COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
CIVIL ACTION NO. 14-3620H

HARVARD CLIMATE JUSTICE COALITION, ET AL.,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
HARVARD MANAGEMENT COMPANY, INC.,
and MARTHA M. COAKLEY

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT MARTHA M. COAKLEY'S MOTION TO DISMISS

We hereby oppose Defendant Martha M. Coakley's Motion to Dismiss (the "Motion"). Because each count in our complaint states a viable claim for relief, the Motion should be denied.

I. Introduction

Defendant grounds her arguments for dismissal in a misapprehension of our claims and the law underlying them. Massachusetts courts have not addressed whether students possess the special interest requisite to challenge the management of university assets in exceptional circumstances. This case, however, presents such circumstances, and we have narrowly tailored our assertion of standing to them. As such, a grant of standing would neither contravene this state's public policy nor open the door to excessive litigation. Moreover, since any determination of our ability to meet standing requirements and the extent of the Harvard Corporation's and Harvard Management Company's ("the Harvard Defendants"") charitable duties requires a fact-based inquiry, it is unsuitable for resolution via a motion to dismiss.

Defendant Attorney General similarly mistakes the nature of our novel tort claim, which we bring on behalf of Future Generations. Because it alleges an independent tort and does not

implicate the Harvard Defendants' fiduciary duties, this claim requires no showing of special interest.

Our interest in this case is far from hypothetical. To achieve marginally better financial return for a university endowment that is already the world's largest, the Harvard Defendants knowingly contribute to a problem that threatens our well-being as students and that of Future Generations. Not only is the case suitable for judicial resolution, but even the most elementary adherence to principles of fairness and justice demands it. The Harvard Defendants cannot abrogate their duties—and put the health of the planet and its inhabitants at risk—by appealing to fiduciary discretion. Nor should the Court allow Defendant Attorney General's objections to this action to facilitate such an injury. For these reasons, and as detailed below, our case should be allowed to proceed.

II. Facts

Our request for relief is consistent with the Harvard Defendants' charitable obligations, their past conduct, and the demands of justice. The catastrophe of climate change is now of such a scale and intensity that underwriting it not only harms the public interest but also violates the Harvard Corporation's duty to promote the "advancement and education of youth." Cplt. at Ex. H.

Harvard Corporation President Drew Faust has stated that "climate change poses a serious threat to our future—and increasingly to our present." *Id.* at Ex. J. But the Harvard Defendants' efforts to address that threat fall far short of what is required. In particular, research and scholarship on climate change, while important for guiding action to confront it, cannot substitute for such action. Likewise, campus sustainability measures have a minimal impact on the continued extraction of fossil fuels—an impact overwhelmingly outweighed by the Harvard

Defendants' investment in them. Finally, the appointment of a Vice President for Sustainable Investing does not commit the Harvard Defendants to any changes in their investment behavior. In short, these steps, though laudable, do nothing to address the harms caused by Harvard's investments in fossil fuels.

The Corporation has several times chosen to divest from morally repugnant sectors, thereby recognizing the political and moral implications of its investments. *See* Cplt. at Ex. N.[1] Recently, the Harvard Corporation's decisions to sign the United Nations Principles for Responsible Investment and to join the Carbon Disclosure Project, *id.* at Ex. J, acknowledge the connection between its investments and its duty to address climate change. Taken together, Harvard Defendants' current attention to their investments' climate impacts and their past divestment decisions suggest that they have recognize a duty to withdraw investments that endanger social welfare and the interests enumerated in the Charter of the Harvard Corporation, Cplt. at Ex. H. This duty, once recognized, is not obviated by the personal judgment or preferences of the Harvard Defendants' trustees. Therefore, further factual inquiry is needed to ascertain its full extent.

In sum, divestment of the Harvard Defendants' assets from fossil fuels is the only remedy capable of ameliorating our harms. Defendant claims that only she, as Attorney General, is empowered to seek such relief. But where defendants claim the right to use their charitable funds to profit off of global warming and to insulate their investment decisions from any legal challenge, Massachusetts' interest in empowering private plaintiffs to enforce charitable duties is

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[1] For example, in 1990 Harvard divested its tobacco stocks following a campaign by public health groups. Then-Harvard President Derek Bok stated that the decision to divest was based on a desire to stop supporting companies whose products "create a substantial and unjustified risk of harm to other human beings." Tamar Levin, *Harvard and CUNY Shedding Stocks in Tobacco*, The New York Times (May 24, 1990), *available at* http://www.nytimes.com/1990/05/24/us/harvard-and-cuny-shedding-stocks-in-tobacco.html.

triggered. As such, this Court should confer standing to pursue our claims related to a private interest in the Harvard Defendants' investment practices and should allow our tort claim to proceed.

II. Standard for Motion to Dismiss

A motion to dismiss for failure to state a claim upon which relief may be granted under Mass. R. Civ. P. 12(b)(6) permits "prompt resolution of a case where the allegations in the complaint clearly demonstrate that the plaintiff's claim is legally insufficient." *Harvard Crimson, Inc. v. President & Fellows of Harvard Coll.*, 445 Mass. 745, 748 (2006). To survive a motion to dismiss, a complaint must set forth the basis for the plaintiff's entitlement to relief with "more than labels and conclusions." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636, quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). At the pleading stage, Mass. R. Civ. P. 12(b)(6) requires that the complaint set forth "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief . . . . " *Id.*, quoting *Bell Atl. Corp.*, 550 U.S. at 557. The Court, must, however, accept as true the allegations of the complaint and draw every reasonable inference in favor of the plaintiff. *Curtis v. Herb Chambers I–95, Inc.*, 458 Mass. 674, 676 (2011). The court takes into consideration the allegations in the complaint "although matters of public record, orders, items appearing in the record of the case and exhibits attached to the complaint, also may be taken into account." *Schaer v. Brandeis University*, 432 Mass. 474, 477 (2000). As a general matter, courts are not to "resolve undecided points of substantive law" via a motion to dismiss. *M. Aschheim Co. v. Turkanis*, 17 Mass. App. Ct. 968, 968 (1983).

IV. We Have Standing to Challenge Defendants' Investments in Fossil Fuels

Defendant's argument in favor of dismissal rests upon the claim that she has exclusive authority to challenge Harvard Defendants' fossil fuel investments. However, Massachusetts

courts allow plaintiffs with a special interest in the management of a charity to bring actions challenging breaches of duty in charitable administration. *See, e.g.*, *Maffei v. Roman Catholic Archbishop of Boston*, 449 Mass. 235, 245 (2007). The Complaint describes with great particularity our special interest in the Harvard Defendants' fossil fuel investments and their resulting harms. Cplt. ¶¶ 49-62. Contrary to Defendant's contention, our claim for standing is sufficiently limited to avoid disrupting the Commonwealth's charity enforcement scheme or impinging upon Defendant's traditional enforcement authority. Indeed, this action seeks to vindicate the interests and enforce the charitable duties that Massachusetts' special interest doctrine was created to protect. Accordingly, Defendant's Motion should be denied and our action should be allowed to proceed.

A. Massachusetts Law Allows Plaintiffs With a Special Interest in the Management of a Charity to Sue for Breaches of Charitable Duty

Authority to enforce the due application of charitable funds in Massachusetts normally rests with the Attorney General. M.G.L. c. 12, § 8. Under prior common law, this authority was exclusive. *Burbank v. Burbank*, 152 Mass. 254, 256 (1890). However, in accordance with the modern trend, Massachusetts courts have created and progressively expanded a special-interest exception to the general rule. *See, e.g.*, *Lopez v. Medford Cmty. Ctr., Inc.*, 384 Mass. 163, 167 (1981); *Maffei*, 449 Mass. at 245; Restatement (Third) of Trusts § 94 (2012) ("[a] suit for the enforcement of a charitable trust may be maintained . . . by another person who has a special interest in the enforcement of the trust"). In determining whether a plaintiff has standing to litigate based on a special interest, the crucial question is whether that interest is distinct from one shared by the general public. *Lopez*, 384 Mass. at 167 ("Notwithstanding the Attorney General's exclusive and discretionary role as protector of the public interest in the efficient and

lawful operation of charitable corporations, a private plaintiff possesses standing to assert interests in such organizations which are distinct from those of the general public.").

The Supreme Judicial Court has provided some guidance as to the difference between excluded, generally shared public interests and nonexcluded private interests. The Court has found only an insufficiently private interest when a plaintiff's control over a charitable trust is temporally limited, *Dillaway v. Burton*, 256 Mass. 568, 573 (1926) (cotrustee could not bring action against other cotrustees for mismanagement where special interest would be extinguished after trust paid out) or lacks real force, *Ames v. Attorney General*, 332 Mass. 246, 252 (1955) (members of arboretum visiting committee "with no rights or powers" lacked standing to compel Attorney General enforcement action). Similarly, special interest claims based on anticipated benefits fail when the benefits are identical to those anticipated by the general public. *Burbank*, 152 Mass. 254 at 256 (heirs and next of kin had no interest in trust distinct from that of other residents standing to benefit from bequest to town).

On the other hand, the Court has granted standing where, as in this case, the plaintiffs are in a special relationship with the charity and suffer harms arising from that relationship. For example, the Court has found a special relationship where supervision is mandated by the trust document. *Trustees of Andover Theological Seminary v. Visitors of Theological Inst. in Phillips Acad. in Andover*, 253 Mass. 256, 301-2 (1925) (visitors responsible for school's religious mission had standing to challenge trustees' plan for closer affiliation with another school). The Court has also found a special relationship when the plaintiff is entitled to the entire benefit of the trust. *Trustees of Dartmouth College v. Quincy*, 331 Mass. 219, 225 (1954) (college had standing to challenge administration of trust fund to which it was entitled on occurrence of contingency). Finally, special interest claims based on membership rights may succeed when

there is an allegation of bad faith. *Jessie v. Boynton*, 372 Mass. 293, 303-4 (1977) (employee members of hospital had standing to challenge procedure of vote on disenfranchisement).

The distinction between public and private interests is best illustrated by *Lopez*, where would-be members of the Medford Community Center sued its board of directors for corporate mismanagement and unlawful denial of membership. 384 Mass. at 165. The Court upheld dismissal of the mismanagement claims because the plaintiffs had failed to assert any interest distinct from the general public in the management of the Center. *Id.* at 167. However, citing *Jessie*, the Court ruled that the plaintiffs had standing to pursue their membership rights claim because denial of membership deprived them of rights guaranteed by the organization's bylaws, giving rise to a private interest. *Id.* at 167-8. The Court expanded upon this logic in *Maffei*, finding that parties claiming an equitable reversionary interest in property belonging to the Roman Catholic Archdiocese of Boston or alleging negligent misrepresentation on the part of the Archdiocese would have standing to assert a breach of duty because such claims are "personal, specific, and exist apart from any broader community interest." 449 Mass. at 245 (claim dismissed for failure to plead such special interests).

In sum, the Court's inquiry into whether a private plaintiff possesses interests that are "distinct from those of the general public," *Lopez*, 384 Mass. at 167, is fact based and depends crucially on the specific nature of the relationship between plaintiffs and the defendant charitable organization. The Court's rulings look to such factors as the plaintiff's control over charitable assets; rights bestowed by the charity's governing document; the distinction between the plaintiff's and the public's benefits; and distinct harms suffered as a result of mismanagement. The Court also considers whether granting special interest standing would undermine the purposes motivating the default rule of exclusive Attorney General enforcement authority,

namely the competence of the public representative and "the necessity of protecting public charities from being called upon to answer to proceedings instituted by individuals, with or without just cause, who have no private interests distinct from those of the public." *Dillaway*, 256 Mass. at 575. Because the nature of our interest in the Harvard Defendants' fossil fuel investments cannot be properly determined without significant factual inquiry, the Court should dismiss Defendant's Motion as inappropriate at this stage of litigation.

B. We Have a Special Interest in Defendants' Investments in Fossil Fuels

As demonstrated by the Complaint, our interest in certain of the Harvard Defendants' investment decisions supports standing to challenge their fossil fuel investments in particular. This special interest is limited to those investments that "directly affect 'the advancement and education of youth' and the maintenance of the university's physical campus." Cplt. at ¶ 49 (quoting the Charter, *id.* at Ex. H). The interest is grounded in the language of the Charter, *id.*, the special benefits that we enjoy from these decisions as students and a student association, *id.* at ¶¶ 49-51, and the particular harms we do and will suffer as a result of the Corporation's contribution to climate change, *id.* at ¶¶ 52-63. Furthermore, our standing claim is narrowly tailored to the the particular harms we do and will suffer as a result of the Corporation's contribution to climate change, which the Complaint describes in detail. *Id.* at ¶¶ 16-28, 52-63. Finally, and contrary to her assertions, the Court's limited recognition of our standing would not implicate the Attorney General's prerogative to enforce the public interest in the administration of charities, the ability of charities to operate free of vexatious litigation, or the Court's reluctance to interfere with nonprofit corporate governance.

President Faust has stated that Harvard has "a special obligation and accountability to the future, to the long view needed to anticipate and alter the trajectory and impact of climate

change," and that this obligation encompasses Defendants' investment decisions. *Id.* at Ex. J. Indeed, Massachusetts law governing nonprofit management requires investors to consider each "asset's special relationship or special value, if any, to the charitable purposes of the institution." M.G.L. c. 180A, § 2(e)(2)(viii). Continued investment in fossil fuels in the face of scientific certainty about their extreme harms not only fails to comport with the charitable purposes enumerated in the Charter but also threatens Harvard's campus and our well-being as students and a student association. These harms are sufficiently developed to survive a motion to dismiss. As detailed in the Complaint, they include interference with the Harvard Climate Justice Coalition's mission to secure a safe transition to a healthier energy future and damage to Individual Plaintiffs' future enjoyment of the campus and current well-being as students. ¶¶ 52-62.

As in *Lopez*, where the plaintiffs' special interest standing rested upon an injury (denial of membership rights), 384 Mass. at 167-68, so in the instant case the scope of our special interest is defined by the harms caused by the particular investments identified in the Complaint. ¶ 32. The Charter and subsequent affirmation by President Faust recognize special duties toward students, the long-term health of the university, and future generations. *Id.* at ¶¶ 41-52. The unique harms we suffer as a result of Defendants' investment practices in fossil fuel companies confer a right to enforce these duties[2]—a right that is distinct from any enjoyed by members of the general public, who neither by Charter grant nor by university affiliation enjoy a special

[2] As a general rule, standing in Massachusetts courts depends upon a showing of injury. *Slama v. Attorney Gen.*, 384 Mass. 620, 624 (1981) ("To have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury"); *see also* Mass.R.Civ.P. 17(a). While weighing the limiting rules of Massachusetts special interest standing law, the Court should be cognizant of the fact that the outcome of this litigation affects us in a way distinct from that of the public. Cplt. ¶¶ 52-62. This differentiated interest should at the least allow us to survive a motion to dismiss.

interest in the well-being of Harvard. As such, we seek the Court's recognition of a special interest held by only a limited number of potential litigants.[3]

Additionally, the restriction of our standing claim to a specific and narrow relationship to the Harvard Corporation avoids the danger of vexatious litigation raised in *Dillaway*, 257 Mass. at 575. *See* Part IV.A, *supra*. This danger is limited where plaintiffs "whose positions with regard to the charitable trust [are] more or less fixed" and who are "certain to receive trust benefits" seek to enforce charitable duties. Ronald Chester et al., Bogert's Law of Trusts and Trustees § 414 (3d ed. 2014). As current students and a Harvard-exclusive student association, Cplt. ¶¶ 1, 3-9, our positions with regard to the Harvard Corporation are well defined, and we currently and actually enjoy the benefits of Harvard's charitable activity. The Complaint clearly describes the issue-specific grounds of our standing claim as tied to the exceptional harms of climate change. ¶¶ 49-62. Both our fixed relationship and this issue specificity negate any danger of unpredictability in the class of potential litigants. Furthermore, we are not seeking monetary relief, obviating the risk that similar actions could drain the coffers of charitable organizations. Finally, as in any enforcement action, we ask the Court only to enforce pre-existing duties, not to fashion new ones.

C. Defendant's Arguments Against Standing Rely Upon an Incomplete Analysis of the Special Interest Requirement. Our Claim Is Not Precluded By Student Status.

Defendant's argument against granting us special interest standing rests on two flawed assumptions. First, Defendant alleges that the Complaint makes no claim to a fiduciary or beneficial interest. Def. Mem. at 7. Second, Defendant alleges that our standing argument rests solely on our "status as Harvard students," *id.* at 8, which she alleges is insufficient to confer

[3] While we refrain to speculate whether any investments other than those in fossil fuels could rise to the level of certain and pervasive harm described in the Complaint, the exceptional risks posed by climate change readily provide a limiting principle.

standing. Contrary to these allegations, and as the Complaint makes clear, we both claim a beneficial interest in the Harvard Corporation and assert standing based on factors beyond student status alone.

Defendant acknowledges special interest standing as an exception to the general rule of exclusive Attorney General enforcement. *Id.* at 5. However, Defendant attempts to narrow the zone of possible exceptions to a greater degree than precedent or Massachusetts courts' trend toward expanded standing allow. First, Defendant refers to the Supreme Judicial Court's statement in *Weaver v. Wood* that "we have never held that membership in a public charity, alone, is sufficient to give standing," 425 Mass. 270, 277 (1997), to cast doubt of the sufficiency of our standing claim. This authority is inapposite: both the Harvard Corporation and the Harvard Management Company are nonmember charities, and the Complaint makes no claim based on membership rights. Defendant next alleges that we have failed to assert an beneficial interests in the Harvard Corporation. Def. Mem. at 7. However, paragraphs 49-51 of the Complaint describe our distinct interests in particular Harvard investments and paragraphs 52-62 explain why these interests are triggered in the case of fossil fuels. While Defendant correctly identifies "a reversionary interest or a right to vote on a particular matter" as examples of interests that have merited special interest enforcement in Massachusetts, Def. Mem. at 7, nothing in the relevant authority suggests that they are the *only* interests capable of conferring standing. *See, e.g.*, *Weaver*, 425 Mass. at 276 (defining the special interest rule in general terms). Defendant's repeated emphasis on our lack of such interests is therefore misplaced, and her argument that *Maffei*'s definition of excepted special interest does not apply simply because we have not alleged a reversionary interest is inapt. Def. Mem. at 9.

Next, Defendant argues that the Individual Plaintiffs' "status as Harvard students does not give them standing to assert claims of mismanagement" and that "as Harvard students, the Individual Plaintiffs are on the same level as . . . any member of the general public . . . in their relationship to Harvard." *Id.* at 8. While Defendant is correct in describing our standing claim as linked to student status, she fails to take note of the crucial, additional factor that builds upon this status: namely, the exceptional harms caused by investments in fossil fuels.

Defendant attempts to conflate any claim related to student status with a claim based on membership rights. *Id.* As already stated, *supra* Part IV.C, the Complaint makes no claim based on membership rights. Moreover, Defendant's brief citation to two authorities incompletely describes the precedent on student standing. In *Trustees of Dartmouth College v. Woodward*, the Supreme Court, in considering plaintiff trustees' challenge to a legislative alteration of their charter, noted that "students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a court of justice." 17 U.S. 518, 641 (1819). This observation was made in the absence of any claim of injury by the students. *Id.* at 641. Furthermore, *Woodward*'s concern that students are too "fluctuating" a body to have direct interests in the management of a university because they graduate within a few years is not implicated here, as we are challenging only management decisions that harm us for the rest of our lives, and especially in our capacity as Harvard graduates.

Defendant also cites *Russell v. Yale University*, in which the Appellate Court of Connecticut rejected for lack of standing students' challenge to the reorganization of the Yale Divinity School. But the *Russell* court explicitly based its conclusion on the fact that the plaintiffs did not plead a "special injury to a student or his or her fundamental rights," 54. Conn. App. 573, 579 (1999), implying that students could have standing if they did so, *id.* ("The

plaintiff students lack standing because they alleged no injuries to themselves or to any of their fundamental rights, collectively or individually."). Furthermore, at least one court has granted special interest standing based on student status alone. *See Jones v. Grant*, 344 So.2d 1210, 1212 (Ala. 1977) ("[w]e find that the interest of the students . . . as beneficiaries in the financing of the educational institution with which they are associated is a sufficient special interest to entitle them to bring suit"), *superseded by* Ala. Code § 10A-3-2.44 (1984) (generally adjusting the state's enforcement scheme without reference to student status). This decision belies Defendants' assertion that there is a categorical common law rule against special interest standing based on student status.

Indeed, whether students have standing to challenge the management of university assets in exceptional circumstances causing harm to the students is a question of first impression in Massachusetts. Defendant's argument that students may not bring a special interest action simply because they are students is unavailing; our special interest in the Harvard Defendants' fossil fuel investments is linked to our status as students but is not reducible to it. Therefore, Defendants fail to show why our standing claim is precluded under Massachusetts law.

D. Conferring Standing to Challenge Harvard's Investments in Fossil Fuels is Consistent with Massachusetts's Charitable Enforcement Scheme

Massachusetts statutory law empowers the Attorney General to enforce the duties of the directors of charitable organizations, M.G.L. c. 12, § 8, including the duty to consider each "asset's special relationship or special value, if any, to the charitable purposes of the institution." M.G.L. c. 180A, § 2(e)(2)(viii). As explained in *supra* Part IV.A, the Attorney General's enforcement authority is supplemented by the authority of plaintiffs with special interest standing to enforce charitable duties. This latter enforcement mechanism maintains the distinction between public interests in charities, enforced by the Attorney General, and private interests,

enforced by individuals and associations. *See, e.g.*, *Weaver*, 425 Mass. at 276 (denying standing to church members based on membership alone). Special interest standing supports important policy goals of Massachusetts' charitable enforcement scheme, namely enhanced enforcement and ensuring that reasonable donor expectations are met. *See, e.g.*, *id.* at 275. ("[T]he Legislature has determined that the Attorney General is responsible for ensuring that its charitable funds are used in accordance with the donor's wishes . . . such a duty can be more satisfactorily performed by one acting under official responsibility") (citation omitted).

Liability for climate change harms presents public officials and courts with an array of administrative and doctrinal difficulties. Given the rapidly closing window to confront climate change and to hold duty-bound parties liable for failing to do so, Cplt. ¶¶ 23-27, the courts cannot expect the Attorney General to fashion and provide the sole means of relief for climate change harms in the charitable context. As explained in *supra* Part IV.A, Massachusetts common law looks to the specific nature of plaintiffs' interests and harms to decide whether special interest standing is warranted rather than applying a rigid set of categorical requirements. In this case, allowing our claim to go forward will supplement rather than displace the Attorney General's enforcement authority and will provide a means to ensure that donors' expectations regarding the "advancement and education of youth," *id.* at Ex. H, are protected.

Even if the Court finds that granting special interest standing in this case would require an expansion of recognized special interests, such an expansion would be consistent with the "tendency of the courts to relax the rule requiring the charity to be represented by the Attorney General." Chester et al. § 414; *see also* Mary Grace Blasko et. al., *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. Rev. 37, 82 (1993) (noting a "growing tendency" to grant special

interest standing across jurisdictions).[4] This growth in special interest standing seeks to accommodate private claims that are not justiciable under the formalist scheme of exclusive Attorney General enforcement. The inadequacy of such a scheme is especially pronounced with respect to the harms caused by climate change, where common law rules of exclusive enforcement are likely to foreclose meritorious claims.

Finally, Supreme Court precedent supports our standing claim. In *U.S. v. Students Challenging Regulatory Agency Procedures* (*SCRAP*), the Court granted standing to an unincorporated association of law students alleging injuries stemming from adjusted freight recycling rates. 412 U.S. 669 (1973). Although causation was "far more attenuated" than in previous environmental cases, the Court ruled that the students could pursue their claims because they had alleged "specific and perceptible harm[s] that distinguished them from other citizens" and that were provable at trial. *Id.* at 686-89. *See also Massachusetts v. EPA*, 549 U.S. 497, 526 n.24 (2007) (maintaing *SCRAP*'s validity despite dissent's objection). This logic is particularly applicable the context of climate change harms, where the difficulty of proving precise defendant contributions and the widely shared nature of the injuries should not serve as loopholes to defeat standing.

Defendant has been made a party to this action in accordance with M.G.L. c. 12, § 8G. While it is well established that private litigants cannot compel the Attorney General to exercise her discretionary enforcement authority, *Ames*, 332 Mass. at 250, Defendant's choice not to join our action is immaterial to the success of our claims. The Attorney General represents the public interest in charitable enforcement actions; our claims are based upon private interests. *See* Part

[4] For example, courts in other states have granted standing to residents challenging the relocation of an area hospital, *City of Paterson v. Paterson Gen. Hosp.*, 97 N.J. Super. 514 (Ch. Div. 1967), to employees seeking to enjoin an employer nonprofit from dissolving its corporate existence, *Alco Gravure, Inc. v. Knapp Found.*, 64 N.Y.2d 458 (1985), and to potential beneficiaries of an elderly home challenging its relocation, *Hooker v. Edes Home*, 579 A.2d 608 (D.C. 1990).

III.A. In *Lopez*, the Court allowed claims based upon private interests to proceed after the Attorney General declined to join the action because he had "determined that the public interest would not be served by his participation in the case." 384 Mass. at 166. In keeping with the modern expansion of charitable enforcement authority to plaintiffs with special interests, the Court should allow this action to proceed despite Defendant's objection.

E. The Court Should Allow Suit by the Harvard Climate Justice Coalition.

Finally, Defendant argues that Harvard Climate Justice Coalition's claims should be dismissed because "[i]t is a well established principle that an unincorporated association cannot be a party to litigation." Defs. Mem. at 10, quoting *Save the Bay, Inc. v. Dep't of Pub. Utilities*, 366 Mass. 667, 675 (1975). The first prong of Defendant's argument turns on the alleged lack of standing for Individual Plaintiffs, Def. Mem. at 9-10, and is therefore addressed by the discussion above, Part III *passim*. As Defendant points out, associational standing under *Hunt v. Washington State Apple Advertising Commission* depends in part upon whether "members would otherwise have standing to sue in their own right." 432 U.S. 333, 334 (1977). We allege that Individual Plaintiffs do have standing, and Defendant's insistence that standing requires a claim of abridged membership rights or a reversionary interest is misplaced for the reasons explained in Part IV.C *supra*.

The second prong of Defendant's argument rests on precedent against granting standing to unincorporated associations. While Massachusetts common law is generally not favorable to the claims of unincorporated associations, the rule is hardly as categorical as Defendant maintains. In *Save the Bay*, the Court allowed an unincorporated association to remain a party in part because its interests merged with those of the individual plaintiffs. *Id.* In *Maria Konopnicka Society of Holy Trinity Polish Roman Catholic Church v. Maria Konopnicka Society*, the Court

granted standing to an unincorporated association, noting that "[t]he practice in Massachusetts has long been that in equity such associations may sue or be sued by a bill containing appropriate allegations that it is brought by or against certain named persons as fairly representative of all the members." 331 Mass. 565, 568 (1954).

In this case, the interests of the Coalition merge with those of the Individual Plaintiffs, who are all members of the association. The Complaint alleges direct harm to the Coalition's mission as well as to Individual Plaintiffs as members of the Coalition. Cplt. ¶ 54. Lastly, we seek only an equitable remedy. Given that the association's interests and demands for relief merge with those of Individual Plaintiffs and that the resolution of Individual Plaintiffs' claims will likewise resolve the Harvard Defendants' liability to the association, the Court should reject Defendants' challenge to the Coalition's standing.[5]

V. Special Interest Standing Is Not Required for Our Tort Claim

Because special interest standing is not required for our tort claim, we do not join Defendant Attorney General with respect to it. Defendant misinterprets our claim when she suggests that it "turns on allegations of mismanagement or breach of fiduciary duty," Def. Mem. at 12.

The mere fact of overlap between our tort claim and the activities governed by M.G.L. c. 12, § 8 does not thereby import special interest standing requirements into the former. M.G.L. c. 12, § 8 gives the Attorney General authority to prevent the "misuse of charitable assets" by persons bound to serve "those entitled to the beneficial interests in a public charity" or, in certain circumstances, to see that funds are used in accordance with a donor's wishes. *Weaver*, 425

[5] Relatedly, we should emphasize that Future Generations are not a party to Count I. Defendant's Memorandum expresses uncertainty on this point. 11. Only the Individual Plaintiffs and the Harvard Climate Justice Coalition assert standing under Massachusetts' private interest doctrine, and thus the arguments in *supra* Part IV are inapplicable to Future Generations.

Mass. at 275. Accordingly, we explained our special interest with respect to our mismanagement claim above. *See supra* Part IV.B. Our tort claim, by contrast, alleges interests unrelated to the trust, its beneficiaries, or the fiduciary duties created by it—that is, Future Generations' interests in the security of their persons and property. It is thus more aptly characterized as an independent tort, in which Defendants' conduct—which so happens to involve its financial decisions—creates harmful externalities affecting third parties and for which Defendants may be liable "when the . . . [tortious conduct took place] in the course of an activity carried out to accomplish . . . [their] charitable purposes." M.G.L. c. 231, § 85K. While Massachusetts courts have rightly recognized the public policy interest in restricting standing to sue public charities for mismanagement, those considerations do not apply in this context.

VI. Conclusion

Dismissing this case before we are permitted to substantiate our claims would obscure the novel issues presented and abdicate this Court's role in adjudicating legitimate grievances. Allowing it to proceed would comport with judicial precedent and further public policy, as courts "have the continuing power and competence to answer novel questions of law arising under ever changing conditions of the society which the law is intended to serve." *George v. Jordan Marsh Co.*, 359 Mass. at 249. We therefore respectfully ask the Court to deny Defendant's motion.

Respectfully submitted,

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Dated: January 5, 2014

Dated this ____ day of January, 2014.

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Certificate of Service

I hereby certify that a true copy of the above document was served upon Assistant Attorney General Brett Blank by e-mail and by mail to 1 Ashburton Place, Boston, Massachusetts 02108 on January 5, 2015.