

No. 10-174

In The
Supreme Court of the United States

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

v.

STATE OF CONNECTICUT, et al.,
Respondent.

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

BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF HOME BUILDERS
IN SUPPORT OF THE PETITIONER

Amy C. Chai*
Thomas J. Ward
National Association of
Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 866-8200

** Counsel of Record*

February 7, 2011

TABLE OF CONTENTS

	Page (s)
INTEREST OF THE <i>AMICUS CURIAE</i>	1
ARGUMENT	3
I. THE SECOND CIRCUIT ERRONEOUSLY APPLIED STATUTORY STANDING FACTORS TO A COMMON LAW CAUSE OF ACTION	3
A. Significant Differences Exist in the Standing Analysis for Common Law and Statute-Based Causes of Action.....	3
1. Key Standing Principles.....	3
2. Standing and <i>Massachusetts v. EPA</i>	5
a. Injury-in-Fact.....	6
b. Causation-by-Contribution.....	7
c. Redressability.....	8
II. THE SECOND CIRCUIT’S CONFUSION RESULTED IN AN IMPROPER STANDING DETERMINATION	9
A. Because There is No Procedural Right at Issue in <i>Connecticut</i> , a Relaxed Immediacy Requirement is Inappropriate.....	9

TABLE OF CONTENTS (cont.)

	Page (s)
B. The Second Circuit Erroneously Relied on Statute-Based Tests to Determine Causation	10
C. The Second Circuit Impermissibly Relaxed the Redressability Requirement and Misunderstood the Nature of the Requested Relief in <i>Massachusetts</i>	13
D. The Second Circuit Failed to Consider Prudential Barriers to Standing	15
I. <i>WARTH v. SELDIN & HAVENS REALTY v. COLEMAN</i> – A COMPARISON OF STANDING ANALYSES	16
A. <i>Warth v. Seldin</i> : Assertion of a Constitutional Claim to Combat Exclusionary Housing Ordinance.....	17
B. <i>Havens Realty v. Coleman</i> : A Fair Housing Act Cause of Action Challenging Racial Steering.....	20
C. A Comparison of <i>Warth</i> and <i>Havens</i> Demonstrates the Critical Distinctions Between the Standing Analyses Employed in Common Law and Statute-Based Claims	22
CONCLUSION.....	23

TABLE OF AUTHORITIES

	Page (s)
Cases	
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997)	15
<i>Connecticut v. Am. Elec. Power</i> , 582 F.3d 309 (2d Cir. 2009)	3, 10, 11
<i>Gladstone, Realtors, v. Vill. of Bellwood</i> , 441 U.S. 91 (1979)	21
<i>Havens Realty Corp., et al., v. Coleman</i> , 455 U.S. 363 (1982)	20, 21, 22
<i>International Primate Prot. League v. Admin. of Tulane Educ. Fund</i> , 500 U.S. 72 (1991)	6
<i>Lujan v. Def. of Wildlife</i> , 504 U.S. 555 (1992)	<i>passim</i>
<i>Massachusetts v. Evtl. Prot. Agency</i> , 549 U.S. 497 (2007)	<i>passim</i>
<i>Native Vill. of Kivalina v. ExxonMobil Corp., et al.</i> , 663 F.Supp.2d 863 (2009)	12
<i>Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.</i> , 913 F.2d 64 (3d Cir. 1990)	10-11, 12

TABLE OF AUTHORITIES (cont.)

	Page (s)
<i>Trafficante v. Metro. Life Ins. Co.</i> , 409 U.S. 205 (1972)	20, 23
<i>U.S. v. Hays</i> , 515 U.S. 737 (1995).....	15
<i>Valley Forge Christian Coll. v. Am. United for Separation of Church and State</i> , 454 U.S. 464 (1982)	4, 15
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	<i>passim</i>
<i>Whitmore v. Arkansas</i> , 495 U.S. 149 (1990).....	10
 Statutes	
Clean Air Act § 304, 42 U.S.C. §7604(a).....	5, 6
Clean Air Act § 307, 42 U.S.C. §7607	5
Clean Air Act § 202(a)(1), 42 U.S.C. 7521(a)(1)	5
Fair Housing Act of 1968 § 804, 42 U.S.C. §3604	20, 21, 22
Fair Housing Act of 1968 § 804(d), 42 U.S.C. §3604	21
Fair Housing Act of 1968 § 812, 42 U.S.C. §3612	21
Administrative Procedure Act of 1966, 5 U.S.C. §553(e).....	5

TABLE OF AUTHORITIES (*cont.*)

Page (s)

Other

Paul Emrath, PhD and Helen Fei Liu, PhD,
Residential Greenhouse Gas Emissions, Special
Studies, April 30, 2007 at [http://www.nahb.org/
generic.aspx?genericcontentID=75563&from
GSA=1](http://www.nahb.org/generic.aspx?genericcontentID=75563&fromGSA=1) 2

INTERESTS OF AMICUS CURIAE

The National Association of Home Builders (NAHB) has received the parties' written consent to file this *amicus curiae* brief supporting petitioners.¹ NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the shelter industry. As the voice of America's housing industry, NAHB helps promote policies that will keep housing a national priority. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 160,000 members are home builders and/or remodelers, and its members construct about 80 percent of the new homes built each year in the United States.

NAHB is a vigilant advocate in the Nation's courts, and it frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members. NAHB was a petitioner in *NAHB v. Defenders of Wildlife*, 551 U.S. 644 (2007). Attached at Appendix A to this brief is a list of cases in which NAHB has participated before this Court as *amicus curiae* or "of counsel." A large number of these cases involved landowners and other parties aggrieved by excessive regulation under a wide array of statutes and regulatory programs.

NAHB's organizational policies have long advocated that access to the federal courts be limited

¹ Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

to those parties that have satisfied Article III standing requirements, as well as prudential standing principles. In particular, NAHB has advocated for standing to be conferred where a party is within the “zone of interests” of a statute or is the object of the challenged regulation. The Second Circuit’s opinion threatens to undermine this Court’s longstanding jurisprudence of properly limited access to the federal courts, and would grant near-unfettered access to the federal courts for parties seeking to advance all manner of “generalized grievances.”

Residential structures are estimated to be responsible for 18% of domestic greenhouse gas (GHG) emissions, largely due to the energy used by occupants of the property.² NAHB has been at the forefront of establishing and promoting green building practices for more than a decade, and, along with the International Code Council, developed the only ANSI-approved standard, the National Green Building Standard. Green building at its core promotes greater energy efficiency and, among other benefits, reduces GHG emissions. NAHB members are nonetheless concerned that they, as GHG emitters like all other industries, could one day be subject to a public nuisance claim if the Second Circuit’s decision is allowed to stand. *See, e.g.*, Pet. for Cert. at 3-4, *Am. Elec. Power Company, Inc., et al. v. State of Connecticut*, 2010 WL 3054374 (Aug. 2, 2010)(No. 10-174).

² *See, e.g.*, Paul Emrath, PhD and Helen Fei Liu, PhD, *Residential Greenhouse Gas Emissions*, Special Studies, April 30, 2007 at <http://www.nahb.org/generic.aspx?genericContentID=75563&fromGSA=1>.

ARGUMENT

I. THE SECOND CIRCUIT ERRONEOUSLY APPLIED STATUTORY STANDING FACTORS TO A COMMON LAW CAUSE OF ACTION.

In *Connecticut v. American Electric Power*, 582 F.3d 309 (2d Cir. 2009), the Second Circuit found that the plaintiff states and trusts had sufficiently established their standing to bring a federal common law nuisance claim against five defendant utilities. *Id.* at 315. The court engaged in an exhaustive review of the various elements of standing – the unique nature of state standing (e.g., propriety, *parens patriae*, and sovereign); the Article III “irreducible constitutional minimum;” and reliance on this Court’s standing determination in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007). However, the Second Circuit’s analysis is fatally flawed because it treats a common law cause of action exactly as it would a statutory cause of action. As discussed more fully below, this misapplication has resulted in an improper determination that the states and trusts have standing to bring their claim.

A. Significant Differences Exist in the Standing Analysis for Common Law and Statute-Based Causes of Action.

1. Key Standing Principles

All parties before the federal courts must satisfy Article III requirements for standing; that is, first, “the plaintiff must have suffered an ‘injury in fact’...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....Third, it must be ‘likely’...that the injury will be ‘redressed by a favorable decision.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

In addition to Article III, courts have over time fashioned prudential standing barriers. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499 (1975). The purpose of prudential standing is anchored in the “concern about the proper – and properly limited – role of the courts in a democratic society.” *Id.* at 498. There are three main principles embodied within prudential standing. First, the courts will typically decline standing where the plaintiff seeks to “rest his claim to relief on the legal rights or interests of third parties.” *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 474 (1982) (internal citations omitted). Second, courts will not adjudicate “‘abstract questions of wide public significance’ which amount to ‘generalized grievances,’ pervasively shared and most appropriately addressed in the representative branches.” *Id.* at 475. Third, courts generally require that the plaintiff’s complaint fall within “the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Id.* Unlike Article III standing, Congress can legislatively overrule prudential standing principles. *See, e.g., Warth*, 422 U.S. at 501 (1975) (“Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.”). However, where Congress has not acted to trump prudential standing, or as here, where there is no

statute, the full range of prudential standing requirements apply.

The courts have also developed a distinct Article III analysis when the cause of action arises not from the common law or constitutional law, but from a statute. Courts have long recognized that Congress can “define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” *Lujan*, 504 U.S. at 580 (citing *Warth*, 422 U.S. at 500). This is especially true where a statute conveys a specific procedural right. *Lujan*, 504 U.S. at 572. While Congress cannot legislate away Article III requirements, courts have determined that a plaintiff alleging a violation of a procedural right need not be subject to “all the normal standards for redressability and immediacy.” *Lujan*, 504 U.S. at 572 n.7. For example, the Clean Air Act creates a right of action for “any person” to bring a lawsuit against alleged violators of the Act, including the United States, and against the EPA for failing to act in accordance with the statute. See 42 U.S.C. §7604(a). The procedural rights granted by the Clean Air Act played a pivotal role in the case on which the Second Circuit heavily relied: *Massachusetts v. EPA*.

2. Standing and *Massachusetts v. EPA*

In *Massachusetts v. EPA*, plaintiff organizations filed a petition for rulemaking pursuant to Clean Air Act section 307, 42 U.S.C. §7607, and the Administrative Procedure Act, 5 U.S.C. §553(e), urging EPA to adopt GHG emissions standards for motor vehicles under Clean Air Act section 202(a)(1). See 549 U.S. at 510. EPA may grant or deny this petition. *Id.* The Clean Air Act also provides that the petitioner can bring suit against the agency if it

denies a petition or fails to respond in a timely fashion. 42 U.S.C. §7604(a). In this case, EPA denied the petition and the plaintiffs, joined by a number of intervening states, brought suit against EPA. *See Massachusetts*, 549 U.S. at 511-514.

A majority of this Court found that the Commonwealth of Massachusetts had standing to bring its claim against the EPA. *See Massachusetts*, 549 U.S. at 526. The Court was clear, however, that the existence of a statute, with its congressionally created procedural right, was a critical factor – if not the most critical factor – leading the court to find standing. “Congress has moreover authorized this type of challenge to EPA action....That authorization is of critical importance to the standing inquiry.” *Id.* at 516. This Court has long held that “standing is gauged by the specific common-law, statutory or constitutional claims that a party presents.” *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 77 (1991). Thus while Massachusetts remained subject to Article III requirements, the Court explicitly relaxed the standard for immediacy and redressability because of the statutorily created rights articulated in the Clean Air Act.

a. Injury-in-Fact

The Court in *Massachusetts* began its standing analysis by reviewing the *Lujan* test for an injury-in-fact that is concrete and particularized, and actual or imminent. 549 U.S. at 517. As the Court recognized, “[h]owever, a litigant to whom Congress has ‘accorded a procedural right to protect his concrete interests...can assert that right without meeting all

the normal standards for redressability and immediacy.” *Id.* at 517-518.

The Court noted that the petitioners challenged EPA’s failure to regulate GHG emissions from mobile sources under the Clean Air Act section 202(a)(1). Petitioners alleged a wide range of harms that will result if global warming continues unabated, including reduced snowpack, more violent storms, and rising sea levels. *See Massachusetts*, 549 U.S. at 521-522. The *Massachusetts* Court focused on one of Massachusetts’ alleged injuries – loss of shoreline from rising sea levels – to conduct its standing analysis. *See id.* at 522; *see also id.* at 540 (Roberts, C.J., dissenting).³

b. Causation-by-Contribution

In *Massachusetts*, this Court held that Massachusetts had sufficiently demonstrated causation, even though it sought EPA regulation of only U.S. motor vehicle emissions (as opposed to other domestic or foreign U.S. emissions sources), and these emissions were not the sole cause of the petitioners’ harm. 549 U.S. at 523-24. The Court’s rationale that the “contribution” of GHG emissions from motor vehicles is sufficient to allege causation because the petitioners’ claim is based on statute. This Court recognized that legislatures and regulatory agencies often tackle one element of a problem at a time; thus,

³ While the majority did not delve deeply into the question of “imminence,” the dissent did, disputing that plaintiffs sufficiently satisfied the requirement that their injuries, if not actual, be imminent. As the dissent stated, “accepting a century-long time horizon and a series of compounded estimates renders requirements of imminence and immediacy utterly toothless.” 549 U.S. at 542 (Roberts, C.J., dissenting).

if parties were not permitted to challenge incremental approaches in court, this “would doom most challenges to regulatory action.” 549 U.S. at 524. Thus, the Court found that Massachusetts had sufficiently demonstrated that the injuries were caused by EPA’s failure to treat carbon dioxide as a pollutant under the Clean Air Act, holding that “[t]here is...a ‘substantial likelihood that the judicial relief requested’ will prompt EPA to take steps to reduce that risk.” *Id.* at 521.

c. Redressability

The *Massachusetts* Court held that “[w]hen a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant,” 549 U.S. at 518, and that, in the context of “relaxed redressability,” Massachusetts’ injury could be redressed by a favorable decision. Additionally, and more significantly, this Court found that the petitioners’ claims were redressable, even if a decrease in GHG emissions from motor vehicles did not reverse climate change, based solely on the statute. “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.” *Id.* at 525 (emphasis in original). Thus, this Court did not hold that, when it comes to climate change, anything that slows or decreases emissions is sufficient to demonstrate redressability. Rather, the question was whether the statute created a duty for EPA to take action to slow or reduce emissions. For this reason, the

Commonwealth had standing, largely because it had asserted a procedural right granted to it by Congress.

II. THE SECOND CIRCUIT'S CONFUSION RESULTED IN AN IMPROPER STANDING DETERMINATION.

The Second Circuit's confusion regarding the appropriate tests for determining standing is not without consequence. The Court's misapplication of statutory standing factors to a common law cause of action resulted in the court incorrectly finding that the states and trusts have standing when in fact they do not. The Second Circuit relied on statutory constructs, such as the granting of a procedural right and the concomitant relaxed immediacy and redressability requirements, that are unavailable to common-law claims. Moreover, the Second Circuit failed to consider prudential standing, which governs unless Congress has explicitly removed a prudential principle. Where, as here, there is no statute underpinning the claim, all prudential standing principles must be considered to properly determine the court's jurisdiction.

A. Because There is No Procedural Right at Issue in *Connecticut*, a Relaxed Immediacy Requirement is Inappropriate.

Without a relaxed requirement to demonstrate "immediacy," the court should have found that the states and trusts failed to demonstrate an injury-in-fact because the future injuries they alleged are not immediate as required by Article III. The test for immediacy is whether the injury-in-fact is "actual or

imminent, not conjectural or hypothetical.” *Lujan*, at 560. In *Lujan*, the Court considered whether plaintiffs had standing when they asserted that their past visits to an endangered species’ habitat meant they would return again at some unspecified time in the future. The Court found their allegations to be insufficient. “Such ‘some day’ intentions...do not support a finding of the ‘actual or imminent’ injury that our cases require.” *Id.* at 564; *see also Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (finding that, when alleging a future injury, that injury “must be concrete in both a qualitative and temporal sense.”).

The states and trusts alleged a variety of injuries from greenhouse gas emissions to which they “expect” to be subjected within a timeframe of 10 years to 100 years into the future. *Connecticut*, 582 F.3d at 317-18. Even if the plaintiffs in *Lujan* had alleged they planned to return to the impacted locations sometime after 10 years but before they died, the Court’s actual or imminent requirement would not have been satisfied. The states and trusts’ time frame similarly does not satisfy the requirement. This lack of precision puts this Court in the precarious position of “deciding a case in which no injury would have occurred at all.” *Lujan*, 504 U.S. at 564 n.2.

B. The Second Circuit Erroneously Relied on Statute-Based Tests to Determine Causation.

The Second Circuit relied primarily on this Court’s holding in *Massachusetts* and the Third Circuit’s decision in *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*,

913 F.2d 64 (3d Cir. 1990) to find that the states and trusts had sufficiently alleged that their injuries are “fairly traceable” to the defendants’ actions.⁴ *Connecticut*, 582 F.3d at 345. However, the court’s reliance on both is misplaced because *Massachusetts*’ and *Powell Duffryn*’s causation-through-contribution findings were based on the presence of a statute.

The Third Circuit in *Powell Duffryn* addressed environmental organizations’ claims that a discharger violated its Clean Water Act National Pollution Discharge Elimination System (NPDES) permit and contributed to the pollution of a waterbody. *Powell Duffryn*, 913 F.2d at 68. The court employed a three-part test to determine whether the plaintiffs had standing. The court stated: “In a **Clean Water Act** case, [the substantial likelihood that the defendant’s conduct caused the plaintiffs’ harm] may be established by showing that a defendant has 1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.” *Powell Duffryn*, 913 F.2d at 72 (emphasis added).

Powell Duffryn concerned a violation of a permit issued under a paradigm established by statute, which is inapposite to the case here. Because there is no permit or statutory limit here, the Second

⁴ While the Second Circuit briefly raises the notion of common law public nuisance principles of “liability on contributors to an indivisible harm,” 582 F.3d at 346, the court appears to rest its decision on its analysis of *Massachusetts* and *Powell Duffryn*. *Id.* at 346-7.

Circuit should have refrained from reliance on the *Powell Duffryn* test in its entirety. Instead, the court seized on the third prong of the test — that the pollutant “cause[d] or contribute[d] to” the plaintiffs’ injuries. This reading is inconsistent with the plain language of the decision. See *Native Village of Kivalina v. ExxonMobil Corp., et al.*, 663 F.Supp.2d 863, 880 n.7 (“The tripartite test articulated in *Powell Duffryn* to demonstrate the requisite ‘substantial likelihood’ is stated in the conjunctive, not the disjunctive as concluded by the *AEP* court.”).

The Second Circuit also turned to *Massachusetts* to support its causation-by-contribution claim, but again, misapplied this Court’s holding which was based on the existence of a statutory claim. 582 F.3d at 347 (“Tellingly, in *Massachusetts*’ discussion of causation, the Court rejected EPA’s argument that ‘its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners’ injuries that the agency cannot be haled into federal court to answer for them.’” (quoting *Massachusetts*, 549 U.S. at 523.)). However, the Court did not base its decision on a finding that EPA’s claim of a small contribution to a much larger problem was incorrectly downplayed by the agency. Instead, *Massachusetts* held that EPA incorrectly assumed that incremental regulatory actions could not be subjected to judicial review. 549 U.S. at 524 (“[A]ccepting that premise would doom most challenges to regulatory action.”).

Despite this Court’s repeated emphasis in *Massachusetts* on the statutory origin of the petitioners’ claim, the Second Circuit proceeded to apply this contribution analysis to a non-statutory

case. However, unlike a rulemaking agency which can “whittle away” at a problem over time, *id.*, a court ruling on a common law nuisance claim has no such flexibility. Instead, it can only adjudicate the particular issue brought to it by the parties in a conflict. Unlike an executive agency or legislature, courts cannot proceed to tackle another element of an issue, no matter how warranted, unless the issue is brought to them by parties with a justiciable conflict. The Second Circuit misapplied both of the causation-by-contribution analyses described above, thereby incorrectly finding that the states and trusts have adequately demonstrated a causal link between their injuries and the defendants’ conduct.

C. The Second Circuit Impermissibly Relaxed the Redressability Requirement and Misunderstood the Nature of the Requested Relief in *Massachusetts*.

Again, the Second Circuit relied on *Massachusetts* to justify its holding that the states and trusts’ injuries could be redressed by a favorable decision. Defendants argued that reducing their emissions would not redress the states and trusts’ injuries because GHG emissions will continue to rise globally. The court rejected their arguments, stating “*Massachusetts* disposed of this argument,” 582 F3d at 348, and “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.’” *Id.* (emphasis in original). However, the Second Circuit omitted a key phrase, critical to the *Massachusetts* holding: “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 determine ***whether EPA has a duty*** to take steps to *slow or reduce* it.” 549 U.S. at 525 (emphasis added). Thus, it was not “sufficient for the redressability inquiry to show that the requested remedy would ‘slow or reduce it.’” *Id.* Instead, *Massachusetts* held that the court had jurisdiction to consider whether EPA had a duty under the Clean Air Act, and whether the petitioners’ assertion of a procedural right could be remedied, at least in part, by requiring EPA to reconsider its denial of the petitioners’ petition for rulemaking. The Court believed that ordering EPA to consider promulgating a GHG emissions regulation would reduce risks to the plaintiffs by “some extent.” *Id.* at 526.

The Second Circuit had no such procedural right question before it, and therefore did not have the benefit of a relaxed redressability standard, nor did it have a statutory obligation through which it could force an agency to act. Instead, the Second Circuit should have judged redressability by asking whether it would be “‘likely,’ as opposed to merely ‘speculative,’...that the injury will be “redressed by a favorable decision.” *Lujan*, at 561 (internal citations omitted).

The Second Circuit therefore erred in its finding of redressability because it misinterpreted the procedural right nature of the claim at issue in *Massachusetts*, and misapplied a statutory causation test to a common law cause of action.

D. The Second Circuit Failed to Consider Prudential Barriers to Standing.

The Second Circuit made no mention of prudential considerations in its decision, despite its obligation to consider both Article III and prudential standing limitations. *See, e.g., U.S. v. Hays*, 515 U.S. 737, 742 (1995) (“The federal courts are under an independent obligation to examine their own jurisdiction, and standing ‘is perhaps the most important of [the jurisdictional] doctrines.’”). Where, as here, Congress has not legislatively overruled prudential considerations, the Second Circuit is bound to apply prudential standing principles along with Article III requirements. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997). As discussed above, there are three prudential barriers to standing: raising the legal interests or rights of third parties; “generalized grievances,’ pervasively shared and most appropriately addressed in the representative branches;” and an affirmative requirement that parties must be within the zone of interests the statute sought to protect. *Valley Forge Christian College*, 454 U.S. at 474-5. At a minimum, the Second Circuit should have considered whether the prudential limitation against generalized grievances applied to this case.

Global climate change arguably impacts the global population. *See generally Massachusetts*, 549 U.S. at 508-10, 541 (“Global warming is a phenomenon ‘harmful to humanity at large.’”) (Roberts, C.J., dissenting). The Second Circuit should therefore have considered whether the prudential bar against suits challenging generalized grievances that are best handled by the legislature or executive

branches, applied in this case. Given the global nature of global climate change, including not only global impacts, but also globally-located emitters numbering well into the hundreds of millions, there is a strong argument that this case, a common-law nuisance cause of action brought against five emitters, is one best left to the representative branches.

Because the Second Circuit applied statutory standing principles to a common law claim, the resulting conclusion is fundamentally flawed. The plaintiff states and trusts should have been evaluated based on Article III standing requirements, as well as the full range of prudential limitations, without the application of any injuries, chains of causation, or procedural rights created by statute. If the Second Circuit had correctly analyzed standing as it pertains to a common law claim, it would have found that the states and trusts had not sufficiently alleged facts to support the court's decision.

III. *WARTH v. SELDIN & HAVENS REALTY v. COLEMAN* – A COMPARISON OF STANDING ANALYSES.

To better illustrate the dangers of misapplying a statutory standing analysis to a common law claim, *Amicus* presents a comparison between two cases from a different context – housing discrimination. The comparison will demonstrate the vastly different results in standing determinations that occur where there is an applicable statute, even in causes of action that are otherwise very similar. In the following cases, plaintiffs alleged very similar injuries, but different causes of action. In the first case, plaintiffs

asserted constitutional claims, while in the second case, plaintiffs asserted statutory claims stemming from violations of the Fair Housing Act of 1968. Standing was a critical issue in both cases, and the Court's approach to determining whether the parties had standing in each case was governed by the nature of the claim asserted.

A. *Warth v. Seldin*: Assertion of a Constitutional Claim to Combat Exclusionary Housing Ordinance.

In *Warth*, petitioner individuals and organizations claimed that the Town of Penfield's zoning ordinances effectively excluded persons of low- and moderate-income from living in the town, an incorporated municipality adjacent to Rochester, New York. The petitioners brought suit under the First, Ninth, and Fourteenth Amendments. 422 U.S. at 493. Specifically, the petitioners claimed that the ordinance in question allocated 98% of the town's vacant land to single-family housing, and also required unreasonable lot size, set back, floor area, and habitable space requirements. *Id.* at 495. Only 0.3% of vacant land was allocated to low-density multifamily housing. *Id.* The petitioners also alleged that the Planning and Zoning Boards purposefully delayed action on proposals for low- and moderate-income housing projects; denied proposals; and refused to grant variances and permits to low- and moderate-income housing projects. *Id.*

There were three different categories of petitioners. First, several individuals in the suit were Rochester property owners and taxpayers, who claimed that because of Penfield's ordinance, they had

to pay higher taxes in Rochester so that Rochester could subsidize the low- and moderate-income housing needs that Penfield refused to meet. *Id.* at 496. Second, several individuals claimed that they had low to moderate incomes and that the ordinance prevented them from buying or leasing property in Penfield, forcing them to live in less attractive environments. *Id.* Third, three organizations, who entered or attempted to enter the litigation at various times, claimed they had standing either because the organization itself had been injured or because their members suffered injuries. *Id.* at 494, 497. The District Court dismissed the complaints on the grounds that the petitioners lacked standing, and the Second Circuit affirmed. *Id.* at 497-98.

This Court noted at the outset that the standing “inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.” *Warth*, 422 U.S. at 498. The Court highlighted two prudential considerations that militated against standing in this case: the existence of a “‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens,” *id.* at 499, and the assertion of “legal rights or interests of third parties.” The Court also noted that standing “often turns on the nature and source of the claim asserted. The actual or threatened injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing....’” *Id.* at 500 (citations omitted). In other words, “Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.” *Id.* at 501.

The Court then applied these principles to each of the categories of petitioners in turn. Beginning with the low- and moderate-income petitioners, the Court found that the petitioners alleged “in conclusory terms” that they were members of the injured group. *Id.* at 503. While the petitioners claimed they had searched for affordable property to buy or rent in Penfield, the court found that they had failed to allege facts that would lead to a reasonable inference that, but for the defendants’ ordinance and enforcement practices, the petitioners would have found affordable housing within Penfield. *Id.* at 503-504. “We may assume...that respondents’ actions have contributed...to the cost of housing in Penfield. But there remains the question whether petitioners’ inability to locate suitable housing in Penfield reasonably can be said to have resulted...from respondents’ alleged constitutional and statutory infractions.” *Id.* at 504.

The second group of petitioners, the Rochester property owners and taxpayers, had alleged that they would pay higher taxes to the City of Rochester so that the City could subsidize the services that Penfield refused to provide. *Id.* at 508-09. However, the Court found that any decision regarding taxes in Rochester would be made by the City of Rochester, which was not before the court. *Id.* at 509. The Court found that this group of petitioners sought to vindicate the rights of third parties, which was barred by prudential standing limitations. *Id.*

Finally, the Court turned to the association petitioners. One of the association petitioners, Metro-Act, alleged that the ordinance deprived Penfield residents (of which some were Metro-Act members) of

the benefits of living in a racially and ethnically integrated community. Metro-Act sought to rely on the Court's ruling in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), which held that petitioners had standing to bring a similar deprivation claim. *Id.* at 512. However, the Court noted the "critical distinction between *Trafficante* and the situation" in *Warth*: in *Trafficante*, "Congress had given residents of housing facilities covered by the statute an actionable right to be free from the adverse consequences to them of racially discriminatory practices directed at and immediately harmful to others." *Warth* at 513. In *Warth*, no statute was alleged to be applicable and therefore *Trafficante* was not controlling. *Id.* at 512. The Court affirmed the District Court and the Second Circuit, and the petitioners' claims were dismissed.

B. *Havens Realty v. Coleman*: A Fair Housing Act Cause of Action Challenging Racial Steering.

In *Havens Realty Corporation, et al., v. Coleman*, 455 U.S. 363 (1982), individual and association plaintiffs brought a class action suit against Havens Realty and one of its employees for engaging in racial steering. They alleged this violated section 804 of the Fair Housing Act of 1968. 455 U.S. at 366. The plaintiffs consisted of one African-American renter, two "testers" (one African-American and one Caucasian), and an organization whose purpose was to further equal opportunity housing in the Richmond, Virginia area. The District Court dismissed the claims of the organization and the testers on the grounds that they lacked standing.

Id. at 369. The Fourth Circuit reversed and remanded the case for further proceedings. *Id.*

The Court began its analysis by highlighting its earlier decision in *Gladstone, Realtors, v. Village of Bellwood*, 441 U.S. 91 (1979). *See Havens*, 455 U.S. at 371. In *Gladstone, Realtors*, which also concerned alleged racial steering, the Court found that “Congress intended standing under section 812 to extend to the full limits of Art. III’ and that the courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section.” *Havens*, 455 U.S. at 372.

The Court first turned to the standing inquiry of the “tester” plaintiffs. Section 804(d) of the Fair Housing Act, provides that it is unlawful to represent to “*any person* ...that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.” *Id.* at 373. The Court found that “Congress has thus conferred on all ‘persons’ a legal right to truthful information about available housing. This congressional intention cannot be overlooked in determining whether testers have standing to sue.” *Id.* The Court held that the tester who received false information had standing to pursue her claim. *Id.* at 374.

Second, the Court turned to whether the individual plaintiffs had standing to allege that the petitioners’ steering practices had “deprived them of the benefits of living in an integrated community.” *Id.* at 375. The Court termed this standing “neighborhood standing” and labeled it an “indirect harm” because plaintiffs were alleging the harms of third parties – those potential renters or purchasers who are unlawfully steered away or toward housing

in violation of section 804. While a prudential bar exists to prevent plaintiffs from bringing claims on behalf of third parties, where there is a statute, the Court noted, the “distinction [between first- and third-party standing] is ... of little significance . . .” *Id.* at 375. Thus, the existence of a statute, conferring a legal right that was not before in existence, resulted in the Court’s decision to uphold the Fourth Circuit and find that the plaintiffs had adequately alleged standing at the pleadings stage.

C. A Comparison of *Warth* and *Havens* Demonstrates the Critical Distinctions Between the Standing Analyses Employed in Common Law and Statute-Based Claims.

Plaintiffs in *Warth* and *Havens* alleged very similar injuries – both claimed they had been subject to exclusionary or discriminatory practices that deprived them of housing, and of the benefits of living in an integrated, diverse community. However, the plaintiffs in *Warth* had no substantive statute on which to rely and instead brought a purely constitutional cause of action. The plaintiffs in *Havens* had the benefit of the Fair Housing Act, which gave “rise to a case or controversy where none existed before.” *Lujan*, 504 at 580 (Kennedy, J., concurring). The lack of a statute made the difference here between a justiciable and non-justiciable claim.⁵

⁵ Interestingly, in both cases, the court found fault in the plaintiffs’ complaints. However, the Court in *Havens*, upon finding standing, encouraged the District Court to permit plaintiffs to file supplemental pleadings to more fully allege their standing.

Likewise, the plaintiffs in *Massachusetts* and this case allege similar injuries – threats to property and legal rights because of impacts resulting from global climate change – with one substantial difference. The plaintiffs in *Massachusetts* alleged a procedural harm, by virtue of a violation of the governing statute, the Clean Air Act. The statute and associated procedural right demonstrated Congress’ intent to establish a new injury and chain of causation, and its intent to overrule at least some prudential standing considerations.

In this case, plaintiffs have no statute nor procedural right on which to hang their claims. In addition to bearing the burden of establishing that they have met all of the Article III requirements, the plaintiffs must also demonstrate they satisfy prudential standing considerations as well. As the Court held in *Warth*, the “critical distinction” between that case and *Trafficante* was the existence of a statute, which rendered the former case non-justiciable, while allowing plaintiffs in the latter case to proceed to the merits. That critical distinction exists here.

CONCLUSION

This Court is faced with determining standing where there is no statute that has created or conferred a specific legal right or interest on the plaintiffs. The Court must therefore determine not only whether the parties have Article III standing, it must also determine whether the parties can survive prudential standing barriers. *Massachusetts*, because its claims were based on a statute which conferred procedural rights to the plaintiffs, involved an analysis that allowed for relaxed immediacy and

redressability requirements. It also concerned a statute that legislatively overruled prudential standing considerations. Thus, from a standing perspective, *Massachusetts* is inapplicable to the case at bar. Therefore, the states and trusts must satisfy the full range of standing principles in a common law cause of action. For all of the reasons stated above, they have failed to do so.

Respectfully submitted,

Amy C. Chai*
Thomas J. Ward
National Association of
Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 866-8200
* *Counsel of Record*

February 7, 2011

APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or “of counsel” before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga*

Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Env'tl. Prot.*, 547 U.S. 370 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife*, 55 U.S. 644 (2007); *John R. Sand and Gravel Co. v. United States*, 551 U.S. 130 (2008); *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009); *Entergy Corp. v. Env'tl. Prot. Agency*, 129 S. Ct. 1498 (2009); and *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Coeur Alaska, Inc. v. Southeast Alaska Cons. Council*, 129 S. Ct. 2458 (2009); *Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010); *United States v. Tohono O'odham Nation*, 559 F.3d 1284 (Fed. Cir. 2009), *cert. granted* 130 S. Ct. 2097 (2010) (No. 09-846).

**IN THE
SUPREME COURT OF THE UNITED STATES**

AMERICAN ELECTRIC POWER)	
COMPANY, INC., et al.,)	
)	
<i>Petitioner,</i>)	No. 10-174
<i>v.</i>)	
STATE OF CONNECTICUT,)	
)	
<i>Respondent.</i>)	

CERTIFICATE OF COMPLIANCE

Pursuant to rule 33.1(h) of the Rules of the Supreme Court of the United States (adopted July 17, 2007), I hereby certify that this brief contains 5,820 words, including footnotes. In making this certification, I have relied on the word count of the word-processing system used to prepare this brief.

Dated: February 7, 2011

Amy C. Chai