

No. 10-174

In the
Supreme Court of the United States

AMERICAN ELECTRIC POWER CO., INC. ET AL.,
Petitioners,

v.

STATE OF CONNECTICUT ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF THE STATES OF NORTH
CAROLINA, ILLINOIS, MARYLAND AND
MASSACHUSETTS AS *AMICI CURIAE* FOR
THE RESPONDENTS

ROY COOPER
Attorney General of North Carolina

Christopher G. Browning, Jr.*
Solicitor General of North Carolina

James C. Gulick
Senior Deputy Attorney General

Marc D. Bernstein
Special Deputy Attorney General

North Carolina Dep't of Justice
Post Office Box 629
Raleigh, NC 27602-0629
(919) 716-6900
cbrowning@ncdoj.gov

March 2011 * Counsel of Record
(Additional Counsel Listed on Inside Cover)

LISA MADIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS

DOUGLAS F. GANSLER
Attorney General
State of Maryland

MARTHA COAKLEY
Attorney General
Commonwealth of Massachusetts

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	6
I. COMMON LAW NUISANCE IS AN ESSENTIAL TOOL IN MODERN ENVIRONMENTAL LAW.....	6
II. THE STATES HAVE STANDING UNDER ARTICLE III TO BRING THIS ACTION AS <i>PARENS PATRIAE</i>	16
CONCLUSION	37

TABLE OF AUTHORITIES

CASES

<i>Acme Fertilizer Co. v. State</i> , 72 N.E. 1037 (Ind. Ct. App. 1905)	9
<i>Alfred L. Snapp & Son, Inc. v. Puerto Rico</i> <i>ex rel. Barez</i> , 458 U.S. 592 (1982)	<i>passim</i>
<i>Am. Farm Bureau Fed'n v. EPA</i> , 559 F.3d 512 (D.C. Cir. 2009)	12
<i>Andrews v. Western Asphalt Paving Corp.</i> , 188 N.W. 900 (Iowa 1922)	8
<i>Appalachian Power Co. v. EPA</i> , 249 F.3d 1032 (D.C. Cir. 2001)	14
<i>Baltimore & Potomac R.R. Co. v. Fifth</i> <i>Baptist Church</i> , 108 U.S. 317 (1883)	6, 7
<i>Bonewitz v. Parker</i> , 912 N.E.2d 378 (Ind. Ct. App. 2009)	10
<i>Fed. Election Comm'n v. Akins</i> , 524 U.S. 11 (1998)	27
<i>Galaxy Carpet Mills, Inc. v. Massengill</i> , 338 S.E.2d 428 (Ga. 1986)	10

<i>Georgia v. Pennsylvania R.R. Co.</i> , 324 U.S. 439 (1945)	21, 26
<i>Georgia v. Tennessee Copper Co.</i> , 206 U.S. 230 (1907)	<i>passim</i>
<i>Hawaii v. Standard Oil Co.</i> , 405 U.S. 251 (1972)	17
<i>Illinois Cent. R.R. Co. v. Illinois</i> , 146 U.S. 387 (1892)	18
<i>Int'l Paper Co. v. Ouellette</i> , 479 U.S. 481 (1987)	10, 11, 15
<i>Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund</i> , 500 U.S. 72 (1991) . . .	35, 36
<i>Kansas v. Colorado</i> , 185 U.S. 125 (1902)	8
<i>Kansas v. Colorado</i> , 206 U.S. 46 (1907)	7, 8
<i>Lewis v. Casey</i> , 518 U.S. 343 (1996)	25
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	<i>passim</i>
<i>Martin Bldg. Co. v. Imperial Laundry Co.</i> , 124 So. 82 (Ala. 1929)	8
<i>Maryland v. Louisiana</i> , 451 U.S. 725 (1981) . .	29, 30

<i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007)	<i>passim</i>
<i>Mayor of Georgetown v. Alexandria Canal Co.</i> , 37 U.S. 91 (1838)	20, 35
<i>Miller v. French</i> , 530 U.S. 327 (2000)	25
<i>Miller v. Rohling</i> , 720 N.W.2d 562 (Iowa 2006)	10
<i>Missouri v. Illinois</i> , 180 U.S. 208 (1901)	8, 19, 24
<i>Missouri v. Illinois</i> , 200 U.S. 496 (1906)	21
<i>New Jersey v. New York</i> , 283 U.S. 473 (1931)	7
<i>New York v. New Jersey</i> , 256 U.S. 296 (1921)	7
<i>North Carolina v. EPA</i> , 531 F.3d 896, <i>modified</i> , 550 F.3d 1176 (D.C. Cir. 2008)	14, 36
<i>North Carolina ex rel. Cooper v. TVA</i> , 515 F.3d 344 (2008)	33
<i>North Carolina ex rel. Cooper v. TVA</i> , 593 F. Supp. 2d 812 (W.D.N.C. 2009), <i>rev'd on other grounds</i> , 615 F.3d 291 (4th Cir. 2010), <i>cert. pending</i> , No. 10-997	36

<i>North Dakota v. Minnesota,</i> 263 U.S. 365 (1923)	7
<i>Ohio v. Wyandotte Chems. Corp.,</i> 401 U.S. 493 (1971)	22
<i>Ouellette v. Int'l Paper Co.,</i> 666 F. Supp. 58 (D. Vt. 1987)	10
<i>Pennsylvania v. West Virginia,</i> 262 U.S. 553 (1923)	31
<i>People v. Detroit White Lead Works,</i> 46 N.W. 735 (Mich. 1890)	9
<i>Sierra Club v. Johnson,</i> 444 F. Supp. 2d 46 (D.D.C. 2006), <i>further proceedings</i> , 2011 U.S. Dist. LEXIS 5316 (D.D.C. Jan. 20, 2011)	13
<i>State ex. rel Bd. of Health of the Twp. of Lyndhurst v. United Cork Cos.,</i> 172 A. 347 (N.J. Ch. 1934)	8
<i>State ex rel. Renfrow v. Serv. Cushion Tube Co.,</i> 291 S.W. 106 (Mo. 1927)	8
<i>State v. Chicago, Milwaukee & St. Paul Ry. Co.,</i> 130 N.W. 545 (Minn. 1911)	9
<i>State v. Uvalde Asphalt Pav. Co.,</i> 53 A. 299 (N.J. 1902)	9

<i>Union Elec. Co. v. EPA</i> , 427 U.S. 246 (1976)	11
<i>Valley Forge Christian Coll. v. Americans United for Separation of Church & State</i> , 454 U.S. 464 (1982)	30, 31
<i>Whitman v. Am. Trucking Ass'ns</i> , 531 U.S. 457 (2001)	12
<i>Wyoming ex rel. Crank v. United States</i> , 539 F.3d 1236 (10th Cir. 2008)	33
<i>Wyoming v. Colorado</i> , 259 U.S. 419 (1922)	7
<i>Wyoming v. Oklahoma</i> , 502 U.S. 437 (1992)	31, 32

CONSTITUTION AND STATUTES

U.S. Const., art. III, cl. 2	26
Clean Air Act, 42 U.S.C. § 7401 <i>et seq</i> (2006)	6
42 U.S.C. § 7401(a)(2) (2006)	32
42 U.S.C. § 7401(a)(3) (2006)	1
42 U.S.C. § 7409 (2006)	11, 12
42 U.S.C. § 7409(d)(1) (2006)	12
42 U.S.C. § 7410 (2006)	12

42 U.S.C. § 7412 (2006) 13

42 U.S.C. § 7416 (2006) 10, 15

42 U.S.C. § 7426 (2006) 13

42 U.S.C. § 7426(b) (2006) 13

33 U.S.C. § 1251(b) (2006) 1

Conn. Gen. Stat. Ann. § 16-245a (West 2007) 29

Md. Code Ann., Envir. §§ 2-1201-2-1211
(LexisNexis Supp. 2010) 2

REGULATORY MATERIALS

40 C.F.R. Part 50 (2010) 12

Interstate Pollution Abatement; Final
Determination, 47 Fed. Reg. 6624 (1982) 14

National Ambient Air Quality Standards
for Ozone, 73 Fed. Reg. 16,436 (2008) 12

National Ambient Air Quality Standards
for Ozone, 75 Fed. Reg. 2938
(proposed Jan. 19, 2010) 12, 13

National Ambient Air Quality Standards
for Particulate Matter, 71 Fed. Reg. 61,144
(2006) 12

Notice of Proposed Consent Decree,
70 Fed. Reg. 10,088 (2005) 14

Rulemaking on § 126 Petition from N.C. to
Reduce Interstate Transport of Fine
Particulate Matter & Ozone,
71 Fed. Reg. 25,328 (2006) 13, 14

310 Mass. Code Regs. § 7.70 (2011) 2

15A N.C. Admin. Code 2D .1104 (2011) 11

N.Y. Pub. Serv. Comm'n, Order Regarding
Retail Renewable Portfolio Standard
(Case 03-E-0188, Sept. 24, 2004) 29

Regional Greenhouse Gas Initiative, Inc.,
Program Design, State Statutes & Regs.,
<http://www.rggi.org/design/regulations>
(March 18, 2011) 28

TREATISES AND OTHER MATERIALS

N.C. Legislative Comm'n on Global Climate
Change, Final Rep. to the General Assembly
& the Env'tl. Rev. Comm'n (May 2010) 2

Order Granting Mot. to Approve Consent
Judgment, *Am. Lung Ass'n v.*
Whitman, No. 05-cv-01814
(D.D.C. July 31, 2003) 12

Restatement (Second) of Torts § 821B (1979)	35
Restatement (Second) of Torts § 821C (1979)	35
Richard A. Epstein, <i>Ordering State-Federal Relations Through Federal Preemption Doctrine: Federal Preemption & Federal Common Law in Nuisance Cases</i> , 102 Nw. U.L. Rev. 551 (2008)	6
Robert V. Percival, <i>The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance</i> , 55 Ala. L. Rev. 717 (Spring 2004)	8
William H. Rodgers, Jr., <i>Environmental Law</i> (2d ed., 1994)	6

INTEREST OF THE *AMICI CURIAE*

Pollution control is, as Congress has recognized, the “primary responsibility of States.” 42 U.S.C. § 7401(a)(3) (2006) (regarding air pollution); 33 U.S.C. § 1251(b) (2006) (similar regarding water pollution). The *amici* States have exercised their police powers to regulate pollution within their borders and maintain comprehensive enforcement programs. However, States cannot directly control sources of pollution in neighboring and distant States. Interactions between States and facilities in other States implicate federal concerns. But the Environmental Protection Agency (“EPA”) often has not and cannot always respond to the States’ needs. Therefore the *amici* States retain an interest in maintaining the full panoply of tools available to them, which includes common law causes of action and resort to the federal courts. To this end, the *amici* States seek to ensure that the Court takes into account the States’ unique role in the federal scheme when construing Article III standing as it relates to state access to federal remedies.

Additionally, the *amici* States have an obligation to safeguard their citizenry and their environments within their respective jurisdictions, which includes supporting the physical and economic well-being of their residents and assuring the continued existence and quality of their natural resources. Climate change that is related to ambient carbon dioxide threatens the *amici* States on several levels. These adverse impacts have been set forth in detail by the Respondent States, Resp. States Br. 4 (discussing impacts to the Respondent States that will likely also occur at least to

some degree in the *amici* States), and discussed previously by this Court, *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007) (“The harms associated with climate change are serious and well recognized.”); see also N.C. Legislative Comm’n on Global Climate Change, Final Rep. to the General Assembly & the Env’tl. Rev. Comm’n 20-29 (May 2010) (reviewing potential climate change impacts to North Carolina). The *amici* States are taking steps to address and combat these harms. *E.g.*, *id.* at 40-63; see also, *e.g.*, Md. Code Ann., Env’tl. §§ 2-1201-2-1211 (LexisNexis Supp. 2010) (mandating a 25% reduction in greenhouse gas emissions by 2020); 310 Mass. Code Regs. § 7.70 (2011) (establishing the “Massachusetts CO₂ Budget Trading Program, which is designed to stabilize and then reduce anthropogenic emissions of CO₂”). Slowing the pace of global climate change is one part – albeit a very important part – of minimizing the impacts to the *amici* States. Therefore, the *amici* States support the efforts of the Respondent States to address this issue.

SUMMARY OF THE ARGUMENT

The cause of action for nuisance under the common law has historically served as an important tool in the protection of the public health and welfare and natural resources from pollution. This Court has adjudicated common law nuisance actions covering a variety of environmental ills, including such local harms as smoke and noise from a rail yard, to the potentially devastating and widespread impacts of waterborne

diseases emanating from sewage discharges to a river. These matters have ranged from local disputes, involving only private parties, to interstate battles in the Court's original jurisdiction.

Despite the advent of modern pollution control statutes, common law nuisance claims persist, and for good reason. The federal government, under statutes such as the Clean Air Act, does not regulate all pollutants nor all sources of pollution. Moreover, even in areas where EPA is regulating, too many times States have seen EPA fail to meet congressional deadlines to promulgate or update pollution control standards and adjudicate interstate pollution disputes, thus necessitating resort to state common law. Even if resort to public nuisance actions may only be sporadic, it is nonetheless vital when it is needed.

When a State brings such a public nuisance action, it often is acting as *parens patriae*. When these disputes have an interstate dimension, special concerns come into play. This Court has repeatedly recognized that the States formed the Union in part by surrendering their rights to resolve disputes with other States and their citizens by war and diplomacy. In the stead of those sovereign tools of war and diplomacy stands the federal judiciary. Thus, States retain a unique status as litigants and enter the courts with a different dignity than private parties.

Historically this Court has not even questioned standing when States have brought public nuisance

actions in their *parens patriae* capacity. Similarly no such analysis is warranted here. Further, to engage in such an inquiry at this stage would improperly hasten a review of the merits of the case.

Nevertheless, under any proper analysis the States have standing in this case. Article III standing respects the States' quasi-sovereign role. In *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 609 (1982), this Court affirmed "*parens patriae* standing" and set forth a framework to analyze a State's claim to this alternative means of demonstrating standing. To proceed as *parens patriae*, a State must establish an interest apart from the interests of an identifiable group of its citizens; the interest must not be merely proprietary, nor strictly sovereign; and the interest must be adversely affected by the challenged behavior of the defendants. It is also significant whether the plaintiff State can demonstrate that it would address the harm by legislation if it could. At least some of the Respondent States here have adopted programs to control greenhouse gas emissions from the very same types of sources that are operated by the Petitioners. Thus, these States have demonstrated a deliberate, considered, and self-controlling judgment that the emissions sources at issue in this case contribute to the injuries the Respondent States assert and that those harms can be remedied, at least in part, by reductions of emissions from those sources.

Parens patriae standing under *Alfred L. Snapp* is separate from the standard three-part analysis of *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *Lujan* itself recognized that standing is not a one-size-fits-all doctrine. See *id.* at 572 n.7. Moreover, this Court's precedents have consistently and carefully distinguished between standing under *Lujan* and *parens patriae* standing in cases involving State plaintiffs. Nevertheless, *Alfred L. Snapp* and *Lujan* are not at cross purposes. Both implement the requirement of an "actual controversy."

Massachusetts also is not to the contrary. When a State asserts *parens patriae* standing against the federal government, the United States may also claim to be acting as *parens patriae*. In such cases, it may be appropriate to adjudge the State's standing under *Lujan*.

The Petitioners' contention that a finding of standing would open the courthouse doors to a limitless parade of plaintiffs against innumerable defendants is baseless. The Respondent States' *parens patriae* standing is buttressed by the demonstration that certain Respondent States have regulated their own large coal-fired power plants. Any lack of regulation of other categories of sources weighs against *parens patriae* standing as to those sources. Moreover, by law States are favored plaintiffs in public nuisance actions. Private parties have a higher standing hurdle to clear, as they must aver and prove special injury. Finally, as a practical matter, the likelihood of

interstate litigation of this magnitude is inherently low because it is resource intensive and States generally seek to avoid conflict with sister States.

ARGUMENT

I. COMMON LAW NUISANCE IS AN ESSENTIAL TOOL IN MODERN ENVIRONMENTAL LAW.

“Nuisance theory and case law is the common law backbone of modern environmental and energy law.” William H. Rodgers, Jr., *Environmental Law* 113 (2d ed., 1994). Prior to the enactment of the federal Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and its analogs covering other environmental media, the public health and the environment were primarily protected through the state police power. This includes state statutory and common law remedies. Nuisance law was an integral part of that formula. Richard A. Epstein, *Ordering State-Federal Relations Through Federal Preemption Doctrine: Federal Preemption & Federal Common Law in Nuisance Cases*, 102 *Nw. U.L. Rev.* 551, 555 (2008) (“It has long been understood that the discharge of noxious substances into the air or the water lay at the core of the law of nuisance.”).

The use of nuisance law to protect the public health and the environment is an accepted part of the American legal landscape. In *Baltimore & Potomac Railroad Co. v. Fifth Baptist Church*, 108 U.S. 317 (1883), the operations of a rail yard were held to be a

nuisance due in part to “the smoke from the chimneys, with its cinders, dust, and offensive odors.” *Id.* at 329. The defendant was not saved by the fact that its smokestacks complied with local law regulating stack heights because “[i]n requiring that chimneys should have a certain height, the regulations did not prohibit their being made higher.” *Id.* at 334-35. This “rule,” the Court held, was “so obvious” it barely warranted citation. *Id.* at 335; *see also New Jersey v. New York*, 283 U.S. 473, 482 (1931) (rejecting contention “that compliance with the supervisor’s permits . . . leaves the Court without jurisdiction to grant the injunction prayed and relieves defendant in respect of the nuisance”). Nor was the defendant aided by evidence that its locomotives were allegedly “the best known in the business” and that it took significant precautions against offsite impacts. *Baltimore & Potomac R.R.*, 108 U.S. at 320. This Court held that, if necessary, “the engine house and workshop should be . . . remodelled” or the entire facility “removed to some other place.” *Id.* at 334.

This and other private nuisance actions were followed by “a line of cases . . . in which States . . . represent[ed] the interests of their citizens in [seeking to] enjoin[] public nuisances.” *Alfred L. Snapp*, 458 U.S. at 603 (citing *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (action to abate flooding of farmland); *Wyoming v. Colorado*, 259 U.S. 419 (1922) (action to abate diversion of river); *New York v. New Jersey*, 256 U.S. 296 (1921) (action to abate discharge of sewage); *Kansas v. Colorado*, 206 U.S. 46 (1907) (action to abate

deprivation of flow of river); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (action to abate air pollution); *Kansas v. Colorado*, 185 U.S. 125 (1902) (action to abate deprivation of water); *Missouri v. Illinois*, 180 U.S. 208 (1901) (action to abate pollution of drinking water). These types of cases “help[ed] stimulate the development and implementation of improved pollution control technologies” and “ultimately improved environmental conditions.” Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 Ala. L. Rev. 717, 773 (Spring 2004).

In the state courts as well, as the industrial revolution progressed, nuisance actions both public and private became an important mechanism to vindicate the rights of those adversely affected by environmental harms. See, e.g., *State ex. rel Bd. of Health of the Twp. of Lyndhurst v. United Cork Cos.*, 172 A. 347, 348 (N.J. Ch. 1934) (public nuisance of “dust, odors, fumes and gases” from cork factory); *Martin Bldg. Co. v. Imperial Laundry Co.*, 124 So. 82, 83 (Ala. 1929) (private nuisance of “smoke and soot” from industrial coal boiler); *State ex rel. Renfrow v. Serv. Cushion Tube Co.*, 291 S.W. 106, 108, 109 (Mo. 1927) (public nuisance of “great volumes of black smoke” that “pervaded a community”); *Andrews v. Western Asphalt Paving Corp.*, 188 N.W. 900, 901 (Iowa 1922) (private nuisance of “smoke, soot, fumes, cinders, ashes, and dirt” from asphalt plant).

Pursuant to the States' police power, the States, usually through their attorneys general, historically prosecuted public nuisances affecting broader populations. *See, e.g., State v. Chicago, Milwaukee & St. Paul Ry. Co.*, 130 N.W. 545 (Minn. 1911) (affirming fine for firing bituminous coal in violation of an ordinance declaring such to be a public nuisance); *Acme Fertilizer Co. v. State*, 72 N.E. 1037, 1038 (Ind. Ct. App. 1905) (affirming conviction for public nuisance upon showing that defendant's facility released "poisonous smells, so that the air for a great distance . . . was . . . rendered . . . injurious to the health, comfort and property of many citizens"); *State v. Uvalde Asphalt Pav. Co.*, 53 A. 299 (N.J. 1902) (affirming indictment for public nuisance against asphalt plant that released "noxious and unwholesome smokes, vapors, smells and stenches which impregnate the air, rendering it corrupt, offensive and unwholesome"); *People v. Detroit White Lead Works*, 46 N.W. 735, 737 (Mich. 1890) (adjudicating paint facility that caused "odors, smoke, and soot of . . . a noxious character" to be a public nuisance despite the fact that it was operated in a "prudent manner").

There is no doubt that the number of nuisance cases prosecuted regarding environmental and public health matters has declined in recent decades. It is equally evident that this has resulted, in large measure, from the success of Congress and the administrative state in addressing these matters. Even before Congress enacted the major environmental statutes of the early 1970s, state

legislatures had codified and/or superseded some common law public nuisance actions. These state and federal statutes facilitated enforcement because they were more industry- and pollutant-specific, and because they established tailored enforcement procedures. But the advent of the modern environmental law structure has by no means eliminated the common law nuisance action. *E.g.*, *Bonewitz v. Parker*, 912 N.E.2d 378, 380, 385 (Ind. Ct. App. 2009) (allowing damages or “total, permanent injunction” against mycelium drying facility due in part to “emissions of smoke” and “sawdust” creating a nuisance); *Miller v. Rohling*, 720 N.W.2d 562, 566 (Iowa 2006) (affirming that grain operation was a nuisance due in part to “emissions” of “fugitive dust”); *Ouellette v. Int’l Paper Co.*, 666 F. Supp. 58 (D. Vt. 1987) (denying motion to dismiss claim that paper mill caused common law air pollution nuisance); *Galaxy Carpet Mills, Inc. v. Massengill*, 338 S.E.2d 428, 429 (Ga. 1986) (affirming that coal-fired boiler was a nuisance due in part to emissions of “large amounts of soot and ash” and despite the fact that the facility had secured a permit).

This comes as no surprise regarding air pollution. The Clean Air Act has hardly eliminated the need for the common law public nuisance cause of action to address air pollution. As an initial matter, the fact that Congress included in the Clean Air Act a specific savings clause for state law, 42 U.S.C. § 7416, is proof enough that Congress was aware that the standards and plans required by the Act were not the end of the

matter. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987). The Clean Air Act is generally premised on mandating minimum – not maximum – air quality standards. *Union Elec. Co. v. EPA*, 427 U.S. 246, 256-57 (1976) (The Act “place[s] the primary responsibility for formulating pollution control strategies on the States, but nonetheless subject[s] the States to strict minimum compliance requirements.”). The Act’s National Ambient Air Quality Standards (“NAAQS”) establish an upper bound of pollutant concentrations in the ambient air for select pollutants, *see* 42 U.S.C. § 7409, but nothing prohibits a State from, in its judgment, seeking to reduce levels of pollutants to well below those standards. The Act requires regulation of hazardous air pollutants but nothing bars any State from adopting supplemental programs to further protect its citizens. *See, e.g.*, 15A N.C. Admin. Code 2D .1104 (2011) (state toxic air pollutant limits that supplement the Clean Air Act’s toxics program). After all, it is “the State” that “has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.” *Tennessee Copper*, 206 U.S. at 237.

The Clean Air Act additionally suffers from major implementation delays that limit its utility and demonstrate the continued vitality of public nuisance actions under the laws of the source state, as this Court allowed in *Ouellette*. For example, at the heart of Title I of the Clean Air Act are the NAAQS. These standards dictate the maximum concentrations of a handful of “criteria” pollutants that are allowed in the

ambient air. See 42 U.S.C. § 7409 (2006); 40 C.F.R. Part 50 (2010). A significant amount of state-level planning focuses on meeting these standards. See, e.g., 42 U.S.C. § 7410 (2006). EPA is required to complete a “thorough review” of the science underlying these standards and the standards themselves “at five-year intervals.” 42 U.S.C. § 7409(d)(1) (2006); *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 462-63 (2001). EPA completed a cycle of reviews for two of the six criteria pollutants – ozone and particulate matter – in July 1997. *Whitman*, 531 U.S. at 463.

By 2003, EPA was subject to a consent decree spelling out the schedule for completing subsequent reviews regarding these pollutants because EPA failed to abide by Congress’ five-year deadline. Order Granting Mot. to Approve Consent Judgment, *Am. Lung Ass’n v. Whitman*, No. 05-cv-01814 (D.D.C. July 31, 2003). The revised particulate matter standard became effective in December 2006, National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 61,144 (2006), and the ozone revision was not effective until May 2008, National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436 (2008). Although the particulate NAAQS is currently effective, the D.C. Circuit Court of Appeals granted petitions for review on the central issue of whether EPA’s decision not to change the primary standard was adequately supported. *Am. Farm Bureau Fed’n v. EPA*, 559 F.3d 512 (D.C. Cir. 2009). EPA is currently reconsidering the ozone NAAQS. The agency has proposed, but not finalized the ozone standard. National Ambient Air

Quality Standards for Ozone, 75 Fed. Reg. 2938 (proposed Jan. 19, 2010). What should have been a five-year process has taken nine years for particulate matter and twelve years for ozone and counting. *See also, e.g., Sierra Club v. Johnson*, 444 F. Supp. 2d 46 (D.D.C. 2006) (ordering EPA to promulgate dozens of rules for hazardous air pollutants under Section 112 of the Clean Air Act, 42 U.S.C. § 7412, that were required to be promulgated by 2000), *further proceeding*, 2011 U.S. Dist. LEXIS 5316, at *3 (D.D.C. Jan. 20, 2011) (further extending deadline for EPA action and noting that the court had “granted a number of EPA’s motions to extend the deadlines”).

These delays are not limited to EPA’s duties to promulgate generally applicable standards, but extend also to its dispute resolution functions. The Clean Air Act provides an avenue for EPA to resolve interstate air pollution controversies regarding a few specific regulated pollutants upon the petition of an impacted State. *See* 42 U.S.C. § 7426 (2006). Although the Act requires EPA to grant or deny any such petition “[w]ithin 60 days after receipt,” 42 U.S.C. § 7426(b) (2006), to the *amici*’s knowledge EPA has *never* made a decision within the time frame demanded by Congress. Delays range to several years and often require judicial intervention to compel EPA action. *See, e.g.,* Rulemaking on § 126 Petition from N.C. to Reduce Interstate Transport of Fine Particulate Matter & Ozone, 71 Fed. Reg. 25,328 (2006) [hereinafter “§ 126 Rule”] (resolution of petition over two years after filing); *Appalachian Power Co. v. EPA*,

249 F.3d 1032 (D.C. Cir. 2001) (resolution of petition one year and nine months after filing); Interstate Pollution Abatement; Final Determination, 47 Fed. Reg. 6624 (1982) (resolution of petition nearly three years after filing); Notice of Proposed Consent Decree, 70 Fed. Reg. 10,088 (2005) (providing public notice of consent decree to compel EPA to issue final decision in March 2006 regarding petition filed in March 2004).

Timing, of course, is significant when dealing with public health matters. A plaintiff in a contract action seeking money damages who is forced to wait for years for relief can be made whole with post-judgment interest and other remedies. A citizen who suffers a fatal heart attack, or a child whose education is impaired due to frequent bouts of asthma, can never be made whole.¹ *Cf. North Carolina v. EPA*, 531 F.3d 896, 911-12 (ordering EPA to expedite air pollution control program to help States attain air quality standards according to Congress' schedule), *modified*, 550 F.3d 1176 (D.C. Cir. 2008).

The *amici* States do not suggest that common law claims are or should be used simply to differ with EPA's decisions. For regulated pollutants, a downwind

¹ Although such a plaintiff or her estate could be awarded money damages, which would make the plaintiff whole as a matter of law, money damages are no substitute for loss or significant impairment of life, or irreparable or long-term damage to natural resources. Much of the harm caused by pollution is not merely economic.

party is protected by federal statutory and regulatory law and by state law, including state common law. *See* 42 U.S.C. § 7416 (2006). A suit under state common law relies on a policy choice made by the State with jurisdiction over the pollution source to afford greater protection than federal law. *See Ouellette*, 479 U.S. at 497 (concluding that the Clean Water Act allows a State to “impose higher common-law . . . restrictions” on sources within its jurisdiction). The governing State may end that policy whenever it wishes. On the other hand, where there are no governing federal statutes or regulations, federal common law may provide relief exactly because there is no EPA decision with which to differ. In either case, for reasons discussed later, common law nuisance actions are relatively infrequent and affirmation of a federal common law claim here would not result in a flood of such claims. *See infra* pp. 34-37.

Nevertheless, despite the relative infrequency with which a State might need to resort to a public nuisance cause of action today, it makes little sense to deny the State this tool, particularly on the theory that nuisance law is somehow inherently defective, as the Petitioners and their *amici* contend here. Public nuisance actions have been and should continue to be allowed to work in concert with regulatory and statutory remedies in order to allow States to best protect the health and welfare of their citizens and their environments. Any other result would be contrary to Congress’ intent to safeguard States’ traditional jurisdiction and protect the environment.

II. THE STATES HAVE STANDING UNDER ARTICLE III TO BRING THIS ACTION AS *PARENS PATRIAE*.

The Petitioners (which exclude defendant Tennessee Valley Authority² (“TVA”)) attack the Respondent States’ standing on Article III grounds. In doing so, the Petitioners misapply the Court’s precedents and fail to understand the significance of the nature of the States as sovereigns. The history of States as litigants before this Court makes clear that an injury to a State’s *parens patriae* interest generally confers Article III standing upon the State, as it does in this case.

This Court stated long ago in the seminal interstate air pollution case of *Tennessee Copper*, that “[t]he States by entering the Union did not sink to the position of private owners subject to one system of private law.” 206 U.S. at 237-38. In that matter, the Court focused its attention not on the State’s proprietary interest – which it termed merely a “makeweight” – but instead on its “interest independent of and behind the titles of its citizens, in all the earth and air within its domain,” that is, its “quasi-sovereign” interest. *Id.* at 237. It is such a “quasi-sovereign” interest that the State may vindicate

² TVA – a defendant but also a Respondent – concedes the States’ Article III standing. TVA Br. 25-33. Any reference to the Petitioners in this argument does not include TVA.

in a suit as *parens patriae*. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 (1972) (A State may “sue as *parens patriae* to prevent or repair harm to its ‘quasi-sovereign’ interests.”).

Advancing forward three-quarters of a century, the Court bore into the question of *parens patriae* standing in *Alfred L. Snapp*. In order to lend a measure of clarity to the concept of quasi-sovereign interests, the Court reviewed several cases, including *Tennessee Copper*, in which it had allowed a State to sue based on what the Court termed “*parens patriae* standing.” 458 U.S. at 602-06, 609. From this analysis, the Court distilled two quasi-sovereign interests that support *parens patriae* standing. “First, a State has a quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.” *Id.* at 607. But the Court admitted that this was not a “definitive list” and that it could not establish an “exhaustive formal definition.” *Id.*

Doubtless, if “a State has a quasi-sovereign interest in the health and well-being . . . of its residents in general,” it has a similar interest in maintaining its natural resources. *Tennessee Copper* proves that much. 206 U.S. at 237 (relying on Georgia’s quasi-sovereign “interest . . . in all the earth and air within its domain”). Individuals have an interest in “all the earth and air” as well. But the

State has public trust rights and obligations regarding the care of the earth, air and water within its jurisdiction for its current citizens and future generations. *See, e.g., Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452-54 (1892). These rights and obligations go beyond the rights and duties of any individual citizen and beyond even the aggregate rights and obligations of all its citizens. In the words of *Tennessee Copper*, the State “has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.” 206 U.S. at 237. This “word” is the States’ “final power” on the matter. *Id.* This “word” is part and parcel of the State’s “quasi-sovereign” interest in this case.³ *Id.* This assuredly renders the State’s “interest . . . in all

³ The *amici* States are not here suggesting that a separate public trust right is determinative regarding the existence of a quasi-sovereign interest. The Court itself has indicated that no such talismanic test exists for quasi-sovereign interests and a case-by-case inquiry is necessary. *See Alfred L. Snapp*, 458 U.S. at 602. Additionally, although a State has a quasi-sovereign interest in maintaining the “last word” on the quality of its natural resources, it also has a sovereign interest in creating and maintaining a legal code to that end. *See id.* at 601. In large part, except when the State is acting in its sovereign capacity to protect its natural resources, *e.g.*, by enacting domestic statutes, it is acting in its quasi-sovereign capacity, *e.g.*, by pursuing similar goals through the common law in the courts of the United States. *See id.* at 600-02.

the earth[, water] and air within its domain” quasi-sovereign.

It is of no moment whether these resources are publicly owned, as in the publicly-held lands discussed in *Massachusetts*, or whether they are, for example, the aggregate public and private shore lands within the States’ borders. The States have jurisdiction over all of these resources, in one capacity or another. The State – simply because it is the State – is tasked with the protection of these resources no matter in whose ownership they may be. The States have a quasi-sovereign interest in assuring the continued existence of resources within their territorial jurisdictions, maintaining the quality of those resources, and continuing their authority over those resources.

The fact that a State has a quasi-sovereign interest does not mean that it has *parens patriae* standing under Article III in all such cases. But historically this Court has not questioned the existence of a jurisdictional controversy once the complaining State has established its *parens patriae* interest in abating a public nuisance. *E.g.*, *Missouri*, 180 U.S. at 240-41 (finding a “controvers[y]” to exist in a public nuisance action after concluding that the State had alleged a *parens patriae* interest). That is, standing in such cases appears to be self-evident. The State is the proper entity to prosecute a public nuisance action (without a showing of special injury). *See, e.g.*, *Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. 91, 97-

99 (1838). The nature of the action inherently encompasses allegations of public harm and causation. To require a separate standing analysis would necessitate review of the merits of the case and should not be undertaken. A State's properly pled complaint seeking to vindicate a clear public right from invasion by a public nuisance emanating from outside the State is, as it has been historically viewed, sufficient to establish a controversy for the federal courts to resolve.

Nevertheless, a rigorous standing analysis further supports the Respondent States' standing. In *Alfred L. Snapp* the Court stated that quasi-sovereign interests, due to their breadth, "risk[] being too vague to survive the standing requirements of Art. III: A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant." 458 U.S. at 602. The Court's review of the history of *parens patriae* standing led it to the following conclusions: To demonstrate *parens patriae* standing, "the State must articulate an interest apart from the interest[] of particular private parties." *Id.* at 607. That is, "[t]he State must express a quasi-sovereign interest." *Id.* When that interest is based on "health and well-being – both physical and economic – of its residents in general," then the State must allege that more than an "identifiable group" is "adversely affected by the challenged behavior." *Id.* In making this allegation, the Court must consider the "indirect effects of the injury." *Id.*

The Petitioners and a few of their *amici* assume, without any analysis, that the States must demonstrate standing under *Lujan*. *E.g.*, Pet. Br. 17; Wash. Legal. Found. Br. 10-11; Nat'l. Ass'n of Home Builders Br. 3-4; Chevron U.S.A. Inc. Br. 10-11. The contention is incorrect. *Parens patriae* standing under *Alfred L. Snapp* is independent of *Lujan*.

The special status of States when proceeding as *parens patriae* is firmly rooted in this Court's jurisprudence. *See, e.g., Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 447 (1945) ("Suits by a State, *parens patriae*, have long been recognized."). Many of the earliest *parens patriae* decisions of this Court resulted from cross-border pollution disputes and similar controversies over natural resource allocation. As the ability of man to affect larger and larger areas of the environment progressed, interstate disputes became more common. *See, e.g., Alfred L. Snapp*, 458 U.S. at 603 (collecting cases). And as the science available to trace the origins of environmental impacts evolved, it became more feasible for parties at a distance to demonstrate proximate cause. *See Missouri v. Illinois*, 200 U.S. 496, 522 (1906) (indicating, with reference to the scientific evidence, that "if this suit had been brought fifty years ago it almost necessarily would have failed"). These factors were doubtless at the center of the uptick in interstate environmental litigation that occurred just after the turn of the last century.

A salient feature of those early public nuisance cases brought by States is not necessarily what the Court said, but what it did not say. In a string of cases where States sought to protect their citizenry and their resources from out-of-state interference, the Court never seriously, if at all, questioned any State's Article III standing to bring the claim. In *Tennessee Copper*, for example, the defendants contended that “[i]n order to prosecute an original suit in the Supreme Court, a State must show just such interest in the controversy in question as an individual must show to maintain a suit in a proper jurisdiction.” 206 U.S. at 235. Essentially, the defendant was arguing that the State was subject to the same standing requirements that applied to a private individual. The Court dismissed that notion, concluding instead that this was “a suit by a State for an injury to it in its capacity as quasi-sovereign.” *Id.* at 237. Because the State was, by its very nature, not a private citizen, it was not held to the same standard for entry into the courts as would be required of a private citizen. The entire case is premised on this distinction.⁴

⁴ *Tennessee Copper* was an original jurisdiction case. A State may seek relief against a private party from another State originally in either this Court or the district courts, although this Court's jurisdiction is not mandatory. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 499 (1971). Certainly, the Article III standing requirements cannot vary by court. But the Court, in its discretion, may impose a higher hurdle for a State to bring an action in the Court's original jurisdiction. *Alfred L. Snapp*, 458 U.S. at 604 n.12

In *Massachusetts* the Court observed that “[i]t is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.” 549 U.S. at 518. The Court also indicated that the “special solicitude” owed to the States additionally resulted from the procedural statute under which the States were proceeding. But the standing requirements for plaintiffs vindicating procedural rights under federal statutes already depart from the typical *Lujan* analysis regardless of whether the plaintiff is a State acting as *parens patriae*. *Lujan*, 504 U.S. at 572 n.7; see also *Massachusetts*, 549 U.S. at 536 (Roberts, C.J., dissenting) (observing that the “general judicial review provision cited by the Court” applies to both private litigants and States). There is no reason discernible in *Massachusetts* or elsewhere that the impact a State’s nature has on the standing analysis is necessarily limited to federal statutory cases or cases where a procedural right is at stake. Nor should it be. A State’s quasi-sovereign interest is not diminished by the nature of the case (*e.g.*, common law versus statutory) in which the State seeks to vindicate that interest. Nor is it lessened by the nature of the right

(“There may indeed be special considerations that call for a limited exercise of our jurisdiction in” *parens patriae* original jurisdiction cases that “may not apply to a similar suit brought in federal district court.”). Therefore, the showing for the Respondent States to access the district court can be no greater than it was for the plaintiff State in *Tennessee Copper* and may be considerably less.

(e.g., substantive versus procedural) that it asserts. Therefore, *Massachusetts* confirmed that a State is a litigant of an entirely different order than is a private party and that status affects the standing analysis.

The reason for this is clear. “When a State enters the Union, it surrenders certain sovereign prerogatives.” *Massachusetts*, 549 U.S. at 519. Most notably for the matter at hand, States no longer may settle differences with other States by force or reach out to foreign nations and negotiate a treaty. *Id.* The rights relinquished were not limited to disputes with other sovereigns but also included the subjects of those sovereigns. Whereas a sovereign may resort to force to affect the behavior of a foreign subject, the States have foregone that path with respect to actions of citizens of another State that occur on that other State’s soil. The Constitution specifically provides the States with the right to resolve such disputes in the federal judiciary. *See Missouri*, 180 U.S. at 241 (exercising original jurisdiction to adjudicate interstate public nuisance claim because, “[d]iplomatic 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”); *see also Alfred L. Snapp*, 458 U.S. at 603-04; *Tennessee Copper*, 206 U.S. at 237. This unique consideration militates in favor of a standing requirement that recognizes that a federal lawsuit is a substitute for the rights that the States surrendered in order to form the Union that gave rise to the federal judiciary in the first place.

The fact that States may be subject to a standing analysis that is specific to them is not contrary to Article III. Article III standing is not isolated within the Constitution. This Court has held that it is imbued with separation-of-powers principles, *e.g.*, *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) (recognizing that the standing “doctrine has a separation-of-powers component”), which spring from Articles I, II, and III taken together and not from Article III alone, *Miller v. French*, 530 U.S. 327, 341 (2000). Therefore standing should be responsive as well to the particular constitutional status of the States. Further, in *Lujan* itself the Court recognized that Congress can create classes with differing Article III standing requirements. *See* 504 U.S. at 572 n.7; *see also* Pet. Br. 25 (Congress may permit plaintiffs to proceed under certain circumstances even if plaintiffs cannot meet some of the “normal [Article III] standards.” (quoting *Massachusetts*, 549 U.S. at 517)). Thus, Article III standing is not a one-size-fits-all doctrine. There is good reason, grounded in the Constitution, to apply to States acting as *parens patriae* a unique Article III standing analysis.

Nevertheless, *Lujan* and *Alfred L. Snapp* share the same constitutional goal: to ensure that federal jurisdiction extends only to matters in which the parties are sufficiently adverse to create a “case” or “controversy” within the meaning of Article III. The Court in *Alfred L. Snapp* confirmed that “[a] quasi-sovereign interest must be sufficiently concrete

to create an actual controversy between the State and the defendant.” 458 U.S. at 602.

Although the *Alfred L. Snapp* analysis is specifically tailored to the States’ *parens patriae* standing, it is not far removed from the Court’s three-prong test that applies in private party litigation under *Lujan*. *Alfred L. Snapp*’s “adverse[] affect[]” requirement is analogous to *Lujan*’s injury prong. But *parens patriae* standing has never specifically imported the requirements from *Lujan* that the “invasion of a legally protected interest” be “(a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560 (citations and quotation marks omitted). This, again, can be traced back to the judiciary’s role in resolving disputes to which a State is a party and regarding which States surrendered their rights to “diplomacy and war.” *Penn. R.R.*, 324 U.S. at 450. Any such dispute that would have led to diplomacy or war certainly would qualify as a “controvers[y] between two or more states” or “between a state and the citizens of another state,” U.S. Const., art. III, cl. 2, in the common sense of the term even if it did not meet *Lujan*’s specific “injury in fact” requirements. Some measure of respect is owed to the State in the determination of whether the integrity of its right to protect its citizens and resources has been injured. As

such, *Alfred L. Snapp* only requires that the State's interest be "adversely affected."⁵

Alfred L. Snapp requires that the "adverse[] affect[]" be visited upon the State "by the challenged behavior." 458 U.S. at 607. This causation requirement is similar to the "fairly traceable" prerequisite of *Lujan*. But the causation requirement is given unique treatment in *parens patriae* matters. In *Alfred L. Snapp*, the Court found that "[o]ne helpful indication in determining whether an alleged injury to

⁵ Standing also limits the federal courts from addressing "generally available grievance[s]." *Lujan*, 504 U.S. at 573. Regardless of whether this is an Article III requirement or a "prudential" concern, see *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23 (1998); see also Pet. Br. 30, it is not implicated here. *Parens patriae* matters by their nature may involve harms to large segments – sometimes the entirety – of a State's population. But the harm to the State is differentiated because no private party or group shares the State's unique quasi-sovereign interests. Additionally, the "generalized grievances" for which standing requirements forbid federal court review are those that are "also of an abstract and indefinite nature." *Akins*, 524 U.S. at 23. "[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.'" *Id.* at 24. As applied to climate change issues, this Court already has found that the fact that "climate-change risks are 'widely shared' does not minimize [the States'] interest in the outcome of this litigation." *Massachusetts*, 549 U.S. at 522.

the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.” 458 U.S. at 607. Assuming that a State can demonstrate that it “would likely attempt to address [the injury] through its sovereign lawmaking powers” “if it could,” the State may, from the same showing, confirm that it has made a rational determination that the damage to its interests has been caused at least in part by the challenged actions of the Petitioners. This same demonstration by the State would also go to the redressability aspect of standing.

This case exemplifies how *Alfred L. Snapp* resolves the causation and redressability issues with appropriate deference to the States. There is no question that, if the Respondent States could regulate the Petitioners’ greenhouse gas emissions, they would. Respondents Connecticut, New York, Rhode Island, and Vermont all have adopted regulations for, and participate in, the Regional Greenhouse Gas Initiative, which caps power sector carbon dioxide emissions and will reduce those emissions by ten percent by 2018. See Regional Greenhouse Gas Initiative, Inc., Program Design, State Statutes & Regs., <http://www.rggi.org/design/regulations> (March 18, 2011) (citing implementing statutes and rules). Moreover, several of the Respondent States have also adopted renewable portfolio standards that are increasing the amount of the States’ energy needs that are satisfied from carbon dioxide-free sources. See,

e.g., Conn. Gen. Stat. Ann. § 16-245a (West 2007); N.Y. Pub. Serv. Comm'n, Order Regarding Retail Renewable Portfolio Standard (Case 03-E-0188, Sept. 24, 2004). The States have made it plain, through the exercise of their sovereign authority, that they view the actions of the Petitioners to contribute to the injuries they allege. Further, they have indicated that the remedy they seek – emissions reductions – will, in their view, redress that harm (at least in part). The States assuredly did not impose carbon dioxide reduction programs on their power plants lightly. There is no suggestion that these in-state controls were not imposed, at least in part, in order to implement the States' considered judgment that carbon dioxide emissions are contributing to climate change, which visits harm upon the Respondent States. Nor can it be seriously contended that the Respondent States' control programs are a constitutionally irrational exercise of State power. Therefore, a finding that "the State, if it could, would likely attempt to address [the harm in this case] through its sovereign lawmaking powers" imports a measure of the causation and redressability components of the *Lujan* test.

Although *Lujan* and *Alfred L. Snapp* share a common purpose, the Court has been careful to maintain the distinct applicability of each. As with *Tennessee Copper* and other early twentieth century cases, there is a conspicuous absence in *Alfred L. Snapp* of any follow-on analysis remotely resembling *Lujan*'s three-part test. See *Alfred L. Snapp*, 458 U.S.

at 600-10; compare *Maryland v. Louisiana*, 451 U.S. 725, 736 (1981) (assessing whether the injury to the States' proprietary interest as direct consumers of natural gas "fairly can be traced to the challenged action of the defendant" and therefore can support the States' "[s]tanding to sue"), with *id.* at 737-38 (separately assessing the same States' right to proceed in their *parens patriae* capacity without reference to any of aspect of the *Lujan*-type standing test). The reason is simple enough: A proper *parens patriae* suit ensures that the State's interest is not "too vague to survive the standing requirements of Art. III" and that the State's interest is "sufficiently concrete to create an actual controversy." 458 U.S. at 602. That is, in the context of *parens patriae* standing, if the State satisfies the *Alfred L. Snapp* test, the State has demonstrated the existence of a sufficient "case" or "controversy" within the meaning of Article III.

Of course, *Alfred L. Snapp* was decided in July 1982 and *Lujan* was not authored until 1992, so *Alfred L. Snapp* could not have relied on *Lujan* directly. However, the three-part *Lujan* test was already crystallizing in *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464 (1982). In that matter, which involved only private parties, the Court held: "Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be

redressed by a favorable decision.” *Id.* at 472 (citations and quotation marks omitted). *Valley Forge* was decided six months before *Alfred L. Snapp*. It is remarkable that the Court in *Alfred L. Snapp*, in discussing standing and specifically referencing Article III, never once mentioned *Valley Forge* or the three-part standing test that it assessed in the context of private party litigation just months earlier. The simplest explanation for this is that the *Valley Forge* analysis, *i.e.*, the *Lujan* framework, just does not apply to States asserting a quasi-sovereign interest. In fact, the Court has never applied the *Lujan* factors to a State suing as *parens patriae* against a party other than the federal government, *see infra* pp. 32-33, but it has many times allowed States to proceed to vindicate their *parens patriae* interests against such parties.

For example, in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), two States – Ohio and Pennsylvania – were permitted to sue West Virginia regarding the latter’s attempts to curtail natural gas sales to the former. The Court cited the plaintiff States’ “two-fold interest” as “proprietor” and as “representative of the consuming public whose supply will be similarly affected.” *Id.* at 591. “Both interests are substantial and both are threatened with serious injury.” *Id.* Accordingly, the States had demonstrated “every element of” a “controversy between States in the sense of the Judiciary Article of the Constitution.” *Id.* (emphasis added); *compare id. with Wyoming v. Oklahoma*, 502 U.S. 437, 447 (1992) (affirming that, where Wyoming was asserting a proprietary injury and

not acting as *parens patriae*, the State “had standing to bring th[e] action” because the “loss of severance tax revenues fairly can be traced to” Oklahoma’s legislation (quotation marks omitted)).

Parens patriae standing is not without its limits. The federal government, in enacting a statute or promulgating a regulation, may very well be acting as *parens patriae* itself. Therefore, as against the federal government in such a case, a State’s need to proceed as *parens patriae* to protect the health and welfare interests of its citizens and its natural resources is lessened. It is reasonable that in such context the Court would require a greater showing from the State to demonstrate standing.

The Court’s 2007 decision in *Massachusetts* follows that pattern. The respondent there was EPA – a federal agency – not a private party. The matter involved the Clean Air Act, which was designed to protect the Nation’s health and welfare, including its natural resources. See 42 U.S.C. § 7401(a)(2) (2006) (citing, as a basis for the Act, “mounting dangers to the public health and welfare” from air pollution, including “damage to and the deterioration of property”). The Court applied the “most demanding standards of the adversarial process,” *i.e.*, the *Lujan* test. Although the Court explained that the States were entitled to “special solicitude,” the Court still applied the *Lujan*

factors and not the *Alfred L. Snapp* test.⁶ There is no need for the Court to revisit that issue here because this case does not implicate the competing claims to *parens patriae* representation that obtain when a State sues the federal government.⁷

The Petitioners fail entirely to address the States' quasi-sovereign interest. Instead, they focus on a more proprietary interest that is similar to that which was found sufficient to support standing in *Massachusetts*. Pet. Br. 17-24. Therefore, the Petitioners cannot demonstrate that the States lack standing.

For its part, TVA at least recognizes that the States' claim to *parens patriae* standing presents a separate question. But TVA declines to address the

⁶ Because *Lujan* applies to state *parens patriae* plaintiffs when the federal government is also acting as *parens patriae*, *amicus* Washington Legal Foundation's cite to *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236 (10th Cir. 2008), for the proposition that courts have applied *Lujan* strictly to State plaintiffs, Wash. Legal Found. Br. 10 n.2, is inapposite. Moreover, there is no indication that the plaintiff State in that case even claimed *parens patriae* standing.

⁷ Although TVA is a federal entity, it has no claim to a superior *parens patriae* interest because it is "far removed from the control of the Executive Branch" and "operat[es] as the functional equivalent of a private corporation." *North Carolina ex rel. Cooper v. TVA*, 515 F.3d 344, 349 (2008).

question because it concludes that the States can maintain Article III standing based on their proprietary interest. TVA Br. 27 n.11.

The Petitioners protest that, due to the pervasive and persistent nature of greenhouse gases, a finding of standing in this matter would open the courthouse doors to virtually anybody to sue any of billions of sources, effectively eliminating the standing requirement altogether. Pet. Br. 18-19. The *amici* States take no position on whether an individual on the coast of North Carolina could sue a single small business in Alaska for rising sea levels that threaten to inundate property on the Outer Banks of North Carolina. The *amici* only address whether a State can demonstrate standing. An important inquiry in such situations was stated in *Alfred L. Snapp*: whether “the State, if it could, would likely attempt to address [the harms] through its sovereign lawmaking powers.” 458 U.S. at 607. In this case, the answer is clear because at least some of the Respondent States have in fact regulated within their jurisdictions sources that are substantially similar to the Petitioners’ facilities. See *supra* pp. 28-29. If the State of New York named a single small business in Idaho as a defendant, a further showing may be needed to demonstrate *parens patriae* standing.

Moreover, the States’ action is rooted in the common law of public nuisance – a law under which States not only are authorized plaintiffs, but are favored plaintiffs. When the harms from a nuisance

are widespread, the nuisance is “public” and either a State or a private plaintiff can maintain an action. But, “in [a] case of a public nuisance, where a bill is filed by a private person, asking for relief by way of prevention, the plaintiff cannot maintain a stand in a court of equity; unless he avers and proves some special injury.” *Mayor of Georgetown*, 37 U.S. at 99. In contrast, a State has standing to abate a public nuisance without showing special damage. See generally Restatement (Second) of Torts § 821C (1979). As the Court has indicated, “standing is gauged by the specific common-law, statutory or constitutional claims that a party presents.” *Int’l Primate Prot. League v. Adm’rs of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). The “special injury” requirement for public nuisances further distinguishes State plaintiffs from private plaintiffs and provides a specific limitation on the indiscriminate filing of nuisance claims that the Petitioners decry.

The Petitioners’ argument also proves too much. This Court has already allowed many State-prosecuted public nuisance actions to proceed. Public nuisance is an action that was and is still known at common law, and is a well-used tool in environmental disputes. See *supra* pp. 6-10. By definition a public nuisance is one that impacts the general public. Restatement (Second) of Torts § 821B (1979). The Petitioners’ contention would have standing swallow the cause of action based on a necessary prerequisite to the prosecution of that cause of action. Because “standing is gauged by the specific common-law . . . claims that a party presents,”

Int'l Primate Prot. League, 500 U.S. at 77, it is illogical that standing would entirely preclude a cause of action in this manner.

Finally, as a practical matter, a finding of standing would not unleash a torrent of greenhouse gas nuisance suits. Prosecuting an interstate public nuisance action is a resource-intensive exercise. Therefore, such an action often stands as a last line of defense for a State to protect its citizens and resources when other efforts fail.

In 2006, North Carolina filed a public nuisance action against TVA under Alabama, Kentucky and Tennessee state law. *See North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291 (4th Cir. 2010), *cert. pending*, No. 10-997. The State alleged that TVA's coal-fired power plants were emitting unreasonable amounts of sulfur dioxide (SO₂) and oxides of nitrogen (NO_x) and thereby harming North Carolina and its citizens. Prior to filing its complaint against TVA, North Carolina sought reductions from TVA through negotiation and by pursuing statutory rights under the Clean Air Act. *See, e.g.*, § 126 Rule, *supra*; *North Carolina v. EPA*, 531 F.3d 896, 911-12, *modified*, 550 F.3d 1176 (D.C. Cir. 2008). Only when those efforts failed to produce timely results did the State resort to public nuisance law. *North Carolina ex rel. Cooper v. TVA*, 593 F. Supp. 2d 812, 816 (W.D.N.C. 2009), *rev'd on other grounds*, 615 F.3d 291 (4th Cir. 2010), *cert. pending*, No. 10-997. The case involved a series of expert witnesses, a twelve-day federal trial, and two

appeals, which garnered the participation of twenty-five States as parties, intervenors and *amici* on various sides of the issues. Given the cost and complexity of such litigation, such cases are unlikely to be filed except in the most compelling of circumstances.

Accordingly, the Petitioners have not shown that the Second Circuit erred in concluding that the Respondent States have standing.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

ROY COOPER
Attorney General of North Carolina

Christopher G. Browning, Jr.*
Solicitor General of North Carolina

James C. Gulick
Senior Deputy Attorney General

Marc D. Bernstein
Special Deputy Attorney General

March 2011

*Counsel of Record