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 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 URGING REVERSAL

STEVEN J. LECHNER, ESQ.
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com

Attorney for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
IDENTITY AND INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	3
ARGUMENT	5
I. THE IMMUTABLE REQUIREMENTS OF ARTICLE III STANDING: INJURY IN FACT, CAUSATION, AND REDRESSABILITY	5
II. THIS COURT SHOULD OVERRULE *MASSACHUSETTS* BECAUSE IT SERIOUSLY WEAKENED THE CAUSATION AND REDRESSABILTY REQUIREMENTS OF ARTICLE III STANDING	8
III. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE SECOND CIRCUIT BECAUSE IT EVISCERATES WHAT IS LEFT OF CAUSATION AND REDRESSABILITY	16
A. The Second Circuit Essentially Eliminated The Causation Requirement	17
B. The Second Circuit Rendered The Redressability Requirement Meaningless	22

TABLE OF CONTENTS – Continued

Page

IV. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE SECOND CIRCUIT BECAUSE RESPONDENTS' CLAIMS ARE NON-JUSTICIABLE, GENERALIZED GRIEVANCES..... 24

CONCLUSION..... 27

TABLE OF AUTHORITIES

Page

CASES

Allen v. Wright, 468 U.S. 737 (1984).....2, 7, 9, 10

Babbitt v. Farm Workers, 442 U.S. 289 (1979).....16

Bennett v. Spear, 520 U.S. 154 (1997) 24

Center for Biological Diversity v. U.S. Department of the Interior, 563 F.3d 466 (D.C. Cir. 2009).....13, 14

Clinton v. New York, 524 U.S. 417 (1998).....1

Connecticut v. American Electric Power, Inc., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) 4

Connecticut v. American Electric Power, Inc., 582 F.3d 309 (2nd Cir. 2009).....4, 5, 16, 22, 25

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 18

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).....25

Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658 (D.C. Cir. 1996).....7, 9

Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358 (5th Cir. 1996) 20

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000).....19, 20, 21

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000).....12

TABLE OF AUTHORITIES – Continued

Page

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979).....6

Hein v. Freedom from Religion Found., 551 U.S. 587 (2007).....15

Lewis v. Casey, 518 U.S. 343 (1996).....12

Linda R.S. v. Richard D., 410 U.S. 614 (1973).....24

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

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990).....13, 19

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).....12

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

Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991).....2

Morrison v. Olson, 487 U.S. 654 (1988).....2

Natural Res. Def. Council v. Watkins, 954 F.2d 974 (4th Cir. 1992).....19, 20

Pennsylvania v. West Virginia, 262 U.S. 553 (1923).....16

Public Citizen, Inc. v. Bomer, 274 F.3d 212 (5th Cir. 2001).....26

Public Interest Research Group v. Powell Duffryn Terminals, 913 F.2d 64 (3rd Cir. 1990).....17, 18, 19, 20

TABLE OF AUTHORITIES – Continued

Page

Raines v. Byrd, 521 U.S. 811 (1997).....6

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) 2

Sierra Club v. Morton, 405 U.S. 727 (1972) 12

Sierra Club v. Peterson, 185 F.3d 349 (5th Cir. 1999) 13

Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996).....19, 21

Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26 (1976) 9

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998).....23

Summers v. Earth Island Inst., ___ U.S. ___, 129 S.Ct. 1142 (2009).....12

Texas Independent Producers and Royalty Owners Association v. E.P.A., 410 F.3d 964 (7th Cir. 2005) 20

United States v. Richardson, 418 U.S. 166 (1974).....2

United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).....12, 13, 15

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982).....6, 24, 25

Warth v. Seldin, 422 U.S. 490 (1975).....24, 25

Whitmore v. Arkansas, 495 U.S. 149 (1990) 16

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISION

U.S. Const. art. II, § 3 .....7, 16, 20

STATUTES

33 U.S.C. § 1251(a) 17

33 U.S.C. § 1311(a) 17

33 U.S.C. § 1342 17

33 U.S.C. § 1342(k) 17

RULE

Supreme Court Rule 37 1

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners urging reversal.[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 the right to own and use property, individual liberty, 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 liberty. *Clinton v. New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Separation of powers was designed to implement a

[1] All parties have consented to the filing of this brief. Copies of the consent letters have been filed with the Clerk of the Court. 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.

fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty."); *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 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 nuisance claims against four private utility companies and the Tennessee Valley Authority ("TVA") 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 urging this Court to reverse the judgment of the Second Circuit.

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 ("Respondents")[2] seek to hold four private utility companies ("Petitioners") and the TVA jointly and severally liable for an ongoing phenomenon, *i.e.*, global climate change. *See generally* Joint Appendix ("JA") 56-59, 117-19. Respondents allege that

[2] The term "Respondents" refers to all Respondents except the TVA.

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. *Id*. 57-58, 99-100. These alleged future injuries 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*. 57-58. Respondents are uncertain as to when these alleged injuries might occur but suggest sometime within the next 10 to 100 years. *Id*. 83-84.

The district court dismissed these claims as presenting non-justiciable political questions. *Connecticut v. American Electric Power, Inc.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005). 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 determinations that should be made by the politically accountable branches. *Id*. at 271-74 (The claims "present non-justiciable political questions that are consigned to the political branches, not the Judiciary."). 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 Respondents had standing

under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) ("*Defenders of Wildlife*"), as seriously weakened by *Massachusetts v. EPA*, 549 U.S. 497 (2007). *Connecticut*, 582 F.3d at 339-49. Although Respondents did not have a purported procedural right that was of critical importance in *Massachusetts*, 549 U.S. at 517-18, the Second Circuit still applied *Massachusetts*'s weakened standing requirements to conclude that Respondents had standing to seek injunctive relief with respect to speculative future injuries resulting from Petitioners' purported contribution to global climate change. *Connecticut*, 582 F.3d at 339-49.

ARGUMENT

I. THE IMMUTABLE REQUIREMENTS OF ARTICLE III STANDING: INJURY IN FACT, CAUSATION, AND REDRESSABILITY.

In *Defenders of Wildlife*, this Court reaffirmed that the "irreducible constitutional minimum" of standing is comprised of three requirements:

> 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 – injury in fact, causation, and redressability – may not be modified or abrogated by any branch of government. *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."); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 n.24 (1982) ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III."); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("In no event, however, may Congress abrogate the Art. III minima . . . .").

In reaffirming 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 . . .)." *Defenders of Wildlife*, 504 U.S. at 572. Under such circumstances,

this Court suggested that a plaintiff could establish standing "without meeting all the demanding normal standards for redressability and immediacy."[3] *Defenders of Wildlife*, 504 U.S. at 572 n.7. The basis for 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. *Id*. at 572. Without the impairment to a particularized concrete interest, however, an individual plaintiff could 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; *see Allen*, 468 U.S. at 761.

---

[3] Importantly, this Court did not relax the causation requirement. *Defenders of Wildlife*, 504 U.S. at 572 n.7. To the contrary, a plaintiff still must show that the impairment of the concrete interest is fairly traceable to the procedural violation. *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 essential injury to the plaintiff's own interest.") (emphasis added).

II. THIS COURT SHOULD OVERRULE *MASSACHUSETTS* BECAUSE IT SERIOUSLY WEAKENED THE CAUSATION AND REDRESSABILTY REQUIREMENTS OF ARTICLE III STANDING.

In *Massachusetts*, this Court held that Massachusetts had standing to challenge the decision of the Environmental Protection Agency ("EPA") not to regulate GHG emissions from new motor vehicles under the Clean Air Act ("CAA"). 549 U.S. at 526. That "Congress ha[d] authorized this type of challenge" in the CAA was "of critical importance" to this Court's standing analysis. *Id.* at 516. Recognizing that a plaintiff normally must meet the immutable requirements of standing, *id*. at 517, this Court relied on the procedural right in the CAA to find that Massachusetts was not required 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 *Defenders of Wildlife*, 504 U.S. at 572, n.7).

In *Massachusetts*, however, this Court took *Defenders of Wildlife*'s relaxed requirements for standing in procedural right cases and weakened them further. First, it diminished the causation requirement. *Defenders of Wildlife* requires a plaintiff to 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.'" 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*, however, this Court found causation based upon the following attenuated causal chain:

- 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 GHG emissions from those new motor vehicles has caused total GHG emissions to be higher than they would have been with such regulation; and
- Massachusetts's injury is, therefore, "fairly traceable" to the EPA's failure to regulate

> GHG emissions from new motor vehicles sold in the United States.

See Massachusetts, 548 U.S. at 542-43 (Roberts, C.J., dissenting).

This attenuated causal chain is inconsistent with *Defenders of Wildlife*'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." *Id*. 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. To overcome this infirmity, this Court suggested that causation was satisfied because the EPA's failure to regulate GHG emissions from new motor vehicles "contributes" to Massachusetts's loss of coastline. *Id*. at 523. Thus, after *Massachusetts*, if a plaintiff has a procedural right, causation may be established if that plaintiff can show that the defendant's actions contribute in some tiny, attenuated way to the asserted injury.

Second, *Massachusetts* also lessened the redressability requirement. In *Defenders of Wildlife* this Court ruled that it must be "likely," as opposed to merely "speculative," that a plaintiff's alleged injury will be "redressed by a favorable decision." 504 U.S. at 560-61. In *Massachusetts* this Court changed this

requirement so that redressability is satisfied if any problem may be redressed, even slightly, as 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). Instead, this purported remedy is aimed at global warming. *Id.* at 525 ("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.") (emphasis in

original). Yet, global warming is a phenomenon, not an injury, and not the injury asserted by Massachusetts. *See id.* (noting that Massachusetts's alleged injury was loss of coastal land); *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996) (the remedy must be limited to addressing the alleged injury). 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 Defenders of Wildlife*, 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."); *Sierra Club v. Morton*, 405 U.S. 727, 734-736 (1972) (rejecting the idea that an interest in protecting the environment alone could establish standing).

As the forgoing demonstrates, *Massachusetts* so weakened the immutable requirements of causation and redressability that nothing remains of those requirements in procedural rights cases. In short, *Massachusetts* revived the liberal view of standing in *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) ("SCRAP"),

the reported demise of which was apparently premature.[4] *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990) ("*National Wildlife Federation*") (*SCRAP* "has never since been emulated by this Court"); *Sierra Club v. Peterson*, 185 F.3d 349, 361 n.13 (5th Cir. 1999) (*National Wildlife Federation* "likely eviscerated certain prior cases that afforded procedural rights plaintiffs standing where the [immutable requirements of Article III standing were] not met, *see*, *e.g.*, [*SCRAP*]. . . .").

Indeed, this is evident from the decision in *Center for Biological Diversity v. U.S. Department of the Interior*, 563 F.3d 466 (D.C. Cir. 2009). In that case, environmental groups challenged an offshore oil and gas leasing program on both substantive and procedural grounds. *Id*. at 471-72. The groups argued that the federal agency had failed to consider both the economic and environmental costs of potential GHG emissions associated with the program and the effects of climate change on the wildlife in the areas to be leased. *Id*. at 475.

The D.C. Circuit ruled that the groups lacked standing to challenge the leasing program on substantive grounds because their alleged injury from

---

[4] In *SCRAP*, environmental groups were found to have standing to challenge a decision of the ICC to allow railroads to impose a surcharge on freight because the surcharge could discourage recycling and encourage the use of non-recycled goods, which may require natural resources to be taken from areas used by the environmental groups. 412 U.S. at 688.

climate change was too general. *Id*. at 478. It also ruled that, even if the groups would have been able to satisfy the injury prong, they still would lack standing because they could not establish a causal link between the agency action and the alleged injury. *Id*. at 478-79. In so doing, the D.C. Circuit ruled that the following chain of causation was too attenuated:

- The leasing program will bring about drilling;
- Drilling, in turn, will bring about more oil;
- This oil will be consumed;
- The consumption of this oil will result in additional carbon dioxide being emitted into the Earth's atmosphere;
- This carbon dioxide will contribute to global climate change;
- Global climate change will adversely affect the wildlife that the groups enjoy; and.
- The groups are, therefore, injured by the adverse effects on the wildlife they enjoy.

Id. The D.C. Circuit properly rejected this attenuated chain of causation because it relies "on the speculation that various different groups of actors not present in th[e] 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.

Inexplicitly, the D.C. Circuit then ruled that this same attenuated chain of causation was sufficient for

the groups to have standing to complain about procedural violations. *Id*. In *Defenders of Wildlife*, however, this Court ruled that only redressability and immediacy were relaxed when a plaintiff seeks to enforce 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 that failure and the impairment of a concrete interest. *See Defenders of Wildlife*, 504 U.S. at 572 n.8 (Rejecting 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 (apart from his interest in having the procedure observed).").

Therefore, this Court should take the opportunity and put the final nail in *SCRAP*'s coffin by overruling *Massachusetts*. *Cf. Hein v. Freedom from Religion Found*., 551 U.S. 587, 636 (2007) (Scalia, J., concurring in the judgment) (noting that overruling prior precedent "is a serious undertaking" but sometimes better than the alternative).

III. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE SECOND CIRCUIT BECAUSE IT EVISCERATES WHAT IS LEFT OF CAUSATION AND REDRESSABILITY.

In the instant case, the Second Circuit unjustifiably extended *Massachusetts* by ruling Respondents had standing to bring federal common law nuisance claims for alleged future injuries from global climate change. *Connecticut*, 582 F.3d at 345-47. Although Respondents do not have the purported procedural right that was of great importance in *Massachusetts*, the Second Circuit still applied the weakened causation and redressability requirements of *Massachusetts* to conclude that Respondents had standing to seek injunctive relief with respect to Petitioners' purported contribution to global climate change.[5] *Connecticut*, 582 F.3d at 345-49.

---

[5] Based upon *Massachusetts*, the Second Circuit also found that Respondents' alleged future injuries that might occur within the next 10 to 100 years if global climate change were not abated satisfies the injury in fact requirement. *Connecticut*, 582 F.3d 342-44. MSLF submits that an alleged injury occurring decades in the future fails the immediacy requirement. *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("'Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be "certainly impending" to constitute injury in fact.'") (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923))).

A. The Second Circuit Essentially Eliminated The Causation Requirement.

In finding that Respondents satisfied the causation requirement, the Second Circuit relied primarily on the "contributor theory" from *Public Interest Research Group v. Powell Duffryn Terminals*, 913 F.2d 64 (3rd Cir. 1990) ("*Powell Duffryn*"), and its progeny. *Connecticut*, 582 F.3d at 345-47. Based upon these Clean Water Act ("CWA") cases,[6] the Second Circuit reasoned that the Respondents' injuries are "fairly traceable" to Petitioners' emissions because those emissions "contribute to" Respondents' alleged injuries. By relying on inapposite CWA cases, the Second Circuit essentially eliminated the causation requirement.

In *Powell Duffryn*, an environmental group and others brought a citizen suit under the CWA, alleging the defendant was exceeding the terms of its discharge permit. 913 F.2d at 69. The defendant moved for summary judgment because the plaintiffs could not establish to "a reasonable scientific certainty" that defendant's discharges adversely affected the

[6] The purpose of the CWA is to regulate the discharge of pollutants into water bodies. *See* 33 U.S.C. § 1251(a). Under the CWA, persons are prohibited from discharging pollutants into navigable water bodies unless they obtain a National Pollution Discharge Elimination System permit, which limits the amount of effluent (pollution) that may be discharged. *See* 33 U.S.C. §§ 1311(a), 1342. Compliance with the terms and conditions of the permit constitutes compliance with the CWA. 33 U.S.C. § 1342(k).

water body used by the plaintiffs. *Id*. at 71-72. The district court denied summary judgment because the defendant's violation of the discharge permits, in and of itself, was sufficient to demonstrate that the plaintiffs' injury was fairly traceable to the defendant's discharges. *Id*. at 72.

On appeal, the Third Circuit agreed with the defendant that "permit exceedance alone" is insufficient to meet the causation prong of the test for standing, but it concluded there were sufficient facts to establish causation. *Id*. at 72. Specifically, the Third Circuit ruled:

> The requirement that plaintiff's injuries be "fairly traceable" to the defendant's conduct does not mean that plaintiffs must show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs. A plaintiff need not prove causation with absolute scientific rigor *to defeat a motion for summary judgment*.

Id. at 72 (emphasis added).

Thus, according to the Third Circuit, CWA plaintiffs must demonstrate that they are more than "concerned bystanders" by showing there is a "substantial likelihood" that the defendant's conduct caused their alleged injury. *Id*. at 72 (quoting *Duke Power Co. v. Carolina Environmental Study Group, Inc*., 438 U.S. 59, 75 n.20 (1978)). This likelihood may be established by showing that the defendant has:

(1) discharged a pollutant in concentrations greater than allowed by its permit; (2) into a water body used by the plaintiffs; and (3) the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs. *Powell Duffryn*, 913 F.2d at 72.

Whether this "contributor theory" satisfies the "fairly traceable" requirement in CWA cases is debatable. Yet, the Second Circuit's reliance on it in the instant case is indefensible. Prior to the Second Circuit's decision, the *Powell Duffryn* "contributor theory" had been used only when the alleged pollution was discharged into a discrete area of a water body used by the plaintiffs. *See*, *e.g.*, *Powell Duffryn*, 913 F.2d at 68-69 (discharge into Kill Van Kull, a tidal strait); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156-62 (4th Cir. 2000) (en banc) ("*Gaston Copper*") (discharge into a water body upstream from a private, manmade lake); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 550 (5th Cir. 1996) ("*Cedar Point Oil*") (discharge into the Galveston Bay); *Natural Res. Def. Council v. Watkins*, 954 F.2d 974, 976-77 (4th Cir. 1992) (discharge into tributary of Savannah River). Because the pollution was discharged into a discrete area used by the plaintiffs, the courts believed it was reasonable to presume that the alleged pollution would "contribute" to the plaintiffs' alleged injuries. *E.g.*, *Powell Duffryn*, 913 F.2d at 71-73.

The *Powell Duffryn*'s CWA "contributor theory," however, has no application in the instant case because there is no discrete area. *Cf. National Wildlife*

Federation, 497 at 889 ("[A]verments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which [regulated] . . . activity has occurred or probably will occur by virtue of the governmental action, are insufficient to show that the member's rights have been adversely affected or aggrieved by Government action."); *Defenders of Wildlife*, 504 U.S. at 565 (rejecting the idea that any person who uses any part of a "contiguous ecosystem" adversely affected by an agency action has standing even if the challenged activity is located a great distance away from the area used); *Texas Independent Producers and Royalty Owners Association v. E.P.A.*, 410 F.3d 964, 972-74 (7th Cir. 2005) (noting a distinction between the plaintiff who is within the discharge zone of a defendant and those who are so far downstream that their injuries cannot fairly be traced to that defendant); *Gaston Copper*, 204 F.3d at 162 (same); *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 360-62 (5th Cir. 1996) (environmental organization members who used lake 18 miles and three tributaries from source of alleged unlawful discharge failed to satisfy "fairly traceable" component of Article III standing). Instead, the relevant area in the instant case is the Earth's atmosphere. Because of the immense size of the Earth's atmosphere it is utterly unreasonable to presume causation. Indeed, to take the Second Circuit's analysis to its extreme would mean that every person on Earth was within the discharge zone.

The Second Circuit's reliance on *Powell Duffryn*'s CWA "contributor theory" is badly misplaced for another reason. In all the cases in which it has been applied there was a direct connection between the defendant's alleged discharge of pollutants and the plaintiffs' alleged injuries. *E.g.*, *Powell Duffryn*, 913 F.2d at 72-73 (defendant's discharge of oil and grease could cause the complained of oily or greasy sheen on water body); *Gaston Copper*, 204 F.3d at 156-59 (defendant's discharge of cadmium, copper, iron, lead, and zinc could cause the complained of environmental degradation); *Cedar Point Oil Co.*, 73 F.3d at 558 (defendant's discharge of water produced from oil and gas wells could cause harmful effects on water quality); *Natural Res. Def. Council*, 954 F.2d at 974 (issues of fact as to whether defendant's thermal discharge could cause complained of environmental effects precluded granting of summary judgment).

In the instant case, there is no direct connection. Petitioners' emissions of carbon dioxide into the Earth's atmosphere will not directly affect any of Respondents. Rather, alleged future injuries of Respondents are the alleged result of a phenomenon called global climate change, which may or may not be the result of manmade GHGs in the atmosphere, which may or may not be the result of Petitioners' emissions. Taking the Second Circuit's novel causation theory to its logical extreme would mean that a creative plaintiff's attorney could establish causation against any entity whose emission of carbon dioxide "contributes" in some tiny way to the total amount of

GHGs in the Earth's atmosphere. The absurdity of this proposition proves Respondents lack standing.

B. The Second Circuit Rendered The Redressability Requirement Meaningless.

Respondents seek injunctive relief involving judicially imposed emissions caps on Petitioners and the TVA. *Connecticut*, 582 F.3d at 348. In ruling that Respondents met the redressability requirement, the Second Circuit focused on the statement in *Massachusetts* that redressability is satisfied if global climate change is "slow[ed]" or reduce[d]." *Connecticut*, 582 F.3d at 348 ("[*Massachusetts*] recognized that regulation of motor vehicle emissions would not 'by itself reverse global warming,' but that it was sufficient for the redressability inquiry to show that the requested remedy would 'slow or reduce it.' ") (quoting *Massachusetts*, 549 U.S. at 525).

The Second Circuit's reliance on the redressability requirement of *Massachusetts* is badly misplaced because, again, Respondents lack the requisite procedural right that was of critical importance in *Massachusetts*. The lowest threshold of redressability was accepted in *Massachusetts* because federal agencies can take incremental steps in making regulatory changes. 549 U.S. at 524. That analysis has no applicability here because Respondents are asking for judicially fashioned incremental steps that would afford no relief.

Judicially capping the emissions of a few utilities offers, at best, a speculative chance in reducing total GHG emissions. Moreover, assuming a reduction in total emissions, there is no guarantee that the reduction would reduce global climate change. The amount of global climate change is not directly proportional to a few utilities' GHG emissions. Instead, according to Respondents, global climate change results from GHG emissions from billions of sources over centuries. JA 79-84, 134-36. These emissions randomly mix in the Earth's atmosphere and presumably result in a gradual increase in global temperatures. Thus, capping Petitioners' emissions will not redress global climate change, much less Respondents' alleged future injuries. Accordingly, Respondents lack standing. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.").

Moreover, judicially capping Petitioners' emissions would violate *Defenders of Wildlife*'s requirement that it 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. In *Defenders of Wildlife*, federal agencies supplied only "a fraction of the funding" for projects causing the alleged injury 504 U.S. at 571. Thus, it was pure speculation whether the plaintiffs' injury would be redressed because the alleged injurious projects could go forward even without funding from

federal agencies. *Id*.; *see also Warth v. Seldin*, 422 U.S. 490, 505-06 (1975) (low-income plaintiffs' challenge to exclusionary zoning practices was not redressable because, even if zoning ordinances were invalidated, there was no proof that suitable, low-income housing would be constructed); *Linda R.S. v. Richard D*., 410 U.S. 614, 619 (1973) (mother seeking child support lacked standing because the only result of her requested relief would be the incarceration of the father, and, thus, any payment of child support was purely speculative). In short, the uncertainty of any relief in the instant case proves Respondents lack standing.

IV. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE SECOND CIRCUIT BECAUSE RESPONDENTS' CLAIMS ARE NON-JUSTICIABLE, GENERALIZED GRIEVANCES.

In addition to the immutable requirements of Article III standing, this Court also adheres "to a set of prudential principles that bear on the question of standing." *Valley Forge*, 454 U.S. at 474. "Like their constitutional counterparts, these 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). Without this prudential principle, "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth*, 422 U.S. at 500; *see also Valley Forge*, 454 U.S. at 472 (The prohibition on generalized grievances is "to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.").

Respondents' federal common law nuisance claims are precisely the kind of "generalized grievances" that are "more appropriately addressed in the representative branches." *Elk Grove*, 542 U.S. at 12. This is especially true considering that Respondents did not have a purported procedural right that was of critical importance in *Massachusetts. See Warth*, 422 U.S. at 500 (noting that Article III standing analysis may be different if there is a constitutional or statutory provision that provides a right to judicial relief). Moreover, the speculative future injuries Respondents seek to redress could potentially be suffered by all landowners in the United States. *See Connecticut*, 582 F.3d at 342 (describing Respondents' alleged future injuries). Thus, "no matter how well intended, [Respondents] have done little more than present a

generalized grievance, common to all citizens or litigants in [the United States], and as such, lack standing." *Public Citizen, Inc. v. Bomer*, 274 F.3d 212, 219 (5th Cir. 2001); *Warth*, 422 U.S. at 499 ("[W]hen the asserted harm is . . . shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."); *see Defenders of Wildlife*, 504 U.S. at 573-74 ("We have consistently held that a plaintiff . . . claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief [that] no more directly and tangibly benefits him than it does the public at large[,] does not state an Article III case or controversy.").

Accordingly, this Court's prudential standing principles mandate that Respondents take their generalized grievances to the representative branches. Therefore, this Court should reverse the judgment of the Second Circuit.

CONCLUSION

For the foregoing reasons, this Court should hold that Respondents lack standing and reverse the judgment of the Second Circuit.

Respectfully submitted,

STEVEN J. LECHNER, ESQ.
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com

Attorney for Amicus Curiae

February 7, 2011