

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MARTHA COAKLEY
ATTORNEY GENERAL

(617) 727-2200
www.mass.gov/ago

BY CERTIFIED MAIL

December 10, 2014

Harvard Climate Justice Coalition
309 Allston Street
Cambridge, MA 02139

Alice M. Cherry, Benjamin A. Franta, Sidni M. Frederick, Joseph E. Hamilton, Olivia M. Kivel,
Talia K. Rothstein, and Kelsey C. Skaggs
c/o Harvard Climate Justice Coalition
309 Allston Street
Cambridge, MA 02139

Heather Quay, Esq.
Harvard University Office of General Counsel
Richard A. & Susan F. Smith Campus Center, Suite 980
Cambridge, MA 02138

Re: *Harvard Climate Justice Coalition, et al. v. President & Fellows of Harvard College, et al.*,
Civil Action No. 2014-03620-H

Dear Gentilepersons:

Pursuant to Superior Court Rule 9A, enclosed please find:

1. Notice of Motion to Dismiss Pursuant to Superior Court Rule 9E;
2. The Commonwealth's Motion to Dismiss; and
3. Memorandum of Law in Support of the Commonwealth's Motion to Dismiss.

Under Rule 9A, you have ten (10) days after receipt to submit to me any opposition to the Commonwealth's Motion to Dismiss, which I will then file as a package with the Court.

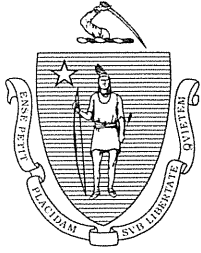
Thank you for your attention to this matter.

Sincerely yours,

Brett J. Blank
Assistant Attorney General
Non-Profit Organizations/
Public Charities Division
617-963-2346
brett.blank@state.ma.us

Enclosures





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MARTHA COAKLEY
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BY HAND DELIVERY

December 10, 2014

Clerk, H. Session
Suffolk County Superior Court
Three Pemberton Square, Room 1008
Boston, MA 02108

Re: *Harvard Climate Justice Coalition, et al. v. President & Fellows of Harvard College, et al.*,
Civil Action No. 2014-03620-H

Dear Sir or Madam:

Enclosed for filing in the above referenced matter please find the following:

1. Notice of Motion to Dismiss Pursuant to Superior Court Rule 9E.

Should you have any questions, please do not hesitate to contact me. Thank you for your attention to this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Brett J. Blank".

Brett J. Blank
Assistant Attorney General
Non-Profit Organizations/
Public Charities Division
617-963-2346
brett.blank@state.ma.us

Enclosures

cc: All parties (via Certified Mail)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPT.
CIVIL ACTION
Docket No. 2014-03620-H

HARVARD CLIMATE JUSTICE COALITION,)
ALICE M. CHERRY, BENJAMIN A. FRANTA,)
SIDNI M. FREDERICK, JOSEPH E. HAMILTON,)
OLIVIA M. KIVEL, TALIA K. ROTHSTEIN,)
KELSEY C. SKAGGS, and FUTURE GENERATIONS,)

Plaintiffs)

v.)

PRESIDENT AND FELLOWS OF HARVARD)
COLLEGE ("HARVARD CORPORATION"),)
HARVARD MANAGEMENT COMPANY, INC.,)
and MARTHA M. COAKLEY as she is Attorney General)
of the Commonwealth of Massachusetts,)

Defendants.)

NOTICE OF MOTION TO DISMISS PURSUANT TO SUPERIOR COURT RULE 9E


Pursuant to Superior Court Rule 9E, defendant Martha Coakley, as she is Attorney General of the Commonwealth of Massachusetts (the "Commonwealth"), hereby notifies the Court that it has served on plaintiffs Harvard Climate Justice Coalition, Alice M. Cherry, Benjamin A. Franta, Sidni M. Frederick, Joseph E. Hamilton, Olivia M. Kivel, Talia K. Rothstein, Kelsey C. Skaggs, and Future Generations, a motion to dismiss pursuant to Massachusetts Rules of Civil Procedure 12(b)(1) and 12(b)(6) entitled "The Commonwealth's Motion to Dismiss" (the "Motion"). Pursuant to Massachusetts Superior Court Rule 9A, the Commonwealth served its Motion by certified mail, return receipt requested, on December 10, 2014.

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Respectfully submitted,

MARTHA COAKLEY

ATTORNEY GENERAL OF MASSACHUSETTS



Mary A. Beckman (BBO # 565655)

Nora J. Mann (BBO # 550450)

Brett J. Blank (BBO # 686635)

Assistant Attorney General

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mary.beckman@state.ma.us

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brett.blank@state.ma.us

Dated: December 10, 2014

Certificate of Service

The undersigned certifies that on December 10, 2014, a copy of the within document was served by certified mail, return receipt requested, to all the following:

Harvard Climate Justice Coalition
309 Allston Street
Cambridge, MA 02139

Alice M. Cherry
c/o Harvard Climate Justice Coalition
309 Allston Street
Cambridge, MA 02139

Benjamin A. Franta
c/o Harvard Climate Justice Coalition
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Sidni M. Frederick
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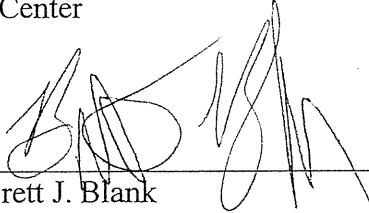
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Suite 980
Cambridge, MA 02138


Brett J. Blank
Assistant Attorney General

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPT.
CIVIL ACTION
Docket No. 2014-03620-H

HARVARD CLIMATE JUSTICE COALITION,)
ALICE M. CHERRY, BENJAMIN A. FRANTA,)
SIDNI M. FREDERICK, JOSEPH E. HAMILTON,)
OLIVIA M. KIVEL, TALIA K. ROTHSTEIN,)
KELSEY C. SKAGGS, and FUTURE GENERATIONS,)

Plaintiffs)

v.)

PRESIDENT AND FELLOWS OF HARVARD)
COLLEGE ("HARVARD CORPORATION"),)
HARVARD MANAGEMENT COMPANY, INC.,)
and MARTHA M. COAKLEY as she is Attorney General)
of the Commonwealth of Massachusetts,)

Defendants.)

THE COMMONWEALTH'S MOTION TO DISMISS

Defendant Martha Coakley, as she is Attorney General of the Commonwealth of Massachusetts (the "Commonwealth") hereby moves this Court, pursuant to Rules 12(b)(1) and 12(b)(6) of the Massachusetts Rule of Civil Procedure, for an order dismissing the complaint (the "Complaint") filed by plaintiffs Harvard Climate Justice Coalition, Alice M. Cherry, Benjamin A. Franta, Sidni M. Frederick, Joseph E. Hamilton, Olivia M. Kivel, Talia K. Rothstein, Kelsey C. Skaggs, and Future Generations (collectively, the "Plaintiffs"). In support of this Motion, the Commonwealth relies upon its Memorandum of Law, submitted herewith.

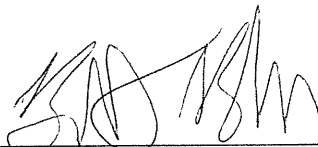
WHEREFORE, the Commonwealth respectfully requests that this Court:

1. Enter an Order dismissing Plaintiffs' Complaint with prejudice; and
2. Award such other relief as this Court deems just and proper.

Respectfully submitted,

MARTHA COAKLEY

ATTORNEY GENERAL OF MASSACHUSETTS



Mary A. Beckman (BBO # 565655)

Nora J. Mann (BBO # 550450)

Brett J. Blank (BBO # 686635)

Assistant Attorney General

Non-Profit Organizations/Public Charities Division

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617.963.2346

mary.beckman@state.ma.us

nora.mann@state.ma.us

brett.blank@state.ma.us

Dated: December 10, 2014

Certificate of Service

The undersigned certifies that on December 10, 2014, a copy of the within document was served by certified mail, return receipt requested, to all the following:

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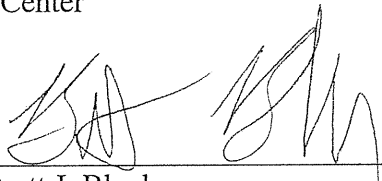
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Heather Quay, Esq.
Harvard University Office of General Counsel
Richard A. & Susan F. Smith Campus Center
Suite 980
Cambridge, MA 02138

A handwritten signature in black ink, appearing to read 'Brett J. Blank', is written over a horizontal line.

Brett J. Blank
Assistant Attorney General

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPT.
CIVIL ACTION
Docket No. 2014-03620-H

HARVARD CLIMATE JUSTICE COALITION,)
ALICE M. CHERRY, BENJAMIN A. FRANTA,)
SIDNI M. FREDERICK, JOSEPH E. HAMILTON,)
OLIVIA M. KIVEL, TALIA K. ROTHSTEIN,)
KELSEY C. SKAGGS, and FUTURE GENERATIONS,)

Plaintiffs)

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PRESIDENT AND FELLOWS OF HARVARD)
COLLEGE ("HARVARD CORPORATION"),)
HARVARD MANAGEMENT COMPANY, INC.,)
and MARTHA M. COAKLEY as she is Attorney General)
of the Commonwealth of Massachusetts,)

Defendants.)

**MEMORANDUM OF LAW IN SUPPORT OF THE COMMONWEALTH'S
MOTION TO DISMISS**

Pursuant to Massachusetts Rules of Civil Procedure 12(b)(1) and 12(b)(6), defendant Martha Coakley, as she is the Attorney General of the Commonwealth of Massachusetts (the "Commonwealth"), hereby submits this Memorandum of Law in Support of the Commonwealth's Motion to Dismiss (the "Motion") the complaint ("Compl." or the "Complaint") filed by plaintiffs Harvard Climate Justice Coalition ("HCJC"), Alice M. Cherry ("Cherry"), Benjamin A. Franta ("Franta"), Sidni M. Frederick ("Frederick"), Joseph E. Hamilton ("Hamilton"), Olivia M. Kivel ("Kivel"), Talia K. Rothstein ("Rothstein"), Kelsey C. Skaggs ("Skaggs," and, collectively with Cherry, Franta, Frederick, Hamilton, Kivel, and Rothstein, the "Individual Plaintiffs"), and Future Generations ("Future Generations" and, collectively with HCJC and the Individual Plaintiffs, the "Plaintiffs").

INTRODUCTION

By their Complaint, Plaintiffs – a collection of Harvard University (“Harvard”) students (Compl. ¶¶ 3-9)¹ and an unincorporated association (of which the Individual Plaintiffs are members (*Id.* ¶¶ 1, 3-9)) – seek to change the manner in which defendants President and Fellows of Harvard College (“Harvard Corporation”) and Harvard Management Corporation, Inc. (“Harvard Management”) fulfill their duty of overseeing and investing Harvard’s endowment. In particular, Plaintiffs allege that the burning of fossil fuels has contributed to climate change (and associated “deleterious geopolitical, economic, and social consequences”), and that Harvard has a duty “to respond to climate change.” (*Id.* ¶¶ 16-28, 31.) From this premise, Plaintiffs allege that Harvard Corporation’s and Harvard Management’s investment of a portion of Harvard’s endowment in “publicly traded fossil fuel companies” has helped cause “environmental and social harms,” and thus is inconsistent with Harvard’s charitable mission and amounts to a mismanagement of Harvard’s endowment. (*Id.* ¶¶ 32-47.) As relief, Plaintiffs primarily seek an injunction ordering Harvard Corporation and Harvard Management to divest Harvard’s endowment from fossil fuel companies. (*Id.* ¶ 74.)

However well-intentioned Plaintiffs may be, they lack standing to use the courts to bring about the changes that they seek.

First, because Harvard Corporation and Harvard Management are public charities (*Id.* ¶¶ 10-11), only the Attorney General of the Commonwealth of Massachusetts (the “Attorney General”) may bring a cause of action alleging breach of fiduciary duty and/or the misuse or mismanagement of their charitable assets. Plaintiffs lack standing to bring these claims, and, as a result, Count I of the Complaint – alleging mismanagement of Harvard’s endowment by Harvard

¹ The following facts are taken from the Complaint, and, for purposes of this Motion only, are assumed to be true.

Corporation and Harvard Management – must be dismissed. *See* Part I.A, *infra*. And while Massachusetts courts have recognized a limited exception to this general rule in cases in which the plaintiff has alleged interests in a public charity that are distinct from those of the general public, a review of the Complaint makes clear none of the Plaintiffs hold such interests. *See* Part I.B, *infra*.

Second, Count II of the Complaint – alleging “Intentional Investment in Abnormally Dangerous Activities” – does not appear to be a recognized cause of action. While the gravamen of this count is unclear, at least certain of the allegations appear to rest on a claim that Harvard Corporation and Harvard Management have mismanaged Harvard’s endowment. To the extent that Count II alleges a breach of fiduciary duty, it should be dismissed for the same reasons as Count I. *See* Part II, *infra*.

Accordingly, the Motion should be granted, and the Complaint should be dismissed.

STANDARD OF REVIEW

A plaintiff’s standing to maintain an action may be challenged via a motion to dismiss pursuant to Massachusetts Rules of Civil Procedure 12(b)(1) or 12(b)(6). *See Ginther v. Comm’r of Ins.*, 427 Mass. 319, 322 (1998). In evaluating a motion to dismiss under either Rule 12(b)(1) or 12(b)(6), a court assumes the truth of the factual allegations in the plaintiffs’ complaint, as well as any favorable inferences reasonably drawn from them. *Id.*

To have standing, the plaintiff bears the burden of proving “that the challenged action has caused the [plaintiff] injury.” *Brantley v. Hampden Div. of Probate and Family Court Dept.*, 457 Mass. 172, 181 (2010) (quoting *Slama v. Attorney Gen.*, 384 Mass. 620, 624 (1981)); *see also id.* (“a plaintiff must demonstrate standing separately for each form of relief sought”). “[S]tanding is not measured by the intensity of the litigant’s interest or the fervor of his advocacy.” *Enos v. Sec’y of Envtl. Affairs*, 432 Mass. 132, 135 (2000) (internal quotation

omitted). “Alleged injury that is ‘speculative, remote, and indirect’ will not suffice to confer standing”; rather, the alleged injury “must be a direct consequence of the complained of action.” *Brantley*, 457 Mass. at 181 (quoting *Ginther*, 427 Mass. at 323).

Under this standard, as further explained below, the Complaint must be dismissed in its entirety.

ARGUMENT

I. Plaintiffs Lack Standing to Challenge Harvard Corporation’s Management of Harvard’s Endowment, and Thus Count I Must Be Dismissed

A. As a General Rule, Only the Attorney General May Bring an Action Alleging the Misuse or Mismanagement of Charitable Assets

In Count I of the Complaint, Plaintiffs allege that Harvard Corporation’s and Harvard Management’s investment of a portion of Harvard’s endowment in fossil fuel companies amounts to “a breach of its fiduciary and charitable duties.” (Compl. ¶ 46.) But because Harvard Corporation and Harvard Management are public charities (Compl. ¶¶ 10-11), only the Attorney General may bring this claim. As a result, Plaintiffs lack standing, and Count I of the Complaint must be dismissed.

The Attorney General has the long-standing, well-established common law role to represent the public interest by protecting against the misuse of charitable assets and abuses in the administration of public charities. *See Jackson v. Phillips*, 96 Mass. 539, 579 (1867) (the Attorney General represents the indefinite public in a *parens patriae* power role to protect property devoted to charitable uses); *Parker v. May*, 59 Mass. 336, 337 (1850) (a suit by the Attorney General “in the name of the [C]ommonwealth, for establishing and sustaining charitable trusts is . . . a suit to protect public interests”).

In a long line of cases spanning more than one hundred years, the Supreme Judicial Court has repeatedly held that the Attorney General’s standing to bring suit to enforce the appropriate

use of charitable funds is exclusive:

We consistently have held that only the Attorney General can bring an action alleging the misuse of charitable assets. A century ago we noted: ‘The law has provided a suitable officer to represent those entitled to the beneficial interests in a public charity. It has not left it to individuals to assume this duty, or even to the court to select a person for its performance. Nor can it be doubted that such a duty can be more satisfactorily performed by one acting under official responsibility than by individuals, however honorable their character and motives may be.’

Weaver v. Wood, 425 Mass. 270, 275 (1997) (citations omitted); *see also Lopez v. Medford Community Center, Inc.*, 384 Mass. 163, 167 (1981) (holding that members of charitable corporation lacked standing to litigate claims of corporate mismanagement because it is “the exclusive function of the Attorney General to correct abuses in the administration of a public charity”); *Ames v. Attorney Gen.*, 332 Mass. 246, 250 (1955) (“The duty of taking action to protect public charitable trusts² and to enforce proper application of their funds rests solely upon the Attorney General as the representative of the public interests.”).³

Accordingly, Plaintiffs lack standing, and Count I should be dismissed.

B. No Exception to the General Rule Applies Because Plaintiffs Lack Any Fiduciary or Beneficial Interest In Harvard or its Endowment that is Separate and Distinct From the Interests of the General Public

On rare occasions, the Supreme Judicial Court has “recognized a private plaintiff’s standing to make claims against a public charity, but only where the plaintiff asserts interests in such organizations which are distinct from those of the general public.... In each such case the

² Massachusetts courts apply this principle consistently in cases involving both charitable corporations and charitable trusts. For example, in *Lopez*, the plaintiffs asserted that the directors of a charitable corporation had breached their fiduciary duties. 384 Mass. at 167. In holding that that plaintiffs lacked standing to litigate that claim, the Court quoted *Ames* – a case involving allegations of mismanagement of a charitable trust – for the proposition that “it is the exclusive function of the Attorney General to correct abuses in the administration of a public charity by the institution of proper proceedings. It is his duty to see that the public interests are protected and to proceed in the prosecution or to decline so to proceed as those interests may require.” *Lopez*, 384 Mass. at 167. Thus, any attempt by Plaintiffs to distinguish between cases involving charitable corporations and cases involving charitable trusts will be meritless.

³ *See also Dillaway v. Burton*, 256 Mass. 568, 573 (1926); *Burbank v. Burbank*, 152 Mass. 254, 256 (1890); *Hoffman v. Univ. of Mass. Amherst*, 79 Mass. App. Ct. 1122, at *1 (June 2, 2011) (memorandum and order pursuant to Appeals Court Rule 1:28); *Garland v. Beverly Hosp. Corp.*, 48 Mass. App. Ct. 913, 914 (1999).

claim has arisen from a personal right that directly affects the individual member, such as where the member has a right to exercise a vote in connection with some aspect of the charity's affairs ... and is prohibited from doing so." *Weaver*, 425 Mass. at 276 (citations and internal quotation marks omitted); *Boy Scouts of Am. v. Monadnock Trust, Inc.*, 1998 WL 1181763, at *5 (Mass. Super. Ct. Aug. 13, 1998) (noting the "narrow" nature of the exception to the general rule that only the Attorney General may bring an action alleging the misuse of charitable assets); *see also Lopez*, 384 Mass. at 167; IVA Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 391 (4th ed. 1989). This narrow exception has never been extended to "a potential beneficiary of the charity, such as a member of a church, or some other non-trustee, such as a donor, seeking to enforce the trust's charitable purposes or bylaws," each of whom lacks standing to litigate a breach of fiduciary duty claim. *In re Boston Regional Med. Ctr., Inc.*, 328 F. Supp. 2d 130, 146 (D. Mass. 2004).

For example, in *Weaver*, two members of the First Church of Christ, Scientist, in Boston (the "Church") – a public charity – brought an action in which they sought to challenge a determination by the Church's directors and its publishing arm (the "Publishing Society") to authorize major investment in television ventures, alleging that such a decision was in disregard of the Church's governing documents and amounted to a breach of fiduciary duty. *Weaver*, 425 Mass. at 271, 274. Framing the question presented as whether the two members – who were "life-long members" of the Church, but had never served as fiduciaries of the Church or the Publishing Society – had standing to litigate this claim, the Supreme Judicial Court answered in the negative and reversed the trial court's denial of the defendants' motion for summary judgment. *Id.* at 274-78. Critically, the Court held that, "[w]hile the plaintiffs' relationship with the Mother Church is indeed different from a member of the public who is not a member of the

Church, we have never held that membership in a public charity, alone, is sufficient to give standing to pursue claims that a charitable organization has been mismanaged or that its officials have acted *ultra vires*.” *Id.* at 277.

Instead, standing to litigate such claims has been found only when the plaintiff is a fiduciary of the public charity⁴ or when the plaintiff possesses a beneficial interest in the public charity that is separate and distinct from the public’s interest as a beneficiary writ large, such as a reversionary interest or a right to vote on a particular matter.⁵ But none of the Plaintiffs here allege that they hold such fiduciary or beneficial interests, and thus all lack standing under this exception.

Individual Plaintiffs. Critically, none of the Individual Plaintiffs allege that they are fiduciaries of Harvard Corporation or Harvard Management, or that they act on their behalf. Nor do any of the Individual Plaintiffs allege that this suit seeks to remedy the abridgement of any specific membership rights that they may have, or that they are the beneficiaries of a reversionary interest that may encumber a portion of Harvard’s endowment.

Instead, Plaintiffs simply allege that the investment of a portion of Harvard’s endowment in fossil fuel companies has caused them some sort of injury *as Harvard students*. (Compl. ¶¶ 51, 53, 55-62.) For example, Individual Plaintiffs allege that the investment of a portion of Harvard’s endowment in fossil fuel companies:

- “demonstrably affects these Plaintiffs’ work, enjoyment, and opportunities as students and graduates of Harvard University.” Compl. ¶ 51.B.

⁴ See *In re Boston Regional Med. Ctr., Inc.*, 328 F. Supp. at 147 (holding that a public charity has standing to sue its fiduciaries, or former fiduciaries, for breach of fiduciary duty); see also *id.* at 145, 147 (trustees of a public charity may sue other trustees for breach of fiduciary duty).

⁵ *Lopez*, 384 Mass. at 167-168 (holding that members of public charity lacked standing to prosecute claims of mismanagement, but had standing to assert claim that charity improperly prohibited members from exercising their rights to vote on a particular matter); *Wigglesworth v. Cowles*, 38 Mass. App. Ct. 420 (1995) (individuals have standing to claim that the reversionary clause in a charitable trust has been triggered because the trustees have failed to comply with the provisions of the trust).

- “directly affects ‘the advancement of youth’ and the maintenance of the university’s physical campus.” *Id.* ¶ 53.
- renders Individual Plaintiffs “unable to enjoy the full benefits of their study of environmental law because [it] impedes their ability to associate with like-minded colleagues and to avail themselves of the open scholarly environment that Defendant Harvard Corporation has a duty to maintain.” *Id.* ¶ 55.
- will diminish their “future enjoyment of the University’s physical campus. *Id.* ¶ 56.
- “contributes to the diminishment of [Individual Plaintiffs’] education.” *Id.* ¶¶ 57-62.

But Individual Plaintiffs’ status as Harvard students does not give them standing to assert claims of mismanagement against Harvard’s fiduciaries. *See Weaver*, 425 Mass. at 277-78 (members of a public charity lack standing to litigate claim that charity has been mismanaged or that its fiduciaries have acted *ultra vires*); *Lopez*, 384 Mass. at 167-169 (holding that members of public charity lacked standing to prosecute claims of mismanagement); *Russell v. Yale Univ.*, 737 A.2d 941, 943-44, 946 (Conn. App. Ct. 1999) (holding that students lacked standing to allege that Yale Corporation’s reorganization of Yale Divinity School amounted to “abuse of discretion as trustee of a public charitable trust” because “absent special injury to a student or his or her fundamental rights, students do not have standing to challenge the manner in which the administration manages an institution of higher education” (citing *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 641 (1819))).

As Harvard students, the Individual Plaintiffs are on the same level as any other student or potential student – indeed, any member of the general public – in their relationship to Harvard and its endowment, and thus their interests may be represented only by the Attorney General. *See Burbank v. Burbank*, 152 Mass. 254, 256 (1890) (Attorney General represents the interests of all of the beneficiaries of a charitable trust); *In re Boston Regional Med. Ctr., Inc.*, 328 F. Supp. 2d at 146 (Attorney General’s standing to enforce the rights of beneficiaries of public charities is exclusive of “other individuals who claim to represent the trust’s beneficiaries”).

There is no merit to Plaintiffs' allegation that they have standing under the Supreme Judicial Court's decision in *Maffei v. Roman Catholic Archdiocese of Boston*, 449 Mass. 235 (2007). (Compl. ¶ 48 and Exh. U.) In *Maffei*, the Court determined that several plaintiffs had standing to assert individual claims for breach of fiduciary duty against the Roman Catholic Archbishop of Boston (the RCAB, a public charity), because they alleged that, *inter alia*, they conditionally gifted their land to the RCAB and "they personally have an equitable reversionary interest in the property as a result of the actions of the RCAB." *Id.* at 245. This claim, the Court observed, is "personal, specific, and exist[s] apart from any broader community interest in keeping [the parish] open.... The plaintiffs have alleged personal rights that would, in the ordinary course, entitle them to standing." *Id.* By contrast, as explained above, none of the Plaintiffs in this case have alleged that they possess such a reversionary interest.

HCJC. Even assuming, *arguendo*, that unincorporated associations are proper parties to a lawsuit (and, for the reasons stated below, they are not), HCJC lacks associational standing to challenge the management of Harvard's endowment. To establish associational standing, an association must demonstrate that, *inter alia*, "its members would otherwise have standing to sue in their own right." *Mass. Ass'n of Cosmetology Schools, Inc. v. Bd. of Reg. in Cosmetology*, 40 Mass. App. Ct. 706, 708 (1996) (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *see also Animal Legal Defense Fund, Inc. v. Fisheries & Wildlife Bd.*, 416 Mass. 635, 638 & n.4 (1993) (the court must "determine whether any individual member of the [association], including the ... individually named plaintiffs, could demonstrate that he or she has suffered a legally cognizable injury" (quoting *Hunt*, 432 U.S. at 343))). For two reasons, it cannot do so.

First, for the reasons set forth above, none of the Individual Plaintiffs – each of whom is

alleged to be a member of HCJC – has standing to maintain this action.

Second, with respect to HCJC's remaining (unnamed) members, the Complaint simply alleges that HCJC's membership is composed exclusively of Harvard students. Compl. ¶ 50.C. As explained above, simply being a Harvard student, without more, is insufficient to confer standing. HCJC does not allege that even one of its members (a) is a fiduciary of Harvard Corporation or Harvard Management, (b) purports to act on behalf of Harvard Corporation or Harvard Management, (c) has suffered an abridgement of his or her membership rights or (d) has a reversionary interest in a portion of Harvard's endowment. As a result, HCJC has not alleged facts that would demonstrate that its members would otherwise have standing to sue in their own right, and thus HCJC lacks associational standing.

In any event, HCJC's claims should be dismissed because "[i]t is a well established principle that an unincorporated association cannot be a party to litigation." *Save the Bay, Inc. v. Dep't of Public Utilities*, 366 Mass. 667, 675 (1975) (citing *McCormack v. Labor Relations Comm.*, 358 Mass. 682, 684 (1971)); *Maria Konopnicka Soc. of the Holy Trinity Polish Roman Catholic Church v. Maria Konopnicka Soc.*, 331 Mass. 565, 568 (1954)); see also *Harvard Square Defense Fund, Inc. v. Planning Bd. of Cambridge*, 27 Mass. App. Ct. 491, 496 n.9 (1989) ("An unincorporated association cannot be a party to a lawsuit."); *McCavitt v. Zoning Bd. of Appeals of City of Newburyport*, Case No. 381972-HMG, 2008 WL 4572928, at *4 (Mass. Land. Ct. Oct. 14, 2008) (holding that unincorporated association lacked standing to maintain action), *aff'd* 75 Mass.App.Ct. 1106 (2009); Mass. R. Civ. P. 23.2 at Reporter's Notes ("Rule 23.2 [which allows, if certain conditions are met, members of an unincorporated association to bring suit on behalf of the unincorporated association as representative parties] does not change the rule in Massachusetts that with some statutory exceptions (i.e., suits against certain voluntary

associations and business trusts—G.L. c. 182, § 6) unincorporated associations do not have the capacity to sue or be sued.”). Because HCJC is an unincorporated association (Compl. ¶ 1), it lacks the capacity to sue in its own name, and its claims must be dismissed.

“Future Generations.” While it is not entirely clear, Plaintiffs do not appear to allege that “Future Generations” – a putative class of individuals “not yet born or too young to assert their rights but whose future health, safety, and welfare depends on current efforts to slow the pace of climate change” purportedly represented by HCJC as next friend – are parties to Count I of the Complaint. But, even if Plaintiffs had sought to name “Future Generations” as parties to Count I of the Complaint, such a claim would fail for the reasons set forth above. Critically, Plaintiffs have not alleged that they seek to protect, on behalf of “Future Generations,” a fiduciary or beneficial interest in Harvard or its endowment that is separate and distinct from that held by the general public. Thus, as with the remaining Plaintiffs, this claim may be litigated only by the Attorney General.

* * * *

As a result, each of the Plaintiffs lacks standing to litigate Count I of the Complaint, which must be dismissed.

II. To the Extent that Count II of the Complaint Rests on Allegations of Mismanagement of Harvard’s Endowment, it Must Be Dismissed

Count II of the Complaint alleges “Intentional Investment in Abnormally Dangerous Activities.” The Commonwealth’s independent research has not revealed any cases that recognized such a cause of action, and thus the gravamen of this count is unclear. Certain of the allegations under this count, however, seem to allege a mismanagement of Harvard’s endowment. *See* Compl. ¶¶ 68-70 (alleging that investment of a portion of Harvard’s endowment in fossil fuel companies causes harm). But as explained in Part I, *supra*, such a claim

may be brought only by the Attorney General. Thus, to the extent that Count II turns on allegations of mismanagement or breach of fiduciary duty, Count II must be dismissed.

In any event, Count II should be dismissed under Massachusetts Rule of Civil Procedure 12(b)(6). In evaluating a motion to dismiss under Rule 12(b)(6), this Court must “examine each of the plaintiffs’ theories, considering ‘whether the factual allegations in the complaint are sufficient, as a matter of law, to state a recognized cause of action or claim, and whether such allegations plausibly suggest an entitlement to relief.’” *Kelley v. Cambridge Historical Comm’n*, 84 Mass. App. Ct. 166, 173 (2013) (quoting *Dartmouth v. Greater New Bedford Regional Vocational Technical High Sch. Dist.*, 461 Mass. 366, 374, (2012)). Because “Intentional Investment in Abnormally Dangerous Activities” is not a recognized cause of action, Plaintiffs cannot meet this standard.

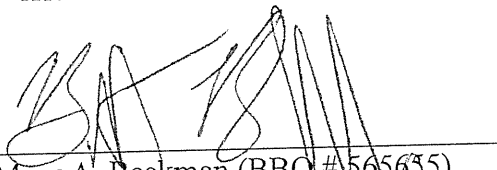
CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court enter an order pursuant to Massachusetts Rules of Civil Procedure 12(b)(1) and 12(b)(6) granting the Motion, dismissing the Complaint, and awarding such other relief as this Court deems just and proper.

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Respectfully submitted,

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Dated: December 10, 2014

Certificate of Service

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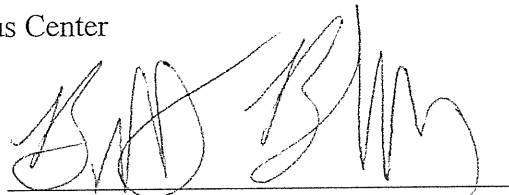
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A handwritten signature in black ink, appearing to read 'Brett J. Blank', written over a horizontal line.

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