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

BRIEF FOR *AMICI CURIAE* DEFENDERS OF WILDLIFE, CENTER FOR BIOLOGICAL DIVERSITY, AND NATIONAL WILDLIFE FEDERATION IN SUPPORT OF RESPONDENTS

JASON C. RYLANDER
DEFENDERS OF WILDLIFE
1130 17th Street, N.W.
Washington, D.C. 20036
(202) 682-9400

SEAN H. DONAHUE
DONAHUE & GOLDBERG, LLP
2000 L Street, N.W.
Suite 808
Washington, D.C. 20036
(202) 277-7085

ERIC R. GLITZENSTEIN
Counsel of Record
WILLIAM S. EUBANKS II
SHRUTI SURESH
MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009
(202) 588-5206
EGlitzenstein@meyerglitz.com

Counsel for Amici Curiae

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

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INTERESTS OF *AMICI CURIAE*

Amici are leading non-profit conservation and wildlife protection organizations with longstanding interests in protecting wildlife, particularly endangered and threatened species, from various forms of habitat destruction and degradation, including the devastation that is being, and will be, wrought by global warming on wildlife and the ecosystems on which they depend.[1]

Defenders of Wildlife ("Defenders") is a non-profit conservation organization with over one million members and supporters across the country. Defenders is dedicated to the protection and restoration of all native animals and plants in their natural communities.

The Center for Biological Diversity is a non-profit environmental organization dedicated to protecting endangered species and wild places through rigorous science, advocacy, and environmental law, and that has over 320,000 members and online activists. The Center's Climate Law Institute develops and implements

[1] 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 persons or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. One of the counsel for Respondents, Matthew Pawa, is a member of the Board of Directors of Defenders of Wildlife, but he played no role in the organization's decision-making concerning the filing of this brief or its contents. Parties have filed letters indicating their consent to the filing of *amicus* briefs.

legal campaigns to limit global warming pollution and prevent it from driving species to extinction.

The National Wildlife Federation is a non-profit conservation education and advocacy organization with over four million members and supporters in the United States. The Federation works in communities across the country to protect and restore wildlife and wildlife habitat, to confront global warming, and to connect people with nature.

Amici seek to protect and restore wildlife and the ecosystems on which animal and plant species depend through a variety of means, including litigation in federal court under statutes designed to conserve wildlife and protect other natural resources. Although *amici*'s ability to bring such statutorily-based claims predicated on climate-related impacts or other environmental harms is not at issue in this case, and although *amici* have not pursued common law public nuisance claims and have no plans to pursue such claims in the future, *amici* are nonetheless concerned that several of the standing arguments advanced by Petitioners and the Tennessee Valley Authority ("TVA"), could, if endorsed by the Court, impede the ability of *amici* to further their and their members' interests even through more routine federal litigation brought under longstanding federal statutory provisions that authorize citizens to enforce federal statutory and regulatory safeguards for imperiled wildlife and other natural resources.

As alleged in Respondents' Complaints, there is a clear scientific consensus that global climate change is already having a deleterious impact on a plethora of animal and plant species, and that such effects will be devastating to ecosystems around the world unless rapid action is taken in the near future. *See, e.g.*, J.A. 58, 91, 97, 98. Since the Complaints were filed in 2004, the scientific data have become even more overwhelming that global warming, if left unchecked, threatens a global extinction crisis and an unprecedented world-wide collapse of ecosystems. According to a 2010 National Academy of Sciences report that was requested by Congress, climate shifts have already begun dramatically to change the ranges and distribution of many animals and plants. Nat'l Research Council, *America's Climate Choices: Advancing the Science of Climate Change* (2010), at 212 ("NAS Report"); *see also* Camille Parmesan, *Ecological and Evolutionary Responses to Recent Climate Change*, 37 Annual Rev. Ecol. & Evol. Syst. 637-69 (2006). At present, the problem is particularly acute for cold-adapted species in the Arctic and Antarctic, such as the polar bear and some species of seals and penguins, where sea ice is rapidly diminishing. NAS Report, *supra*, at 212. Species adapted to mountaintops are also diminishing rapidly as boreal forests invade their tundra habitat. Parmesan, *supra*, at 649.

Tropical coral reefs and amphibians have likewise been severely negatively affected as global warming both raises water temperatures and alters the ocean's chemical composition. *Id*. at 649-50. Recent studies

indicate that rapidly rising greenhouse gas concentrations are driving natural ocean systems toward conditions not seen for millions of years, with an associated risk of "fundamental and irreversible ecological transformation." Ove Hoegh-Guldberg, *et al.*, *The Impact of Climate Change on the World's Marine Ecosystems*, 328 Science 1523 (2010); *see also* William W.L. Chung *et al.*, *Projecting Global Marine Biodiversity Impacts Under Climate Change Scenarios*, Fish & Fisheries 235-51 (2009) (climate change threatens "dramatic species turnovers of over 60 percent of the present biodiversity, implying ecological disturbances that could potentially disrupt ecosystem services").

The Intergovernmental Panel on Climate Change estimates that 20 to 30 percent of plant and animal species assessed to date are likely to be at a high risk of extinction as global average temperatures exceed a warming of 3.6 to 5.4 °F (2 to 3 °C) above pre-industrial levels. NAS Report, *supra*, at 213. Numerous species of amphibians, butterflies, mammals, and coral have already been documented as declining drastically due to climate-related impacts, and many more are at great risk of such declines in the foreseeable future. *See* Parmesan, *supra*, at 653; Austl. Inst. of Marine Sci., *Status of Coral Reefs of the World: 2004* 7 (Clive Wilkinson ed., 2004). Accordingly, the federal agencies charged with implementing the Endangered Species Act, 16 U.S.C. §§ 1531-1544, have already listed a number of species as endangered or threatened due to climate change effects, *see, e.g.*, 71 Fed. Reg. 26,852 (May 9, 2006) (corals); 73 Fed. Reg.

28,212 (May 15, 2008) (Polar bear), and have formally proposed the listing of other such species. *See, e.g.*, 75 Fed. Reg. 77,476 (Dec. 10, 2010) (Ringed seal); 75 Fed. Reg. 61,872 (Oct. 6, 2010) (Atlantic sturgeon).

Amici recognize that the common law claims in this case arise in a legal context that is very different from the kind of statutory citizen suits that *amici* normally pursue. Nevertheless, *amici* have a vital interest in ensuring that new jurisdictional barriers are not erected that could block otherwise viable, statutorily-based claims not at issue here, including claims that seek to mitigate the impacts of climate change on wildlife species as to which *amici* and their members have longstanding interests.

SUMMARY OF ARGUMENT

1. As TVA concedes, the State Respondents have Article III standing for essentially the same reasons that Massachusetts was deemed to have standing in *Massachusetts v. EPA*, 549 U.S. 497 (2007). As in *Massachusetts*, the State Respondents have asserted concrete sovereign and proprietary interests that are being harmed by global warming, and the Complaint proffers plausible allegations that Petitioners are major carbon dioxide polluters whose emissions are materially contributing, and will continue to contribute, to the serious harms and risks inflicted on the States. Their allegations that Petitioners' (and TVA's) emissions have caused them injury, and that their

risk of injury would be reduced at least in part by a favorable decision, readily satisfy the injury, causation, and redressability requirements established by the Court's precedents.

2. TVA's and Petitioners' prudential standing arguments, advanced for the first time in this Court, are groundless. This Court has directed dismissal of cases on prudential standing grounds only in very narrow circumstances, none of which is present here. Further, TVA's novel rationale for why prudential standing is lacking – *i.e.*, that many people and entities will suffer concrete injuries from global climate change – could, if endorsed by the Court, have adverse and unanticipated consequences for other types of litigation concerning serious but widely-felt injuries. There is no legal or practical justification for the Court to create such a standing precedent in order to resolve this case, particularly because common law adjudication provides other, much better suited means of circumscribing a nuisance cause of action based upon global warming impacts.

ARGUMENT

The focus of this brief is on the threshold standing issues raised by Petitioners and TVA, including the prudential standing arguments invoked for the first time in this Court, because the resolution of those issues may have a bearing not only on whether the specific claims at issue here may be pursued,

but on environmental litigation generally. Indeed, although the standing issues here are extremely narrow – pertaining solely to whether Respondents have standing to bring common law nuisance claims – in crucial respects, Petitioners' and TVA's Article III and prudential standing objections contravene well-entrenched standing principles and precedents and would, if adopted, needlessly muddy and complicate this Court's standing jurisprudence even as it applies to more garden-variety, statutorily-based claims.

I. THE STATE RESPONDENTS HAVE ARTICLE III STANDING.

A. The State Respondents Have Article III Standing Based On The Court's Ruling And Reasoning In *Massachusetts v. EPA*.

As acknowledged by TVA, under this Court's ruling in *Massachusetts v. EPA*, it is clear that at least the State Respondents have Article III standing. Hence, it is unnecessary for the Court to address the standing of the other Respondents, who seek relief identical to that sought by the States. *See, e.g.*, *Massachusetts*, 549 U.S. at 518 ("Only one of the Petitioners needs to have standing to permit us to consider the petition for review."); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").

In *Massachusetts,* the Court held that at least the "special position and interest of Massachusetts" afforded it Article III standing in challenging the EPA's refusal to regulate greenhouse gas emissions, both because the State had sued in its "'capacity of *quasi*-sovereign'" with a cognizable interest in conserving the "'earth and air within its domain'" for the benefit of its residents, and because the State had a "particularized injury in its capacity as a landowner" whose coastal property was already being "swallow[ed]" by rising seas caused by global warming. 549 U.S. at 518-19, 522-23 (internal quotation omitted). The same interests support Connecticut's and the other State Respondents' standing in this case.

Indeed, if anything, the State Respondents have an even more compelling argument for Article III standing here. First, whereas Massachusetts had sued a federal agency for failing to regulate the carbon dioxide emissions of third parties – a kind of claim that, as this Court has explained, can raise particular causation and redressability concerns, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (explaining that "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" (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984))) – the State Respondents here have sued the carbon dioxide emitters alleged to be *directly* responsible for contributing to the ongoing and future injuries to their sovereign and proprietary interests. Consequently, the

issues that arise when "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction," *Defenders of Wildlife*, 504 U.S. at 562, simply are not present in this case. *See* TVA Br. 31 ("Plaintiffs' chains of causation and redressability are *shorter* than the ones in *Massachusetts*, because they seek judicial relief directly from the entities responsible for the allegedly unlawful emissions."). Indeed, Petitioners cite no precedent in which this Court (or any other) has ever found that a common law nuisance claim failed for lack of Article III standing.[2]

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[2] The Court in *Massachusetts* also stressed that Congress had enacted a citizen suit provision that specifically "authorized" the kind of challenge to agency action (or refusal to act) that was at issue there, but that authorization was deemed important in the context of a claim asserting that a "procedural right" had been violated by EPA, *i.e.*, the "right to challenge agency action unlawfully withheld." *Massachusetts*, 549 U.S. at 516-17 (internal quotation omitted). It is well-established that a "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Defenders of Wildlife*, 504 U.S. at 573 n.7. For example, a plaintiff complaining that the government has failed to follow a required procedure need not establish that the agency would have made a decision favorable to the plaintiff had the agency followed the procedure. *See id*. That part of the Court's analysis in *Massachusetts* has no relevance where, as here, the State Respondents are not asserting a procedural right to the government's compliance with a step that *may* further their concrete interests but, rather, are claiming that Petitioners' activities are themselves *directly* contributing to the impairment of the sovereign and proprietary interests deemed sufficient for Article III standing in *Massachusetts*.

Second, in *Massachusetts*, the Court was required to consider whether the State had actually submitted affirmative evidence – *e.g.,* detailed declarations – to support its standing, because that case arose in the context of a petition for review in the D.C. Circuit, and this Court obviously could not resolve the merits in the State's favor (as the Court ultimately did), without finding that the State in fact *had* standing to assert its claims. *See Massachusetts*, 549 U.S. at 522 (explaining that "petitioners' unchallenged affidavits" set forth anticipated rises in sea level due to global warming and how this will inevitably destroy and impair a "significant fraction" of the State's coastal property); *see also Sierra Club v. EPA*, 292 F.3d 895, 898-99 (D.C. Cir. 2002) (explaining that petitions for review in the D.C. Circuit must be supported by affirmative evidence of standing).

In sharp contrast, in this case, since the standing issue was raised in the district court at the motion to dismiss stage, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Defenders of Wildlife*, 504 U.S. at 561 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)) (contrasting the standing analysis at the motion to dismiss stage with that at the summary judgment and trial stages, where "mere allegations" no longer suffice).

B. Petitioners' Standing Objections Are Groundless.

Especially in view of *Massachusetts,* Petitioners' arguments for why the State Respondents lack Article III standing are baseless. To begin with, Petitioners assert that the "pleadings never allege the requisite direct connection between these defendants' emissions and the individual risks to which plaintiffs are allegedly exposed." Pet. Br. 18. This is erroneous. The State Respondents' complaint contains specific allegations that Petitioners are "major emitters" of carbon dioxide and "substantial contributors to global warming"; that their emissions "constitute approximately one quarter of the U.S. electric power sector's carbon dioxide emissions and approximately ten percent of all carbon dioxide emissions from human activities in the United States"; that emissions of this magnitude are sufficient to constitute a "direct and proximate contributing cause of global warming and of the injuries and threatened injuries" to the State Respondents, their citizens, and residents; that Petitioners' "emission of millions of tons of carbon dioxide each year contribute to the risk of an abrupt change in climate due to global warming"; and that "[r]eductions in the carbon dioxide emissions of the defendants will contribute to a reduction in the risk and threat of injury to the plaintiffs and their citizens from global warming," including a reduction in the risk that an "abrupt and catastrophic change in the Earth's climate" will occur. J.A. 57, 84-85, 101, 102, 104.

As TVA recognizes, these allegations cannot meaningfully be distinguished from the assertions of injury deemed sufficient to support a *ruling on the merits* in *Massachusetts*, *see* TVA Br. 29-30, and Petitioners present no persuasive reason why they should be deemed inadequate here, especially when this case is still at the initial pleading stage. In any case, the State Respondents most certainly have alleged an "actual causal connection between the particular risk of injury to the plaintiff and the particular conduct of the defendant[s]," Pet. Br. 19 – entities that are alleged to be the "five largest emitters of carbon dioxide in the United States" and "among the largest in the world," J.A. 57 – and also that the State Respondents have a "distinct interest in the subject matter at issue," Pet. Br. 19, especially in light of the State Respondents' *present and projected* loss of land, as alleged in the Complaint, along with the many other concrete injuries and risks to which the States maintain that Petitioners are major contributors.[3]

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[3] Consequently, Petitioners' claim that allowing this case to go forward would "allow[ ] suits by each against all, for any injury resulting from virtually any climate-related natural event," Pet. Br. 20, is hyperbole. Here, as in *Massachusetts*, the State Respondents have made eminently "plausib[le]" allegations, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560 (2007), that entities that are among the leading emitters of greenhouse gas emissions in the world are in fact contributing to the State Respondents' concrete injuries and grave risks to their sovereign and proprietary interests. Once again, since comparable factual assertions were deemed sufficient to support a favorable resolution on the merits in *Massachusetts,* there is no legal or logical basis for

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Accordingly, Petitioners' claim that others may also assert concrete injuries from global warming, Pet. Br. 21-22, is of no moment. The legal adequacy and "plausibility" of those allegations would have to be assessed in the context of the particular allegations made and claims proffered. However, the fact that "sovereign State[s]," whose coastal landholdings and natural resources are, according to leading climate scientists, *now* being destroyed through precisely the kinds of massive carbon dioxide emissions for which Petitioners are responsible hardly means that the floodgates are being opened to every possible allegation of injury conceivably connected to global warming. *Massachusetts,* 549 U.S. at 518.

In any event, as *Massachusetts* also makes clear, that "climate-change risks are 'widely shared' does not minimize [the States' interests] in the outcome of this litigation." *Id*. at 522 (quoting *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998)). In this connection, Petitioners' transparent effort to conflate an abstract, "generalized grievance," Pet. Br. 30, or an amorphous "risk to 'society,'" *id*. at 19, with a *concrete,* albeit widely shared, harm, should be rejected. It is certainly the case that, as a matter of both Article III and prudential standing, the federal

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foreclosing the State Respondents' standing at the threshold of litigation here. On the other hand, such a ruling would hardly mean that every assertion of a global warming-related injury would satisfy threshold pleading standards, let alone be deemed adequate to support a ruling on the merits.

courts cannot be used as vehicles merely for the "ventilation of public grievances" that have no tangible impact on the particular plaintiff. *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). However, it is equally well-established that, when the plaintiff alleges "some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979), no barrier to standing is posed by the fact that, as is the case with many environmentally-related injuries, others may also be injured or imperiled by the same conduct.

Indeed, as the Court reaffirmed in the specific context of asserted global warming impacts, "*to deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious*" conduct "*could be questioned by nobody*. We cannot accept that conclusion." *Massachusetts,* 549 U.S. at 526 n.24 (internal quotation omitted); *see also Akins*, 524 U.S. at 24 (A widely shared injury, "where sufficiently concrete, may count as an 'injury in fact.' *This conclusion seems particularly obvious where (to use a hypothetical example) large numbers of individuals suffer from the same common-law injury (say, a widespread mass tort),* or where large numbers of voters suffer interference with voting rights conferred by law.") (emphasis added); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449-50 (1989) ("The fact that other citizens or groups of citizens might make the same complaint

after unsuccessfully demanding disclosure under [the Federal Advisory Committee Act] does not lessen appellants' asserted injury, any more than the fact that numerous citizens might request the same information under the Freedom of Information Act entails that those who have been denied access do not possess a sufficient basis to sue."); *Lozano v. City of Hazleton*, 620 F.3d 170, 186 (3d Cir. 2010) ("The fact that an injury is widely-shared is not the primary focus of the particularized inquiry. . . . The question of particularity turns on the nature of the harm, not on the total number of persons affected."); *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001) ("So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury."). In short, Petitioners' peculiar proposition that the more widespread the damage that a particular defendant inflicts or contributes to, the more that defendant should be insulated from liability for the resulting harm, is simply not compatible with this Court's precedents.

Also misplaced is Petitioners' contention that the State Respondents lack standing because "third parties" not before the Court may also contribute to the States' asserted injuries. Pet. Br. 22-23 (citing *Bennett v. Spear*, 520 U.S. 154, 169 (1997)). Under elementary standing principles, the existence of a third-party contributor to the plaintiff's injuries is only relevant to the Court's inquiry if the third party's *independent* actions are crucial to the chain of causation between the defendant's actions and the

plaintiff's alleged injuries, and there is no basis for finding that the third party will act in a manner that will alleviate those injuries. For example, in *Defenders of Wildlife*, invalidation of a regulation issued by one federal agency could have *no* impact whatsoever on the interests of the plaintiffs in the absence of action by other agencies not before the Court – agencies that were not "obliged to honor an incidental legal determination the suit produced," and that in fact had made clear that they did not consider themselves bound by the regulation at issue. 504 U.S. at 569.[4]

In contrast, in this case, the State Respondents' ability to obtain *some* tangible relief from the carbon dioxide emissions that the States allege are contributing to their injuries is not dependent at all on the actions of third parties. Rather, should they prevail on the merits, the State Respondents would accomplish a direct reduction of hundreds of millions of tons of greenhouse gas emissions – a result that the States specifically allege will, at the very least,

[4] On the other hand, in *Bennett*, the Court found standing because a decision document issued by one agency had a "virtually determinative effect" on the actions of other agencies not before the Court. 520 U.S. at 170. Thus, although they came to differing results, the focus in both cases was on the anticipated behavior of a third party whose actions were a "step in the chain of causation." *Id*. at 169. Where, as here, it is the defendants themselves whose actions are alleged to directly cause or contribute to the plaintiff's injury, the *Defenders*/*Bennett* scrutiny of third-party behavior is immaterial.

"contribute to a reduction in the risk and threat of injury to the [States] and their citizens and residents. . . ." J.A. 102. Under the reasoning in *Massachusetts*, this is plainly sufficient for Article III standing, especially at the pleading stage and before the parties have been called on to proffer evidence on whether the injury to the State Respondents' interests, such as property loss or risk of cataclysmic storm events, will in fact be ameliorated by the relief sought. *See Massachusetts*, 549 U.S. at 525 (addressing "emissions [that] make a meaningful contribution to greenhouse gas concentrations and hence . . . to global warming" adequate for standing); *id*. at 526 ("A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere. . . . *The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek*.") (emphasis added).

Consistent with *Massachusetts*, the federal courts of appeals have consistently held that a standing theory based on the proposition that a favorable judicial result will reduce the *risk* of a harmful impact occurring – especially an impact of catastrophic proportions – is sufficient for Article III standing, particularly in the context of environmental and public health claims, which "often are purely probabilistic." *Natural Res. Def. Council v. EPA*, 464 F.3d 1, 6 (D.C. Cir. 2006) (environmental organization had standing to challenge an EPA rule that would allegedly result in an increased risk that one in 200,000 people

would develop skin cancer); *see also Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1235 (D.C. Cir. 1996) (standing existed where the defendant's actions allegedly contributed to an increased risk of wildfire; "the potential destruction of fire is so severe that relatively modest increments in risk should qualify for standing" notwithstanding the "presence of other causal factors"); *Baur v. Veneman*, 352 F.3d 625, 633, 637 (2d Cir. 2003) (the plaintiff's allegation that he faced an increased risk of contracting a food-borne illness from the consumption of downed livestock constituted a "'credible threat of harm' [sufficient] to establish injury-in-fact based on exposure to enhanced risk" (internal quotation omitted); the "courts of appeals have generally recognized that threatened harm in the form of increased risk of future injury may serve as injury-in-fact for Article III standing purposes"); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (*en banc*) (finding water pollution that increased risks of health problems and resource impacts for those living in proximity to the water body sufficient for standing; "Threats or increased risk thus constitutes cognizable harm. Threatened environmental injury is by nature probabilistic. And yet other circuits have had no trouble understanding the injurious nature of risk itself." (citing *Vill. of Elk Grove v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) and *Sierra Club v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 556 (5th Cir. 1996))); *cf. Helling v. McKinney*, 509 U.S. 25, 35 (1993) (a prisoner had standing to bring an Eighth Amendment claim based on allegations that prison

officials had exposed him to second-hand smoke posing an increased risk of damage to his future health). The identical principle supports the State Respondents' standing here, especially in the absence of any legitimate legal basis on which the Court could simply *presume*, as Petitioners urge, that the relief sought by the States would afford them no meaningful benefit.[5]

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[5] That other entities will continue to emit greenhouse gases, or even increase their emissions, does not defeat the States' ability to obtain a reduction in the risk of catastrophic harm to the States' sovereign and proprietary interests relative to a case in which their emissions continued unabated. As *Massachusetts* holds, it is sufficient for standing that the relief sought will help to "'relieve a discrete injury'" and "reduce the probability" of harm to some extent; the States "'need not show that a favorable decision will relieve [their] *every* injury'" or entirely eliminate the risk of harm. 549 U.S. at 525, 526 n.23 (quoting *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982)); other internal quotations omitted; *see also Meese v. Keene*, 481 U.S. 465, 476 (1987) (finding standing where "enjoining the application of the words political propaganda to the films would at least partially redress the reputational injury of which appellee complains"). Indeed, as a matter of both Article III standing and traditional tort law, that entities other than Petitioners may *also* be contributing to the harms and risks suffered by the State Respondents is no impediment to the pursuit of their claims. *See, e.g.*, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d at 161 ("Rather than pinpointing the origins of particular molecules, a plaintiff 'must merely show that a defendant discharges a pollutant that causes or contributes to the kind of injuries alleged' in the specific geographic area of concern." (internal quotation omitted)); *Loggerhead Turtle v. Cnty. Council of Volusia Cnty.*, 148 F.3d 1231, 1247 (11th Cir. 1998) ("[S]tanding is not defeated merely because the alleged injury can be fairly traced to the actions of both parties and non-parties."); *Natural Res. Def. Council v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992).

Many of the arguments of Petitioners and their *amici* essentially invite the Court to disregard the procedural posture of this case. The Court, however, should reject emphatically arguments that seek to deny Article III standing based on controverted contentions about the physics of climate change, or about the alleged relationship between Petitioners' emissions and alleged harms to Respondents.[6] Plaintiffs have alleged facts that suffice, at the motion to dismiss stage, to establish injury, causation, and redressability. Whether they can prove each of those elements, and whether they can ultimately establish an entitlement to relief under their common law nuisance claim, should be determined, not on the bare assertions of counsel, but on the application of the pertinent legal standards to evidence proffered by the parties in accordance with governing procedural and evidentiary rules. *See Defenders of Wildlife*, 504 U.S. at 561; *cf. Akins*, 524 U.S. at 21 (courts must assume the validity of the plaintiff's "view of the law" in ruling on their standing to bring suit).

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[6] *See*, *e.g.*, Br. of Cato Inst. 16-17 (asserting the Respondents could not prove that Petitioners' emissions are substantially likely the cause of their injuries); Br. of Chevron USA, Inc., *et al*. 18 (arguing that the physical realities of climate change make it impossible to establish Article III causation against any emitter); Br. of S.E. Legal Found., Inc., *et al*. 12-20 (asking Court to make factual determinations about the magnitude of Petitioners' contribution to injury and effect of possible remedies).

II. PETITIONERS' AND TVA'S PRUDENTIAL STANDING ARGUMENTS LACK MERIT.

Especially since the State Respondents have satisfied the requirements for Article III standing in view of *Massachusetts* and other precedents, the Court should also reject Petitioners' and TVA's argument that the case should be dismissed on prudential standing grounds – a rationale for dismissal that has been raised for the first time in this Court. The Court's standing precedents "subsume[ ] a blend of constitutional requirements and prudential considerations," and it "has not always been clear in the opinions of [the] Court whether particular features of the 'standing' requirement have been required by Art. III *ex proprio vigore*, or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution." *Valley Forge,* 454 U.S. at 471. Although the Court has not "exhaustively defined the prudential dimensions of the standing doctrine," *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004), only in a handful of cases has the Court directed dismissal *solely* on prudential standing grounds, and the Court has never previously done so based on the kinds of arguments advanced by Petitioners and TVA here.[7]

[7] Tellingly, neither Petitioners nor TVA has cited a single case in which the Court has found that a particular plaintiff had Article III standing (as the government concedes here in view of *Massachusetts*), and yet rejected standing on "prudential" grounds. Rather, the Court has either relied on rationales that

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The Court's precedents set forth three basic categories of cases that implicate prudential standing concerns. First, overlapping with Article III considerations, "the Court has held that when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Warth*, 422 U.S. at 499; *see also* States Br. 23 (explaining that the generalized grievance requirement is "properly part of the Article III – not prudential standing – inquiry, because it addresses whether the plaintiff has suffered an injury-in-fact").

Second, "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim on the legal interests of third parties." *Warth*, 422 U.S. at 499; *see also Newdow*, 542 U.S. at 15 & n.7 (case dismissed on prudential standing grounds where non-custodial parent's standing "derives entirely from his relationship with his daughter, but he lacks the right to litigate as her next friend"; "[t]here are good and sufficient reasons for th[e] prudential limitation on

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clearly implicate *both* Article III and prudential considerations, *see, e.g., Warth v. Seldin*, 422 U.S. 490 (1975); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 218 (1975), or, in the very few cases decided solely on the basis of prudential standing, the Court has done so without resolving Article III standing. *See Newdow,* 542 U.S. at 17-18; *Kowalski v. Tesmer*, 543 U.S. 125, 128-29 (2004).

standing when rights of third parties are implicated – the avoidance of the adjudication of rights which those not before the Court may not wish to assert" (internal quotation omitted)); *Kowalski*, 543 U.S. at 128-29 (finding lack of prudential standing where plaintiff attorneys sought to "raise the rights of others").

Third, in cases predicated on a particular constitutional or statutory provision, the prudential standing issue is "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500. In such cases, the Court inquires whether the "plaintiff's complaint fall[s] within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Valley Forge*, 454 U.S. at 475 (citing *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

None of those rationales for rejecting prudential standing applies here. Because the State Respondents are asserting a federal common law claim, there is no basis for inquiring whether the claim comes within the "zone of interests" of any particular constitutional or statutory provision. Nor is there any question as to whether the States are seeking to advance their own rights and interests in this litigation; rather, as *Massachusetts* makes plain, the State Respondents have an overriding sovereign "interest independent of and behind the titles of [their] citizens," as well as their own ownership interests in coastal areas threatened

by climate change. *Massachusetts*, 549 U.S. at 518 (internal quotation omitted).

As for whether the State Respondents are asserting merely a "generalized grievance," there is no basis in the Court's prudential standing precedents for holding that the kinds of injuries alleged by the States here fall in that category as it has previously been defined by the Court. Rather, as TVA acknowledges, *see* TVA Br. 21 n.7, when the Court has invoked this rationale for rejecting standing, it has done so in the context of an assertion of an "abstract" and "'generalized' interest of a taxpayer or citizen in having the government follow the law." *Id*.; *see also Schlesinger*, 418 U.S. at 217 (rejecting standing where the plaintiff asserted merely an "abstract" interest "shared by all citizens" in the government's compliance with the Incompatibility Clause). That is not even remotely comparable to the kinds of concrete and, indeed, devastating risks and injuries that the State Respondents assert here.

Accordingly, as TVA concedes, although TVA and Petitioners are employing the "generalized grievance" "terminology" from this Court's precedents, they are doing so in the service of a very different rationale for rejecting prudential standing than this Court has previously embraced, *see* TVA Br. 21 n.7 – *i.e.*, that global warming is an unprecedented problem that will invariably harm many landowners, as well as other "individuals, corporations, and governmental entities throughout the Nation and around the world," *id*. at 16, and that given the "complexity" of the

problem, "plaintiffs' concerns about climate change should be resolved by the representative branches, not federal courts," at least in the context of common law nuisance claims. *Id*. at 19, 20. Simply put, TVA's argument is that global warming is such an enormous problem that may harm so many people that the courts should be loath to resolve claims pertaining to it, at least in the absence of a specific citizen suit provision directing them to do so.

As noted, TVA candidly concedes that the Court has never previously invoked this type of rationale for dismissing a case on prudential (or, for that matter, Article III) standing grounds, *see* TVA Br. 21 n.7, and TVA's heavy reliance on *Newdow* underscores the extent to which TVA is asking the Court to plow new ground. *See* TVA Br. 14, 21, 23.[8] *Newdow* involved a non-custodial parent's effort to assert constitutional rights on behalf of a child whose interests were "not

[8] Indeed, the novel prudential standing theory on which TVA heavily relies is not just TVA's own invention, but it is a recent invention; it was not raised by either TVA or Petitioners during any of the extensive proceedings below. It would be especially inappropriate for the Court to make new standing pronouncements with potentially far-reaching implications in such circumstances. Rather, should the Court perceive any potential merit in these arguments, the proper course would be to remand so that the lower courts can take into account not only arguments advanced here for the first time, but also significant changes in the regulatory context – *i.e.*, the recent efforts by the executive branch to address greenhouse gas emissions through regulations and through a settlement that Respondents agree could moot the case.

parallel and, indeed, [were] potentially in conflict," 542 U.S. at 15; this not only triggered the well-entrenched "'prudential limitation on standing when rights of third parties are implicated,'" *id*. at 15 n.7 (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 80 (1978)), but also the Court's longstanding reluctance to resolve "family law" matters traditionally left to state courts. *Id*. at 17. However, *Newdow* involved such unusual facts, and such a concomitantly "narrow" rationale for dismissal on prudential standing grounds, that Chief Justice Rehnquist's separate opinion characterized the ruling as "the proverbial excursion ticket – good for this day only." *Id*. at 25 (Rehnquist, C.J., concurring).

In sum, TVA's new and amorphous prudential standing rationale is unsupported by this Court's standing precedents and contravenes the basic notion that the Court's "doctrine of prudential standing should be governed by general principles, rather than ad hoc improvisations." *Id.* (Rehnquist, C.J., concurring). This is especially so because the improvisation that TVA urges here is unnecessary to any legitimate interest in ensuring against a flood of lawsuits brought by an unconfined universe of plaintiffs against an unconfined universe of defendants.

Unlike the cases that gave rise to many of this Court's leading standing decisions, this case does not involve the question of whether to authorize a cause of action allowing citizens to enforce broadly drawn constitutional or statutory provisions. *See*, *e.g*., *Schlesinger,* 418 U.S. at 222; *United States v. Richardson*,

418 U.S. 166, 179, 188-89 (1974). Rather, this case involves a federal common law cause of action grounded in venerable common law nuisance principles. As Respondents have explained, the common law of nuisance contains its own distinctive requirements that limit who may sue, and when. *See, e.g.,* States Br. 26 (discussing requirements for public nuisance); Land Trusts Br. 18-19 (discussing "special injury" rule limiting class of plaintiffs who may bring suit for public nuisance). Furthermore, beyond the limiting principles inherent in the common law of nuisance, this Court and other federal courts have the authority to shape and confine the interstate federal common law cause of action in accordance with the paramount interests in providing remedies for interstate harms while maintaining interstate harmony. *Cf. Illinois v. City of Milwaukee, Wis.,* 406 U.S. 91, 108 (1972) ("informed judgment" and equitable principles govern); *Georgia v. Tenn. Copper Co*., 206 U.S. 230, 238-39 (1907) ("It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale"; finding that transboundary pollution had occurred on "so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff state, as to make out a case within the requirements of *Missouri v. Illinois*, 200 U.S. 496 [1906].").

Accordingly, the concern cited by TVA and Petitioners that allowing the claim to proceed could provide "virtually every person" with "a claim against virtually every other person," TVA Br. 37; *see also*

Pet. Br. 2, 30, implausibly assumes an indiscriminate cause of action that has not been, and need not be, extended by any real-life system of substantive law. It overlooks both traditional limitations imposed by the common law of nuisance and it assumes away the authority of federal courts, acting in this area as common law courts, to shape the federal nuisance cause of action in light of reason, experience, and common sense. Especially in this legal context, there is no valid basis for erecting a novel prudential standing barrier that lacks solid mooring in this Court's decisions and could have untoward and unanticipated implications for future litigation extending beyond the common law nuisance claims asserted here.

CONCLUSION

For the foregoing reasons, the Court should hold that the State Respondents have Article III and prudential standing.

Respectfully submitted,

ERIC R. GLITZENSTEIN
Counsel of Record
WILLIAM S. EUBANKS II
SHRUTI SURESH
MEYER GLITZENSTEIN & CRYSTAL
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009
(202) 588-5206

JASON C. RYLANDER
DEFENDERS OF WILDLIFE
1130 17th Street, N.W.
Washington, D.C. 20036
(202) 682-9400

SEAN H. DONAHUE
DONAHUE & GOLDBERG, LLP
2000 L Street, N.W.
Suite 808
Washington, D.C. 20036
(202) 277-7085

Counsel for Amici Curiae