noting over 95 percent of the global GHG emissions come from sources other than domestic new motor vehicles). To overcome this infirmity, this Court suggested that causation was satisfied because EPA failure to regulate GHG emissions from new motor vehicles "contributes" to Massachusetts's loss of coastline. *Id.* at 523.

Third, *Massachusetts* created a new redressability requirement. In *Lujan* this Court ruled that it must be "likely," as opposed to merely "speculative," that the plaintiffs' alleged injury will be "redressed by a favorable decision." 504 U.S. at 560-61. *Massachusetts* changed this requirement so that, in certain circumstances, redressability is satisfied if any problem may be redressed, even slightly. Indeed, this is evident from the following:

> 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. Because of the enormity of the potential consequences associated with man-made climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant. Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.

Massachusetts, 549 U.S. at 525-26 (emphasis in original) (citation and footnote omitted). The flaw with this logic is that the purported remedy (lowering emissions from new motor vehicles) is not "likely" to redress Massachusetts's alleged injury (loss of coastal land). Moreover, "the province of the court is, solely, to decide on the rights of individuals," *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 170 (1803), not to vindicate the public interest in environmental protection or a stable climate. *See Lujan*, 504 U.S. at 576-77; *Summers v. Earth Island Inst.*, ___ U.S. ___, 129 S.Ct. 1142, 1149 (2009) (an allegation of harm to the environment, in and of itself, will not support standing); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000) ("The relevant showing for purposes of Article III standing . . . is not injury to the environment but

injury to the plaintiff."); *Center for Biological Diversity v. U.S. Department of the Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) ("Standing analysis does not examine whether the environment in general has suffered an injury.").

Finally, this Court seemingly relaxed Article III's immutable standing requirements simply because a State was involved. *Massachusetts*, 549 U.S. at 520 ("Given . . . Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis."). This Court believed that doing so was permissible because *Lujan* involved private entities. *Id.* at 518 ("It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual."). There is no basis in either *Lujan* or any of this Court's precedents for the proposition that standing requirements are relaxed whenever a State is a plaintiff. *See Snapp,* 458 U.S. at 602 (recognizing that when a State sues as *parens patriae* to protect its quasi-sovereign interests it must still satisfy Article III standing requirements); *see also*, *Massachusetts* 549 U.S. at 536 (Roberts, C.J., dissenting) ("Relaxing Article III standing requirements because asserted injuries are pressed by a State . . . has no basis in our jurisprudence. . . ."); Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 Colum. J. Envtl. L. 293, 304-05 (2005) (recommending that when a State sues in

federal court to vindicate a quasi-sovereign interest, the State "should be subject to the same Article III and prudential standing limitations that apply to suits by aggrieved citizens."). Granted, *Lujan* involved private entities and their individual members, but there is no suggestion in *Lujan* that the immutable requirements of Article III standing apply only to private entities. Rather, in describing the immutable requirements, this Court used the generic word "party" that applies to individuals, organizations, and States alike. *Lujan*, 504 U.S. at 561 ("The *party* invoking federal jurisdiction bears the burden of establishing these elements.") (emphasis added).

III. THE TENSION BETWEEN *MASSACHUSETTS* AND *LUJAN* HAS CREATED CONFUSION IN THE LOWER COURTS.

Needless to say, the tension between *Massachusetts* and *Lujan* has created confusion in the lower courts. For example, in the instant case, the Second Circuit extended *Massachusetts* to find that the States had standing to bring common law nuisance claims for alleged future injuries from global climate change. *Connecticut*, 582 F.3d at 345-47. Although the States did not have a purported procedural right that was of importance in *Massachusetts*, the Second Circuit still applied *Massachusetts*'s relaxed standing requirements to conclude that States had standing to seek injunctive relief with respect to Petitioners'

purported contribution to global climate change. For example, the panel found that an alleged reduced snow pack in California was a current injury-in-fact similar to the purported coastal loss in *Massachusetts*.[7] *Connecticut*, 582 F.3d at 341. Based upon *Massachusetts*, the panel also found that the States' alleged future injuries that might occur within the next 10 to 100 years if global climate change were not abated was injury-in-fact. *Id.* at 342-44. The panel applied *Massachusetts*'s "contributor theory" to find causation because Petitioners' emissions arguably contribute to the States' alleged future injuries. *Connecticut*, 582 F.3d at 345-47. Finally, the panel found that, although Petitioners emit only a small fraction of the world's man-made carbon dioxide emissions, the States satisfied the redressability requirement because in *Massachusetts* it was sufficient to show that the requested remedy would "'*slow* or *reduce*'" global climate change. *Connecticut*, 582 F.3d at 347-49 (quoting *Massachusetts*, 549 U.S. at 525) (emphasis in original).

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[7] An alleged current injury would seem to be irrelevant because the States are not seeking damages, but only injunctive relief to redress alleged future injuries. *Connecticut*, 582 F.3d at 318. As this Court explained in *Los Angeles v. Lyons*, 461 U.S. 95, 102-13 (1983), alleged current injuries may establish standing for damages but do not establish standing for injunctive relief against possible future injuries. Indeed, just as "[s]tanding is not dispensed in gross[,]" *Lewis v. Casey*, 518 U.S. 343, 358, n.6 (1996), neither is equitable relief. *Cf. DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (a plaintiff must demonstrate standing for each claim and type of relief).

Similarly, in *Comer v. Murphy Oil USA*, 585 F.3d 855, 859-60 (5th Cir. 2009), a group of Mississippi residents and property owners filed a putative class action seeking compensatory and punitive damages from dozens of oil, coal, chemical, and utility companies for harms caused by Hurricane Katrina. The plaintiffs alleged that the defendants' emissions of GHGs contributed to global warming that, in turn, caused a rise in sea levels, which added to the ferocity of Katrina. *Id.* at 859. The plaintiffs raised, *inter alia*, various claims under state common-law tort theories. *Id.* at 859-69. The district court dismissed the case. *Id.* at 860. A three-judge panel of the Fifth Circuit reversed. In so doing, the panel applied *Massachusetts*'s "contributor theory" of causation to conclude that the plaintiffs had standing. *Id.* at 864-67. Ultimately, the panel's decision was vacated on the grant of rehearing en banc and the appeal was later dismissed. *Comer v. Murphy Oil USA,* 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010). Yet, that the panel applied *Massachusetts*'s "contributor theory," even though a State was not a plaintiff seeking to enforce a procedural right, shows the confusion caused by the tension between *Massachusetts* and *Lujan*.

Conversely, in *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir.), a native village and a city brought nuisance claims

against numerous oil, energy, and utility companies seeking compensation for costs to be incurred in relocating their village. 663 F.Supp.2d at 868-69. The plaintiffs alleged that global climate change has reduced the Arctic sea ice on the coast, threatening the village and city with destruction from winter storms that erode the coastline, which would, ultimately, require the plaintiffs to relocate. *Id.* In accordance with *Lujan*, the district court correctly dismissed the case for lack of standing because the plaintiffs could not trace their alleged injuries to any of the defendants' emissions. *Id.* at 880 n.7 ("[I]t is illogical to conclude that the mere contribution of greenhouse gases into the atmosphere is sufficient to establish that a plaintiff's injury is fairly traceable to a defendant's conduct.").

In cases not involving tort claims, the courts are similarly confused as to how to reconcile *Massachusetts* and *Lujan*. For example, in *Center for Biological Diversity* the petitioners challenged an offshore oil and gas leasing program on both substantive and procedural grounds. In short, the petitioners argued that the federal agency had failed to consider the effects of GHG emissions associated with the program and the effects of climate change on the wildlife in the areas to be leased. 563 F.3d at 475.

The D.C. Circuit ruled that the petitioners lacked standing to challenge the leasing program on substantive grounds. *Id.* at 476-79. Purporting to eschew the relaxed standing requirements from *Massachusetts* because a State was not a party, the D.C. Circuit

found that petitioners failed to establish standing because their alleged injury from global climate change to the wildlife they enjoy was too general. *Id.* at 476-78. The D.C. Circuit also ruled that, even if the petitioners would have been able to satisfy the injury requirement, they still would have lacked standing because they could not establish a causal link between the challenged agency action and their alleged injury. *Id.* at 478-79. In so doing, the D.C. Circuit ruled that the following casual chain was too attenuated:

- The leasing program will bring about drilling;
- Drilling will bring about more oil;
- This oil will be consumed;
- Consumption of this oil will result in additional carbon dioxide being emitted into the air;
- This carbon dioxide will consequently cause climate change;
- This climate change will adversely affect the wildlife that the petitioners enjoy; and
- Therefore, the petitioners are injured by the adverse effects on the wildlife they enjoy.

Id. at 478-79. The D.C. Circuit properly rejected this causal chain because "[s]uch a causal chain . . . rel[ies] on the speculation that various different

groups of actors not present in this case – namely, oil companies, individuals using oil in their cars, cars actually dispersing carbon dioxide – might act in a certain way in the future." *Id.* at 479.

Inexplicably, the D.C. Circuit then ruled that this same causal chain was sufficient for the petitioners to have procedural standing. *Id.* In *Lujan*, this Court explained that only redressability and immediacy were relaxed when a plaintiff asserts a procedural right. 504 U.S. at 572 n.7. This Court did not relax the causation element. Thus, if the D.C. Circuit's ruling is a precursor of what is to come, environmental groups will be able to challenge a federal agency's failure to comply with a procedural requirement without having to prove a causal relationship between the failure to comply with that requirement and the impairment of a concrete interest. *See Lujan*, 504 U.S. at 572 n.8 (Rejecting the idea that the violation of a procedural requirement "satisfies the concrete-injury requirement by itself, without any showing that the procedural violation endangers a concrete interest of the plaintiff. . . .").

IV. THIS CASE PRESENTS AN EXCELLENT OPPORTUNITY FOR THIS COURT TO RESOLVE THE TENSION BETWEEN *MASSACHUSETTS* AND *LUJAN*.

The confusion in the lower courts, as demonstrated by, *inter alia*, the instant case, *Comer*, *Kivalina*, and *Center for Biological Diversity,* is understandable.

So long as that confusion remains, the lower courts will continue to struggle to resolve the tension between *Massachusetts* and *Lujan*. The instant case presents an excellent opportunity for this Court to resolve this tension, just as this Court has done in similar situations. *See, e.g.*, *Ring v. Arizona,* 536 U.S. 584, 598 (2002) (Granting certiorari to resolve the tension between *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Walton v. Arizona*, 497 U.S. 639 (1990)); *Okla. Tax Comm'n v. Citizen Band P. Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) ("We granted certiorari to resolve an apparent conflict with this Court's precedents and to clarify the law of sovereign immunity with respect to the collection of sales taxes on Indian lands."); *Wainwright v. Witt*, 469 U.S. 412, 417-18 (1985) (Granting certiorari because this "case raises questions on which there is considerable confusion in the lower courts, concerning the degree of deference that a federal habeas court should pay to a state trial judge's determination that a juror may be excused for cause under [*Witherspoon v. Illinois*, 391 U.S. 510 (1968)]"); *Oliver v. United States*, 466 U.S. 170, 173 (1984) (Granting certiorari to clarify the confusion that has arisen as to the continued vitality of the "open fields" doctrine enunciated in *Hester v. United States*, 265 U.S. 57 (1924)); *Michigan v. Clifford*, 464 U.S. 287, 289 (1984) ("We granted certiorari to clarify doubt that appears to exist as to the application of our decision in [*Michigan v. Tyler*, 436 U.S. 499 (1978)]").

CONCLUSION

For the foregoing reasons, this Court should grant Certiorari.

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September 3, 2010

Supreme Court, U.S.
FILED
SEP 3 - 2010
OFFICE OF THE CLERK

No. 10-174

In The
Supreme Court of the United States

AMERICAN ELECTRIC POWER COMPANY INC., *et al.*,

Petitioners,

v.

STATE OF CONNECTICUT, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether States and private parties have standing to seek judicially fashioned emissions caps on four private utility companies for their alleged contribution to harms claimed to arise from global climate change caused by more than a century of emissions by billions of independent sources.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system.

Separation of powers is an essential feature of the American constitutional system and is necessary for the preservation of individual liberty. *Clinton v. New York*, 524 U.S. 417, 450 (1998) ("Separation of

[1] Pursuant to Supreme Court Rule 37.2, letters indicating MSLF's intent to file this amicus curiae brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. The parties have consented to the filing of this brief. Finally, pursuant to Supreme Court Rule 37.6, MSLF affirms that no counsel for a party authored this brief in whole or in part and that no party, person, or entity made a monetary contribution specifically for the preparation or submission of this brief.

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powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty.") (Kennedy, J., concurring); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.,* 501 U.S. 252, 272 (1991) ("The ultimate purpose of . . . separation of powers is to protect the liberty and security of the governed."); *Morrison v. Olson*, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting) ("While the separation of powers may prevent [the Judiciary] from righting every wrong, it does so in order to ensure that we do not lose liberty.").

The Article III requirement of standing is an essential part of the separation of powers. *Allen v. Wright,* 468 U.S. 737, 752 (1984) ("[T]he law of Article III standing is built on a single basic idea – the idea of separation of powers"). "To permit a complainant who has no concrete injury to require a court to rule" on important questions of national importance "would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 222 (1974); *see also United States v. Richardson,* 418 U.S. 166, 192 (1974) (Powell, J., concurring) ("[W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest

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suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens.").

In the instant case, a two-judge panel of the Second Circuit, relying on this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), ruled that eight States, a municipality, and three non-profit land trusts had Article III standing to bring common law tort claims against Petitioners for the purported consequences of global climate change. If this decision is allowed to stand, it would open the floodgates to federal court litigation with respect to an issue of national and global importance that should be addressed by the politically accountable branches of the federal government. Therefore, MSLF respectfully submits this amicus curiae brief in support of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Fearing the uncertain future effects from elevated levels of carbon dioxide in the atmosphere, eight States, three private land trusts, and a municipality (collectively "States") seek to hold four private utility companies ("Petitioners") jointly and severally liable for an ongoing phenomenon, *i.e.*, global climate change. *See generally*, Pet. App. 8a-11a. The States argue that Petitioners' carbon dioxide emissions contribute to atmospheric levels of greenhouse gases ("GHGs"), which contribute to global climate change, which, in turn, will allegedly cause various injuries someday.

Pet. App. 10a-11a. Future injuries alleged by the States include beach erosion, marsh and aquifer salinization caused by rising sea levels, impairment of shipping and recreation in the Great Lakes region caused by declining lake levels, and, more generally, destruction of ecosystems and reduced biodiversity. *Id.* The States themselves are uncertain as to when these alleged injuries would occur but suggest that they might occur sometime within the next 10 to 100 years. Pet. App. 10a-11a.

The district court dismissed the claims as presenting non-justiciable political questions. *Connecticut v. American Electric Power, Inc.*, 406 F.Supp.2d 265, 274 (S.D. N.Y. 2005). In so doing, the district court reasoned that, because climate change is a global phenomenon attributed to global GHG emissions, resolution of the claims would necessarily involve a number of "policy determination[s]," which the Framers intended would be made by the representative Branches. *Id.* at 272. In light of this conclusion, the district court found it unnecessary to address whether the States had standing to bring their claims. *Id.* at 271 n.6.

On appeal, a two-judge panel of the Second Circuit reversed. *Connecticut v. American Electric Power, Inc.*, 582 F.3d 309 (2nd Cir. 2009). As to standing, the panel ruled that the States had both *parens patriae* and proprietary standing in their quasi-sovereign and proprietary capacities, respectively. *Id.* at 392. In so doing, the panel noted that this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007),

"arguably muddled state proprietary and *parens patriae* standing." *Id.* at 337. Nonetheless, the panel purportedly followed *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) ("*Snapp*"), to conclude that the States had *parens patriae* standing to protect their quasi-sovereign interests. *Connecticut,* 582 F.3d at 338-39.

Importantly, the panel recognized that this Court's decision in *Massachusetts* had "called into question" whether *Snapp*'s *parens patriae* test satisfied Article III. *Connecticut*, 582 F.3d at 336; *see also*, *Massachusetts,* 548 U.S. at 539 (Roberts, C.J., dissenting) (Criticizing the majority for "tak[ing] what has always been regarded as a necessary condition for *parens patriae* standing – a quasi-sovereign interest – and convert[ing] it into a sufficient showing for purposes of Article III."). Thus, the panel asked two questions: "What is the role of Article III *parens patriae* standing in relation to the test set out in [*Lujan v. Defenders of Wildlife*, 504 U.S. 555, (1992)]?" and "Must a state asserting *parens patriae* standing satisfy both the *Snapp* and *Lujan* tests?" *Connecticut*, 582 F.3d at 338. The panel conveniently avoided answering these important questions because it determined that the States had proprietary standing under *Lujan*. *Connecticut*, 582 F.3d at 339-49. In so doing, the panel purportedly applied *Lujan*'s well-known "injury-causation-redressability" test. *Connecticut*, 582 F.3d at 339-40. Although the States did not have a purported procedural right that was of critical importance in *Massachusetts,* the Second Circuit still

applied *Massachusetts*'s relaxed injury-causation-redressability requirements to conclude that States had standing to seek injunctive relief with respect to Petitioners' purported contribution to global climate change. *Connecticut*, 582 F.3d at 339-49.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE TENSION BETWEEN *MASSACHUSETTS* AND *LUJAN*.

I. *LUJAN* REAFFIRMED THE "IMMUTABLE" REQUIREMENTS OF ARTICLE III STANDING.

In *Lujan,* environmental groups brought an action, under the citizen-suit provision of the Endangered Species Act, 16 U.S.C. §1540(g), challenging the Secretary of the Interior's regulations that required other agencies to consult only with respect to federally funded projects in the United States and on the highs seas.[2] 504 U.S. at 558-59. In holding that the environmental groups lacked standing, this Court reaffirmed that the "irreducible constitutional minimum" of standing contains three requirements:

[2] The citizen-suit provision provides, in relevant part, that "any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter." 16 U.S.C. § 1540(g)(1)(A).

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

504 U.S. at 560-61 (1992) (citations, quotations, ellipses, brackets, and footnotes omitted). Importantly, these "immutable" requirements of Article III standing may not be modified or abrogated by either the federal judiciary or Congress.[3] *Bennett*, 520 U.S.

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[3] In addition to these immutable requirements, this Court also adheres "to a set of prudential principles that bear on the question of standing." *Valley Forge Christian College v. Americans United for Separation of Church and States*, 454 U.S. 464, 471-72 (1982). "Like their constitutional counterparts, these judicially self-imposed limits on the exercise of federal jurisdiction are founded in concern about the proper – and properly limited – role of the courts in a democratic society[.]" *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quotations omitted). One important prudential principal is the "rule barring adjudication of generalized grievances more appropriately addressed in the representative branches. . . ." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *Allen*, 468 U.S. at 751). As aptly demonstrated by Federal Respondent, the States' claims in the instant case are nothing more than generalized

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at 162; *Raines v. Byrd,* 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.") (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)).

In affirming these immutable requirements, this Court recognized a possible narrow exception, *i.e.*, where a plaintiff is "seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest . . . (*e.g.* the procedural requirement of a hearing prior to the denial of their license application . . .)." *Lujan,* 504 U.S. at 572. Under such circumstances, this Court suggested that a plaintiff could establish standing "without meeting all the normal standards for redressability and immediacy."[4] *Lujan*, 504 U.S. at 572 n.7. The basis for

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grievances that are more appropriately addressed in the representative Branches. Brief for the Tennessee Valley Authority In Support Of Petitioners, at 11-22.

[4] Importantly, this Court did not relax the causation requirement. To the contrary, a plaintiff still must show that the impairment of the concrete interest is fairly traceable to the procedural violation. *Lujan*, 504 U.S. at 572 n.8; *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664-65 (D.C. Cir. 1996) (en banc) ("[T]he Court has never freed a plaintiff alleging a procedural violation from showing a causal connection between the government action that supposedly required the disregarded procedure and some reasonably increased risk of injury to its particularized interest. . . . To demonstrate standing . . . a procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is *substantially probable* that the procedural breach will cause the

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the relaxed requirements of redressability and immediacy is to ensure the federal government's compliance with the procedural requirements established by either the Constitution or Congress to protect an individual's particularized concrete interest from impairment. *Lujan,* 504 U.S. at 572. Without the threat of impairment to a particularized concrete interest, an individual plaintiff would be able to raise purely public rights, *i.e.*, generalized grievances. *Id.* at 573-78. This, in turn, would allow individuals to usurp the President's most important constitutional duty, *i.e.*, to "take care that the Laws be faithfully executed, Art. II, § 3." *Id.* at 577. Based upon these separation of powers considerations and the lack of injury and redressability, this Court ruled that the environmental groups lacked Article III standing. *Lujan*, 504 U.S. at 563-78.

II. *MASSACHUSETTS* IS IN TENSION WITH *LUJAN.*

In *Massachusetts,* this Court held that that Massachusetts had standing to challenge the Environmental Protection Agency's ("EPA") denial of a rulemaking petition seeking to regulate GHG emissions from new motor vehicles under the Clean Air Act. 549 U.S. at 526. That "Congress ha[d] authorized this type of challenge" in the CAA was "of critical

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essential injury to the plaintiff's own interest.") (emphasis added).

importance" to this Court's standing analysis.[5] *Id.* at 516. Recognizing that a plaintiff normally must meet the immutable requirements of standing, *id.* at 517, this Court relied on the purported procedural right in the CAA to find that Massachusetts did not have to meet the normal requirements for redressability and immediacy. *Id.* at 517-18. ("[A] litigant to whom Congress has 'accorded a procedural right . . . can assert that right without meeting all the normal standards for redressability and immediacy[.]'") (quoting *Lujan*, 504 U.S. at 572, n.7).

Next, this Court noted that the party seeking review was "a sovereign State and not, as it was in [*Lujan*], a private individual." *Id.* at 518. In this Court's view, this was "of considerable relevance," for "States are not normal litigants for the purposes of invoking federal jurisdiction" because they have a "desire to preserve [their] sovereign territory. . . ." *Id.* Thus, this Court 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." *Id.* at 520 (emphasis added). Inexplicably, this Court then proceeded to analyze Massachusetts's standing as a

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[5] The provision of the CAA referred to by this Court provides, in relevant part: "A petition for review of action of the Administrator in promulgating any . . . standard under section 7521 of this title . . . or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607(b)(1).

proprietor under *Lujan*. *Massachusetts,* 549 U.S. at 521-26.

This Court found injury based upon alleged rising sea levels that had begun to and would continue to encroach on Massachusetts's coastal land. *Id.* at 522. This Court then found that this injury was fairly traceable to the EPA's refusal to regulate GHG emissions from new motor vehicles because those emissions "contributed" to the injury. *Id.* at 523. Finally, this Court found redressability existed because, if the EPA regulated emissions from new motor vehicles, global warming may be slowed or reduced.[6] *Id.* at 524.

The conflicts between *Massachusetts* and *Lujan* are numerous, but four are of utmost importance. First, *Massachusetts* greatly expands *Lujan's* narrow relaxing of the immutable requirements of Article III standing for procedural rights. In *Lujan*, this Court mentioned this exception in making a distinction

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[6] It is "not at all clear how the Court's 'special solicitude' for Massachusetts as a State" affects the Court's standing analysis, *id.* at 540 (Roberts, C.J., dissenting), especially considering the fusion of proprietary standing, *parens patriae* standing, and the procedural-right exception. For example, "[t]he Court asserts that Massachusetts is entitled to 'special solicitude' due to its 'quasi-sovereign interests,' . . . but then applies . . . Article III standing test to the asserted injury of the Commonwealth's loss of coastal property." *Id.* at 539 (Roberts, C.J., dissenting) (citations omitted). State ownership of property, however, has historically been recognized as a " 'non-sovereign interest[.]' " *Id.* at 539 (Roberts, C.J., dissenting) (quoting *Snapp*, 458 U.S. at 601).

between "[those who] are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest . . . ," *Lujan*, 503 U.S. at 572, and putative plaintiffs who had not suffered an injury but had been given a right of review by Congress. *Id.* Tellingly, in *Massachusetts* the purported "procedural right" conferred by the CAA, 42 U.S.C. § 7607(b)(1), which formed the basis for this Court's holding, is simply a judicial review provision. It is not a procedural safeguard designed to protect a particularized concrete interest. *See Lujan,* 504 U.S. at 572 (noting that such a procedural safeguard would be the procedural requirement for a hearing prior to the denial of a license application). The similarity between the citizen-suit provision in *Lujan* and the judicial review provision in *Massachusetts* yet the differing outcomes demonstrates the tension between the two cases. Indeed, *Lujan* had already explicitly rejected the idea that a simple judicial review provision could confer Article III standing. 504 U.S. at 571-78.

Second, *Massachusetts* essentially eliminated the causation requirement, at least where a procedural right is involved. *Lujan* demands that the plaintiff show that the complained of injury be "fairly traceable" to the defendant's conduct and not "'the result of the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)); *see also Fla. Audubon Soc'y*, 94 F.3d at

663 (The plaintiff must show that "it is substantially probable . . . that the challenged acts of the defendant, not of some absent third party, will cause the particularized injury of the plaintiff."). The more attenuated the causal chain between the challenged conduct and the asserted injury, the less likely the plaintiff will be able to establish causation. *Allen*, 468 U.S. at 757-58.

In *Massachusetts,* this Court found causation based upon the following syllogism:

- Man-made GHG emissions contribute to global warming;
- Global warming and the concomitant rising of sea levels have caused Massachusetts to lose a portion of its coastline, and future increases in global temperatures would cause it to lose more;
- A minute portion of global warming is attributable to GHG emissions from new motor vehicles sold in the United States;
- The EPA's failure to regulate those emissions have caused total GHG emissions to be higher than they would have been with such regulation; and
- Therefore, Massachusetts's injury is "fairly traceable" to the EPA's failure to regulate GHG emissions from new motor vehicles sold in the United States.

See Massachusetts, 549 U.S. at 542-43 (Roberts, C.J., dissenting).

This attenuated causal chain is inconsistent with *Lujan*'s requirement that the plaintiff's injury not be the result of the independent action of some third party. 504 U.S. at 560. Indeed, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (quoting *Allen*, 468 U.S. at 758). It stretches credulity to suggest that Massachusetts's asserted injury is "fairly traceable" to the EPA failure to regulate GHG emissions from new motor vehicles. *See Massachusetts,* 549 U.S. at 544 (Roberts, C.J., dissenting) (noting over 95 percent of the global GHG emissions come from sources other than domestic new motor vehicles). To overcome this infirmity, this Court suggested that causation was satisfied because EPA failure to regulate GHG emissions from new motor vehicles "contributes" to Massachusetts's loss of coastline. *Id.* at 523.

Third, *Massachusetts* created a new redressability requirement. In *Lujan* this Court ruled that it must be "likely," as opposed to merely "speculative," that the plaintiffs' alleged injury will be "redressed by a favorable decision." 504 U.S. at 560-61. *Massachusetts* changed this requirement so that, in certain circumstances, redressability is satisfied if any problem may be redressed, even slightly. Indeed, this is evident from the following:

> 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. Because of the enormity of the potential consequences associated with man-made climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant. Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.

Massachusetts, 549 U.S. at 525-26 (emphasis in original) (citation and footnote omitted). The flaw with this logic is that the purported remedy (lowering emissions from new motor vehicles) is not "likely" to redress Massachusetts's alleged injury (loss of coastal land). Moreover, "the province of the court is, solely, to decide on the rights of individuals," *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 170 (1803), not to vindicate the public interest in environmental protection or a stable climate. *See Lujan*, 504 U.S. at 576-77; *Summers v. Earth Island Inst.*, ___ U.S. ___, 129 S.Ct. 1142, 1149 (2009) (an allegation of harm to the environment, in and of itself, will not support standing); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000) ("The relevant showing for purposes of Article III standing . . . is not injury to the environment but

injury to the plaintiff."); *Center for Biological Diversity v. U.S. Department of the Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) ("Standing analysis does not examine whether the environment in general has suffered an injury.").

Finally, this Court seemingly relaxed Article III's immutable standing requirements simply because a State was involved. *Massachusetts*, 549 U.S. at 520 ("Given . . . Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis."). This Court believed that doing so was permissible because *Lujan* involved private entities. *Id.* at 518 ("It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual."). There is no basis in either *Lujan* or any of this Court's precedents for the proposition that standing requirements are relaxed whenever a State is a plaintiff. *See Snapp,* 458 U.S. at 602 (recognizing that when a State sues as *parens patriae* to protect its quasi-sovereign interests it must still satisfy Article III standing requirements); *see also*, *Massachusetts* 549 U.S. at 536 (Roberts, C.J., dissenting) ("Relaxing Article III standing requirements because asserted injuries are pressed by a State . . . has no basis in our jurisprudence. . . ."); Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 Colum. J. Envtl. L. 293, 304-05 (2005) (recommending that when a State sues in

federal court to vindicate a quasi-sovereign interest, the State "should be subject to the same Article III and prudential standing limitations that apply to suits by aggrieved citizens."). Granted, *Lujan* involved private entities and their individual members, but there is no suggestion in *Lujan* that the immutable requirements of Article III standing apply only to private entities. Rather, in describing the immutable requirements, this Court used the generic word "party" that applies to individuals, organizations, and States alike. *Lujan*, 504 U.S. at 561 ("The *party* invoking federal jurisdiction bears the burden of establishing these elements.") (emphasis added).

III. THE TENSION BETWEEN *MASSACHUSETTS* AND *LUJAN* HAS CREATED CONFUSION IN THE LOWER COURTS.

Needless to say, the tension between *Massachusetts* and *Lujan* has created confusion in the lower courts. For example, in the instant case, the Second Circuit extended *Massachusetts* to find that the States had standing to bring common law nuisance claims for alleged future injuries from global climate change. *Connecticut*, 582 F.3d at 345-47. Although the States did not have a purported procedural right that was of importance in *Massachusetts,* the Second Circuit still applied *Massachusetts*'s relaxed standing requirements to conclude that States had standing to seek injunctive relief with respect to Petitioners'

purported contribution to global climate change. For example, the panel found that an alleged reduced snow pack in California was a current injury-in-fact similar to the purported coastal loss in *Massachusetts*.[7] *Connecticut*, 582 F.3d at 341. Based upon *Massachusetts*, the panel also found that the States' alleged future injuries that might occur within the next 10 to 100 years if global climate change were not abated was injury-in-fact. *Id.* at 342-44. The panel applied *Massachusetts*'s "contributor theory" to find causation because Petitioners' emissions arguably contribute to the States' alleged future injuries. *Connecticut*, 582 F.3d at 345-47. Finally, the panel found that, although Petitioners emit only a small fraction of the world's man-made carbon dioxide emissions, the States satisfied the redressability requirement because in *Massachusetts* it was sufficient to show that the requested remedy would "'*slow* or *reduce*'" global climate change. *Connecticut*, 582 F.3d at 347-49 (quoting *Massachusetts*, 549 U.S. at 525) (emphasis in original).

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[7] An alleged current injury would seem to be irrelevant because the States are not seeking damages, but only injunctive relief to redress alleged future injuries. *Connecticut*, 582 F.3d at 318. As this Court explained in *Los Angeles v. Lyons*, 461 U.S. 95, 102-13 (1983), alleged current injuries may establish standing for damages but do not establish standing for injunctive relief against possible future injuries. Indeed, just as "[s]tanding is not dispensed in gross[,]" *Lewis v. Casey*, 518 U.S. 343, 358, n.6 (1996), neither is equitable relief. *Cf. DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (a plaintiff must demonstrate standing for each claim and type of relief).

Similarly, in *Comer v. Murphy Oil USA*, 585 F.3d 855, 859-60 (5th Cir. 2009), a group of Mississippi residents and property owners filed a putative class action seeking compensatory and punitive damages from dozens of oil, coal, chemical, and utility companies for harms caused by Hurricane Katrina. The plaintiffs alleged that the defendants' emissions of GHGs contributed to global warming that, in turn, caused a rise in sea levels, which added to the ferocity of Katrina. *Id.* at 859. The plaintiffs raised, *inter alia*, various claims under state common-law tort theories. *Id.* at 859-69. The district court dismissed the case. *Id.* at 860. A three-judge panel of the Fifth Circuit reversed. In so doing, the panel applied *Massachusetts*'s "contributor theory" of causation to conclude that the plaintiffs had standing. *Id.* at 864-67. Ultimately, the panel's decision was vacated on the grant of rehearing en banc and the appeal was later dismissed. *Comer v. Murphy Oil USA,* 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010). Yet, that the panel applied *Massachusetts*'s "contributor theory," even though a State was not a plaintiff seeking to enforce a procedural right, shows the confusion caused by the tension between *Massachusetts* and *Lujan*.

Conversely, in *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863 (N.D. Cal. 2009), *appeal pending*, No. 09-17490 (9th Cir.), a native village and a city brought nuisance claims

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against numerous oil, energy, and utility companies seeking compensation for costs to be incurred in relocating their village. 663 F.Supp.2d at 868-69. The plaintiffs alleged that global climate change has reduced the Arctic sea ice on the coast, threatening the village and city with destruction from winter storms that erode the coastline, which would, ultimately, require the plaintiffs to relocate. *Id.* In accordance with *Lujan*, the district court correctly dismissed the case for lack of standing because the plaintiffs could not trace their alleged injuries to any of the defendants' emissions. *Id.* at 880 n.7 ("[I]t is illogical to conclude that the mere contribution of greenhouse gases into the atmosphere is sufficient to establish that a plaintiff's injury is fairly traceable to a defendant's conduct.").

In cases not involving tort claims, the courts are similarly confused as to how to reconcile *Massachusetts* and *Lujan*. For example, in *Center for Biological Diversity* the petitioners challenged an offshore oil and gas leasing program on both substantive and procedural grounds. In short, the petitioners argued that the federal agency had failed to consider the effects of GHG emissions associated with the program and the effects of climate change on the wildlife in the areas to be leased. 563 F.3d at 475.

The D.C. Circuit ruled that the petitioners lacked standing to challenge the leasing program on substantive grounds. *Id.* at 476-79. Purporting to eschew the relaxed standing requirements from *Massachusetts* because a State was not a party, the D.C. Circuit

found that petitioners failed to establish standing because their alleged injury from global climate change to the wildlife they enjoy was too general. *Id.* at 476-78. The D.C. Circuit also ruled that, even if the petitioners would have been able to satisfy the injury requirement, they still would have lacked standing because they could not establish a causal link between the challenged agency action and their alleged injury. *Id.* at 478-79. In so doing, the D.C. Circuit ruled that the following casual chain was too attenuated:

- The leasing program will bring about drilling;
- Drilling will bring about more oil;
- This oil will be consumed;
- Consumption of this oil will result in additional carbon dioxide being emitted into the air;
- This carbon dioxide will consequently cause climate change;
- This climate change will adversely affect the wildlife that the petitioners enjoy; and
- Therefore, the petitioners are injured by the adverse effects on the wildlife they enjoy.

Id. at 478-79. The D.C. Circuit properly rejected this causal chain because "[s]uch a causal chain . . . rel[ies] on the speculation that various different

groups of actors not present in this case – namely, oil companies, individuals using oil in their cars, cars actually dispersing carbon dioxide – might act in a certain way in the future." *Id.* at 479.

Inexplicably, the D.C. Circuit then ruled that this same causal chain was sufficient for the petitioners to have procedural standing. *Id.* In *Lujan*, this Court explained that only redressability and immediacy were relaxed when a plaintiff asserts a procedural right. 504 U.S. at 572 n.7. This Court did not relax the causation element. Thus, if the D.C. Circuit's ruling is a precursor of what is to come, environmental groups will be able to challenge a federal agency's failure to comply with a procedural requirement without having to prove a causal relationship between the failure to comply with that requirement and the impairment of a concrete interest. *See Lujan*, 504 U.S. at 572 n.8 (Rejecting the idea that the violation of a procedural requirement "satisfies the concrete-injury requirement by itself, without any showing that the procedural violation endangers a concrete interest of the plaintiff. . . .").

IV. THIS CASE PRESENTS AN EXCELLENT OPPORTUNITY FOR THIS COURT TO RESOLVE THE TENSION BETWEEN *MASSACHUSETTS* AND *LUJAN*.

The confusion in the lower courts, as demonstrated by, *inter alia*, the instant case, *Comer*, *Kivalina*, and *Center for Biological Diversity,* is understandable.

So long as that confusion remains, the lower courts will continue to struggle to resolve the tension between *Massachusetts* and *Lujan*. The instant case presents an excellent opportunity for this Court to resolve this tension, just as this Court has done in similar situations. *See, e.g.*, *Ring v. Arizona,* 536 U.S. 584, 598 (2002) (Granting certiorari to resolve the tension between *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Walton v. Arizona*, 497 U.S. 639 (1990)); *Okla. Tax Comm'n v. Citizen Band P. Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) ("We granted certiorari to resolve an apparent conflict with this Court's precedents and to clarify the law of sovereign immunity with respect to the collection of sales taxes on Indian lands."); *Wainwright v. Witt*, 469 U.S. 412, 417-18 (1985) (Granting certiorari because this "case raises questions on which there is considerable confusion in the lower courts, concerning the degree of deference that a federal habeas court should pay to a state trial judge's determination that a juror may be excused for cause under [*Witherspoon v. Illinois*, 391 U.S. 510 (1968)]"); *Oliver v. United States*, 466 U.S. 170, 173 (1984) (Granting certiorari to clarify the confusion that has arisen as to the continued vitality of the "open fields" doctrine enunciated in *Hester v. United States*, 265 U.S. 57 (1924)); *Michigan v. Clifford*, 464 U.S. 287, 289 (1984) ("We granted certiorari to clarify doubt that appears to exist as to the application of our decision in [*Michigan v. Tyler*, 436 U.S. 499 (1978)]").

CONCLUSION

For the foregoing reasons, this Court should grant Certiorari.

Respectfully submitted by:

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September 3, 2010