"Special Solicitude" or "Special Hostility?" Where State Standing in Environmental Litigation Stands 17 Years After Massachusetts v. EPA

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The Supreme Court's 2007 decision in Massachusetts v. EPA marked the first time the Court had addressed the standing of states to sue the federal government in an environmental case. The Court's holding that Massachusetts, New York, and the other petitioners had standing to sue the Environmental Protection Agency for climate change-related harms established important precedent for lawsuits brought by states against the federal government. In this article, we examine environmental litigation over the past seventeen years in which federal courts have considered the Massachusetts standing holding—and the Court's instruction that states deserve "special solicitude" in the standing inquiry—in deciding whether states had demonstrated standing against the federal government. As was the case in Massachusetts, it is critical that states have the ability in our system of cooperative federalism to vindicate their rights (and the rights of their residents) in federal court. We discuss the different types of standing theories states have relied on to vindicate those rights, such as financial and quasi-sovereign injuries, and which ones have proven to be the most successful. We then highlight the recent effort to curb the well-established ability of states

to use financial injury to establish standing against federal agencies, leading Justice Alito's admonition that the Court not treat states with "special hostility." We argue that states seeking to establish standing on financial injury grounds should not be held to a higher standard than other litigants in that showing, and we further discuss how states can rely more on quasi-sovereign interests in establishing standing in the event that standing based on financial injury is curtailed. In that vein, we revisit Massachusetts's discussion of quasi-sovereign interests, and conclude that—consistent with the grand bargain of federalism and the fundamental notion of parens patriae ("parent of the country")—a state should be able to sue the federal government where it is neglecting its duty under federal law to protect the health or welfare of the state's residents. Finally, we consider how courts have interpreted Massachusetts's instruction that states deserve special solicitude in the standing inquiry. Drawing on Massachusetts, we argue that, where states are suing the federal government to invoke the protections of federal law (including lawsuits brought by a state to protect the health and well-being of its residents), special solicitude is especially warranted.

I. Introduction

It has been nearly 17 years since the Supreme Court's groundbreaking decision in *Massachusetts v. EPA*—a case brought by states and other parties to address climate change harms. Although the decision is perhaps better known for its holding that the Environmental Protection Agency (EPA) has authority to regulate greenhouse gases under the Clean Air Act,[1] the Court only reached the merits of the case after first determining that the plaintiffs had standing to sue. The case marked the first time in which the Supreme Court considered standing in the context of climate change-related harms, and the first time it considered state standing to sue the federal government in an environmental case.

In *Massachusetts*, the Court, by a 5–4 vote, held that petitioners had standing to challenge EPA's denial of a rulemaking petition that asked the agency to limit greenhouse gas emissions from new motor vehicles. Justice Stevens, who authored the majority opinion, noted that states were entitled to "special solicitude" in the standing inquiry. He then reasoned that the lead petitioner, Massachusetts, had established standing based on harms climate change posed to the health of its residents and its coastal lands.

While establishing important precedent for parties seeking to redress climate change-related and other environmental harms in the courts, *Massachusetts* left some lingering questions: To what extent did its holding on standing depend on the evidence of threatened harms to the Commonwealth's residents

1. *See* Massachusetts v. EPA, 549 U.S. 497 (2007). In the Inflation Reduction Act of 2022, Pub. L. No. 117–167, 136 Stat. 1366 (2022), Congress codified that carbon dioxide and five other greenhouse gases are air pollutants under the Clean Air Act. *See* 42 U.S.C. § 7434(c)(2).

and their properties, or the proof that the Commonwealth itself owned a significant amount of land and infrastructure at risk from sea level rise? How should "special solicitude" be applied in other cases involving state litigants? Would the standing analysis differ for nonstate litigants?

This article considers standing decisions in environmental and certain other litigation involving states and the federal government in which federal courts considered the application of *Massachusetts*. The post-*Massachusetts* decisions demonstrate that states have typically been successful in establishing standing to sue the federal government where they rely on financial injuries to the state. Indeed, courts appear to prefer to decide standing based on these "pocketbook" injuries, precisely because this approach avoids the need to resolve the question of when states should be able to sue the federal government on behalf of their residents. This success, however, has recently led the federal government—in particular, the U.S. Solicitor General in cases before the Supreme Court—to aggressively push back against states' use of financial injuries to establish standing.[2] Thus far, that effort has not prevailed. In the wake of *Massachusetts*, courts have also grappled with state claims of standing to sue in their representative (that is, *parens patriae*) capacities, finding standing where, for example, the federal government has abdicated its duties to protect state residents under federal law. We also found that courts have sometimes struggled with how "special solicitude" fits into the standing inquiry and that the concept rarely appears to have been the dispositive factor in the standing analysis.

This Article is organized as follows: In Part II.A, we discuss the different types of interests that states have used to establish standing in lawsuits brought against the federal government. In Part II.B, we provide an overview of *Massachusetts*, starting with insight into the states' development of their standing proof, including the theories of standing alleged and the evidence introduced to support those theories. We then discuss the most pertinent aspects of the D.C. Circuit's and Supreme Court's decisions, focusing on Judge Tatel's dissent in the D.C. Circuit, Justice Stevens's majority opinion on behalf of the Supreme Court, and Chief Justice Roberts's dissent on standing.

In Part III, we walk through the federal environmental cases in which the courts have considered application of *Massachusetts* in the context of state standing against the federal government, each of which is summarized in part in an attached appendix. Our analysis shows that states were successful in establishing standing in nearly two thirds of the cases, most often finding standing based on financial harms. In Part III.A, we describe how states that were successful followed the *Massachusetts* plaintiffs' approach of alleging a state financial interest in addition to—or instead of—an interest in the health and well-being of their residents as the basis for injury. In addition, in Part III.A we discuss recent attempts by the federal government to limit the ability of

2. This article uses the terms financial injury, monetary injury, and pocketbook injury interchangeably to refer to economic harms suffered by a plaintiff.

states to use these theories. In Part III.B, we examine the potential to expand the use of *parens patriae* theories of standing under *Massachusetts* to address climate change-related and other harms inadequately addressed by the federal government. In Part III.C, we evaluate how courts have construed the concept of "special solicitude" and provide some suggestions on how "special solicitude" should apply in future cases addressing state standing. Finally, in Part IV, we offer some concluding thoughts.

II. The Evolution of State Standing in Massachusetts v. EPA

A. *Different Theories of State Standing*

Prior to turning to *Massachusetts*, we briefly describe the three types of interests that states have relied upon in establishing standing, including in cases brought against the federal government. As our discussion shows, those interests can sometimes overlap or blend with semantic imprecision.

First, like a private entity, a state may suffer a monetary injury in its capacity as a proprietor. In challenging the Trump Administration's travel ban precluding immigration from several majority-Muslim countries, for example, the States of Washington and Minnesota argued that the ban was causing financial harms related to enrollment and hiring at state-owned universities, such as the loss of investments in foreign students and professors and the benefits of their research activities.[3]

Second, as courts have made clear, a state may suffer injury to its quasi-sovereign interests.[4] These interests include both "the health and well-being—[]physical and economic—of its residents in general," as well as the state's interest in "not being discriminatorily denied its rightful status within the federal system."[5] When a state sues to vindicate its quasi-sovereign interests, it is suing in its capacity as *parens patriae*.[6]

Third, a state may invoke its sovereign interests, such as "the power to create and enforce a legal code,"[7] or those implicated in the "adjudication of boundary disputes or water rights."[8] Professor Seth Davis has explained that, in addition to experiencing financial injury in their proprietary capacity, states can also suffer financial harms in their sovereign capacity.[9] For example, Professor Davis explains, such harms may include: (i) lost revenues for regulatory programs

3. *See* Washington v. Trump, 847 F. 3d 1151, 11559–61 (9th Cir. 2017).

4. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 518–19 (2007) (relying, in part, on Massachusetts's quasi-sovereign interest in standing analysis).

5. New York v. U.S. Dep't of Labor, 477 F. Supp. 3d 1, 7 (S.D.N.Y. 2020) (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982)) (internal quotations omitted).

6. *Id.*

7. *Id.*

8. *Id.* (quoting Connecticut v. Cahill, 217 F. 3d 93, 97 (2d Cir. 2000)).

9. Seth Davis, *The New Public Standing*, 71 Stan. L. Rev. 1229, 1247–50 (2019).

and government services (for example, threatened loss of federal grant money under the Trump Administration's policy toward sanctuary cities[10]); (ii) increases in the costs of providing government services (for example, increased alleged costs to Texas of issuing driver's licenses to individuals living in the state who qualified for a federal deferred immigration program[11]); and (iii) general harm to the state's economy (for example, California's alleged loss of tourism dollars stemming from construction of border wall with Mexico).[12]

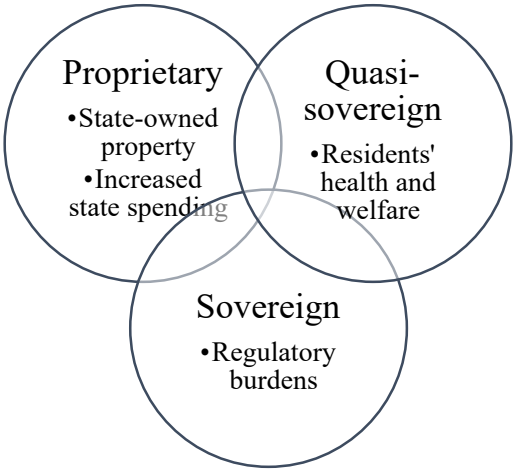

Figure 1: Overlapping State Interests in the Standing Analysis

As one court has observed, and as depicted in Figure 1 above, "these categories (proprietary, quasi-sovereign, and sovereign) are not hermetically sealed off from one another, and a single act may injure a state in more than one respect."[13] As discussed in Part III.A below, for example, a federal regulation could harm a state in its sovereign capacity by forcing the state's hand as regulator to undertake an additional regulatory burden, while at the same time imposing economic consequences on the state in its sovereign and/or proprietary capacity. As will be discussed below, all three types of interests—proprietary, sovereign, and quasi-sovereign—were in play, and overlapping, in the *Massachusetts* case. And, while we attempt to neatly categorize cases since *Massachusetts*, at times courts have been unclear in defining the exact type of harm driving their standing analyses.

10. *See City & County of San Francisco v. Trump, 897 F. 3d 1225, 1231–33 (9th Cir. 2018)*.

11. *See* United States v. Texas, 809 F. 3d 134, 152–53, 162 (5th Cir. 2015), *aff'd by an equally divided Court*, *136 S. Ct. 2271 (2016)*.

12. *See* Complaint in No. 17cv1911-GPC(WVG) ¶¶ 89–92, *In re* Border Infrastructure Env't Litig., 284 F. Supp. 3d 1092 (S.D. Cal. 2018) (*Nos. 17cv1215-GPC(WVG), 17cv1873-GPC(WVG) & 17cv1911-GPC(WVG), 2017 WL 4216386.*

13. New York v. U.S. Dep't of Labor, 477 F. Supp. 3d at 7.

B. *State Standing in Massachusetts v. EPA*

We begin with a close look back at *Massachusetts*. *Massachusetts* began as a rulemaking petition by a group of nongovernmental organizations asking EPA to regulate greenhouse gas emissions under the Clean Air Act for the first time, specifically to control certain motor vehicle greenhouse gas emissions under section 202(a)(1) of the Act.[14] After EPA denied the petition, Massachusetts and a group of states headlined the litigation challenging the denial, culminating in the *Massachusetts* decision. Very quickly, the question of state standing took center stage.

In support of their D.C. Circuit challenge, the state and nongovernmental petitioners filed voluminous appendices with the court. These included, as Judge Sentelle later observed, "reams of affidavits" identifying the harms the states and nongovernmental petitioners would suffer from EPA's denial and the relief that would result from achievable reductions in greenhouse gas emissions from domestic motor vehicles.[15] For example, the petitioners submitted an expert affidavit from climate scientist Michael MacCracken reflecting "the strong consensus of opinion among qualified scientific experts involved in climate change research in the U.S. and around the world"—that human-induced greenhouse gas emissions cause global warming, which has already resulted in and is projected to exacerbate a rise in global sea level and "severe and irreversible changes to important natural ecosystems . . . and geographic features."[16] Achievable reductions in greenhouse gas emissions from U.S. motor vehicles, MacCracken averred, "would significantly reduce the build-up in atmospheric concentrations of these gases and delay and moderate many of the adverse impacts of global warming."[17]

The affidavits detailed harms to the states' coastlines—quasi-sovereign and proprietary harms that would yield significant economic and public health harms as well. Climate scientist Michael Oppenheimer, for example, provided detailed estimates of increases in and impacts of sea-level rise in the New Jersey-New York City-Long Island area, with a one-foot rise in sea level causing an average of 120 feet of erosion and submergence, absent costly adaptation measures.[18] Climate expert Paul Kirshen described the likely effects of climate change on the Massachusetts coast, including permanent losses of land and more frequent and severe storm surge flooding and extreme weather events in the greater Boston area.[19] If sea level rose more than 0.3 meters, as "is likely," the present 500-year flood will occur with a 10-year frequency," and adaptation

14. *See* Massachusetts v. EPA, 549 U.S. 497, 505 (2007).

15. Massachusetts v. EPA, 415 F. 3d 50, 54–55, 59 (D.C. Cir. 2005) (Sentelle, J., concurring in the judgment).

16. Joint Appendix at 224–25, Massachusetts v. EPA, 415 F. 3d 50, 54–55, 59 (D.C. Cir. 2005) (No. 03–1361).

17. *Id.* at 225–26.

18. Aff. of Michael Oppenheimer ¶¶ 9–11, JA 231–35.

19. Aff. of Paul Kirschen ¶¶ 5–12, JA 196–98.

measures to prevent harm from such events "would be quite costly."[20] Similarly, a state mapping expert, Christian Jacqz, stated that a vertical rise of 28 inches would yield an estimated loss of 120 or more square feet of land per foot of Massachusetts coastline (or a total of 14 acres per mile of coastline).[21] Those harms within Massachusetts's borders are both quasi-sovereign—as they will significantly impact Massachusetts residents and natural resources in myriad ways—and sovereign—as they include significant losses to Massachusetts itself in its proprietary capacity along the 200 miles of coastline owned or managed by the state. A Massachusetts state park official, Karst Hogenboom, then translated those harms into pocketbook injury. He confirmed that the likely sea-level rise described in other affidavits would destroy or damage many Massachusetts-owned properties, facilities, and infrastructure, likely resulting in over hundreds of millions of dollars in costs to the Commonwealth to protect, repair, or rebuild such areas, as well as reduced revenues from diminished state-owned properties and facilities.[22] The affidavits also detailed numerous other likely harms that the states and their residents would suffer, including increases in extreme heat, local flooding, drought conditions, impacts to air and water quality, spread and persistence of disease vectors, forest fires, and spread of invasive species.[23]

These affidavits did not sway a majority of D.C. Circuit panel, however. The three judges—Judge Randolph, Judge Sentelle, and Judge Tatel—issued three separate opinions on the petitions for review, resulting in a judgment in EPA's favor but no controlling opinion. Judge Randolph, for his part, did not decide the standing question and instead reached the merits of EPA's determination not to regulate greenhouse gas emissions on the grounds that "the effect of greenhouse gases on climate is unclear and that models used to predict climate change might not be accurate."[24] Assuming, *arguendo*, that EPA had authority to regulate greenhouse gases from new motor vehicles, Judge Randolph concluded that EPA had properly exercised its judgment not to do so at that time.[25]

Judge Sentelle and Judge Tatel, however, zeroed in on—but fundamentally disagreed about—the standing question.[26] Judge Sentelle sided with EPA, focusing squarely on standing.[27] Despite petitioners' "well made and sincere" affidavits, Judge Sentelle nonetheless retained his "unshaken conviction" that they "had alleged no harm particularized to themselves" and therefore could not satisfy the Supreme Court's *Lujan v. Defenders of Wildlife* standing

20. *Id.* ¶¶ 11–12, 198.
21. Aff. of Christian Jacqz ¶¶ 8–11, JA 178–79.
22. Aff. of Karst Hogenboom ¶¶ 3–9, JA 171–73.
23. *See, e.g.*, Aff. of Michael Oppenheimer ¶¶ 20–28.
24. *Id.* at 55–56.
25. *Id.* at 56–58.
26. Massachusetts v. EPA, 415 F. 3d 50 (D.C. Cir. 2005).
27. *Id.* at 59 (Sentelle, J., concurring in the judgment).

test.[28] Global warming, he reasoned, "is harmful to humanity at large," and "[p]etitioners are or represent segments of humanity at large."[29] Though he found jurisdiction lacking, Judge Sentelle concurred in the judgment closest to that which he would have issued—Judge Randolph's—and would have denied the petitions.[30]

Judge Tatel, for his part, found that the petitioners had standing.[31] Delving into the petitioners' affidavits and climate science, Judge Tatel explained his view that rising seas in the Boston area were leading to permanent loss of coastal land, more frequent and severe storm surges, and "serious loss of and damage to Massachusetts's coastal property."[32] That "loss of land within its sovereign boundaries" affects Massachusetts "in a way that it harms no other states"—a "far cry" from the types of generalized harms that had been rejected by the Supreme Court.[33] He found that causation and redressability likewise posed no barriers to establishing standing. The affidavits established that global warming, chiefly triggered by human-caused greenhouse gas emissions, was causing sea-level rise, and the U.S. transportation sector was responsible for about seven percent of global fossil fuel emissions.[34] Achievable emissions reductions from U.S. motor vehicles would delay and moderate adverse impacts of global warming, partially redressing Massachusetts's injury.[35] Indeed, Judge Tatel observed, EPA's own efforts to achieve voluntary greenhouse gas emissions reductions suggested that it, too, thought emissions reductions would have a discernable impact on future global warming.[36]

Despite circumstances arguably auguring against Supreme Court review—including a fractured lower court opinion with no controlling law—the Supreme Court granted the states' ensuing petition for certiorari.[37] The states' standing to sue was in play almost instantly during oral argument. Assistant Attorney General James Milkey, who presented oral argument for Massachusetts on behalf of all of the petitioners, deftly navigated dozens of questions on how the states' claimed harms satisfied the requirements to establish standing: that state

28. *Id.* at 59 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 n.1 (1992)).
29. *Id.* at 60.
30. *Id.*
31. *Id.* at 61 (Tatel, J., dissenting).
32. *Id.* at 64–65.
33. *Id.* at 65.
34. *Id.* (citing Joint Appendix, *supra* note 17, at 224–38).
35. *Id.* (citing Joint Appendix, *supra* note 17, at 224); *see also id.* at 66 (finding further support in uncontested declaration that other countries would come to mandate technology developed in response to U.S. regulation).
36. *Id.* at 66 (citing Control of Emissions From New Highway Vehicles and Engines 68 Fed. Reg. 52,922, 29, 32 (September 8, 2003); Nat'l Rsch. Council, Climate Change Science: An Analysis of Some of the Key Questions 1 (2001)).
37. Massachusetts v. EPA, 548 U.S. 903 (2006). For a fascinating account on the Petitioners' successful strategy to obtain Supreme Court review, we urge you to read Professor Richard J. Lazarus's book entitled *The Rule of Five: Making Climate History at the Supreme Court.*

petitioners suffer immediate, concrete, and particularized injuries caused by the challenged decision and redressable by its reversal.[38] Repeatedly citing to the states' "uncontested affidavits" in the record,[39] Milkey assured Chief Justice Roberts that "[t]he injury doesn't get any more particular" "than states losing 200 miles of coastline, both sovereign territory and property we actually own, to rising seas."[40] And "if we're able to save only a small fraction of the hundreds of millions of dollars that Massachusetts park agencies are projected to lose, that reduction is itself significant."[41] And, near the end of the standing colloquy, Justice Kennedy—whose vote was critical to the outcome of the case—interrupted Milkey to say that he thought petitioners' "best case" was *Georgia v. Tennessee Copper*—a case that appeared nowhere in the *Massachusetts* briefing—in which the Court long ago recognized Georgia's "interest independent of and behind the titles of its citizens, in all the earth and air within its domain."[42]

In a 5–4 opinion authored by Justice Stevens (and joined by Justices Kennedy, Souter, Ginsburg, and Breyer), the Court held that the plaintiffs had standing to sue EPA and that greenhouse gases were pollutants under the Clean Air Act. The Court began:

> A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related.[43]

Before evaluating whether the plaintiffs had satisfied the standing elements (injury-in-fact, traceability, and redressability), Justice Stevens set out two important contextual considerations relevant to that analysis. First, he noted that Congress had afforded parties in section 307 of the Clean Air Act a procedural right to challenge EPA's denial of a petition for rulemaking.[44] Under the Court's decision in *Lujan v. Defenders of Wildlife*,[45] a litigant who has been afforded such a procedural right to protect his or her concrete interest—such as the right to challenge agency action unreasonably withheld—"can assert that right without meeting all the normal standards for redressability and immediacy."[46] The litigant may do so based on a showing that there is "some possibility that the requested relief will prompt the injury-causing party to reconsider the decision" being challenged.[47] Justice Stevens further noted that under the Court's precedent, "it does not matter how many persons have

38. Transcript of Oral Argument at 4:9–17:17, Massachusetts v. EPA, 549 U.S. 497 (2007) (No. 05–1120).
39. *Id.* at 4:12–4:13, 9:6–9:10, 13:4–13:15.
40. *Id.* at 10:14–10:17.
41. *Id.* at 11:23–12:2.
42. *Id.* at 15:9–12 (citing 206 U.S. 230, 237 (1907)).
43. Massachusetts, 549 U.S. at 504–05.
44. *Id.* at 516 (citing 42 U.S.C. § 7607(b)(1)).
45. 504 U.S. 555 (1992).
46. *Id.* at 518 (internal quotation marks and citation omitted).
47. Massachusetts, 549 U.S. at 517–18 (citing Lujan, 504 U.S. at 572, n. 7) (internal quotations omitted).

been injured by the challenged action," so long as the party bringing suit shows that the action injures it "in a concrete and personal way."[48]

Second, Justice Stevens turned to the identity of the litigants. He emphasized that states—as opposed to private litigants—had brought the lawsuit against EPA:

> It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual . . . . States are not normal litigants for purposes of invoking federal jurisdiction.[49]

Citing the quasi-sovereign interest asserted by the state of Georgia in *Georgia v. Tennessee Copper Co.*, Justice Stevens observed that "[j]ust as Georgia's interest 'in all the earth and air within its domain' supported federal jurisdiction more than a century ago, so too does Massachusetts's well-founded desire to preserve its sovereign territory today."[50] He pointed out that, "[w]hen a State enters the Union, it surrenders certain sovereign prerogatives."[51] Massachusetts could not, for example, invade Rhode Island to force reductions in greenhouse gas emissions, or negotiate a treaty with China or India to achieve the same.[52] Further, with respect to limiting emissions from new motor vehicles, Massachusetts may be preempted from imposing such limits.[53] "These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards applicable to" emissions from new motor vehicles that endanger public health and welfare.[54] The fact that Massachusetts owned a great deal of the territory affected, Justice Stevens explained, "reinforce[d] the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power."[55] And, referencing his earlier discussion about the Clean Air Act's general procedural right to bring suit, Justice Stevens concluded that, "[g]iven that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis."[56]

In a footnote, Justice Stevens took on the argument, raised by Chief Justice Roberts in dissent, that the Court's long-ago opinion in *Massachusetts v. Mellon*[57] and subsequent cases cast doubt on a state's standing to

48. *Id.* at 517 (citing Lujan, 504 U.S. at 581 (Kennedy, J., concurring)).
49. 549 U.S. at 518.
50. *Id.* at 519 (quoting Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907)).
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 519–20 (citing 42 U.S.C. § 7521(a)(1)).
55. *Id.* In explaining the reason for special solicitude, Justice Stevens alluded to all three types of interests identified in Part II.A, *supra*: proprietary (Massachusetts's capacity as a landowner), quasi-sovereign (its interest in the health and welfare of its residents), and sovereign (its interest in enacting laws to limit motor vehicle greenhouse gas emissions). *Id.*
56. *Id.* at 520.
57. 262 U.S. 447 (1923).

assert a quasi-sovereign interest against the federal government. In *Mellon*, the Commonwealth had sued federal officials, arguing that a federal law that provided state funding—and federal oversight—for maternal and infant health initiatives violated the Tenth Amendment by infringing on the power of states to provide for the general welfare of their citizens.[58] In holding that Massachusetts lacked standing to sue the federal government over the law, the Supreme Court held that the "citizens of Massachusetts are also citizens of the United States" and that Massachusetts generally cannot, as *parens patriae,* "institute judicial proceedings to protect the citizens of the United States from the operation of the statutes thereof."[59] Distinguishing *Mellon*, Justice Stevens explained that *Mellon* itself did not involve "quasi-sovereign rights actually invaded or threatened." By contrast, Massachusetts in this case "seeks to assert its rights under the Clean Air Act," which a State "has standing to do," rather than "to protect her citizens from the operation of federal statutes," "which is what *Mellon* prohibits."[60]

Moving on from the special solicitude preamble, but "[w]ith that in mind," Justice Stevens then applied the traditional three-pronged standing analysis.[61] On the injury prong, he first noted that the "harms associated with climate change are serious and well-recognized."[62] A National Research Council report on climate change harms, on which EPA itself relied, identified multiple significant harms already inflicted by climate change.[63] And petitioners' affidavits demonstrated the environmental damage yet to come, including sea level rise, severe and irreversible changes to natural ecosystems, reduced winter snowpack storage, increased spread of disease, and increased ferocity of hurricanes.[64] The fact "[t]hat these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation," Justice Stevens explained.[65] Instead, "[b]ecause the Commonwealth 'owns a substantial portion of the state's coastal property,' it has alleged a particularized injury in its capacity as a landowner."[66]

Justice Stevens then rejected EPA's argument that its failure to regulate greenhouse emissions from cars neither causes nor could remedy the states' harms.[67] Such a rationale, he reasoned, would "doom most challenges to regulatory action" because "[a]gencies, like legislatures, do not generally resolve

58. *Id.* at 485.
59. *Id.*
60. Massachusetts*,* 549 U.S. at 520 n.17 (quoting Georgia v. Pa. R.R. Co., 324 U.S. 439, 447 (1945)).
61. *Id.* at 521.
62. *Id.*
63. *Id.* at 521–22 (citing Joint Appendix, *supra* note 17, at 224–37).
64. *Id.*
65. *Id.* at 522 (quoting Fed. Election Comm'n v. Akins, 524 U.S. 11, 24 (1998)).
66. *Id.* at 522–23 & nn.19–20 (citing MacCracken Decl. ¶¶ 5, 23; Hogenboom Decl. ¶¶ 4, 6–7; Kirschen Decl. ¶¶ 10, 12; Jacqz Decl. ¶ 10).
67. *Id.* at 523–36.

massive problems in one fell regulatory swoop."[68] "A reduction in domestic [greenhouse gas] emissions would slow the pace of global emissions increases, no matter what happens elsewhere."[69]

On the merits, the Court held that section 202(a)(1) of the Clean Air Act unambiguously authorizes EPA to regulate greenhouse gases as an "air pollutant."[70] Though Congress "might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete."[71] The Court also rejected as "divorced from the statutory text" EPA's argument that, even if it had such authority, it was "unwise" to regulate greenhouse gases at the time.[72] If EPA makes a finding of endangerment, the agency is required to regulate.[73]

Unpersuaded on standing, Chief Justice Roberts authored a dissent (joined by Justices Scalia, Thomas, and Alito). The Chief Justice found no basis in the Court's jurisprudence or in the Clean Air Act for what he saw in the majority opinion as the relaxing of Article III standing requirements because asserted injuries were being pressed by a state.[74] Invoking *Massachusetts v. Mellon* and its progeny, he expressed skepticism about the state petitioners' ability to sue in their *parens patriae* capacity to protect their quasi-sovereign interests.[75] And he further viewed Massachusetts's assertion of injury as a landowner as not particularized or imminent, not traceable to the alleged action, and not redressable by the remedy sought. An EPA regulation limiting greenhouse gas emissions from new motor vehicles, the Chief Justice explained, would be only a drop in the bucket in terms of remedying sea level rise threatening Massachusetts's coast.[76]

Justice Scalia also penned a dissent on the merits, in which Chief Justice Roberts and Justices Thomas and Alito joined.[77] In his view, EPA had set forth "perfectly valid reasons" for deferring rulemaking at this time.[78] EPA's interpretation of the term "air pollutant" as referring to impurities in the ambient air, he found, was "perfectly consistent with the natural meaning of the term."[79] "No matter how important the underlying policy issues at stake," Justice Scalia

68. *Id.* at 524.
69. *Id.* at 526.
70. *Id.* at 528.
71. *Id.* at 532.
72. *Id.*
73. *Id.* at 533.
74. *Id.* at 536–37 (Roberts, C.J., dissenting).
75. *Id.* at 538.
76. *Id.* at 540–45.
77. *Id.* at 549 (Scalia, J., dissenting).
78. *Id.* at 551.
79. *Id.* at 560.

lamented, "this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency."[80]

III. The Evolution of State Standing Since Massachusetts v. EPA

In the wake of *Massachusetts*, states have employed multiple theories of harm—some more successful than others—to demonstrate standing to sue the federal government on environmental matters. Our research uncovered forty-two reported decisions, excluding decisions reversed on appeal on standing grounds, in which federal courts considered the applicability of *Massachusetts* in deciding whether states had established standing to challenge a federal action in the environmental context.[81] Of these decisions, twenty-four—or fifty-seven percent—found states had standing. States were most often successful when they relied on proprietary or other pocketbook injuries, like state regulatory or administrative burdens resulting from the challenged action or inaction. Twenty decisions found standing based on these types of harms. Courts less often relied on quasi-sovereign theories of standing, with six environmental cases resting on such theories in addition to proprietary harms, and only five resting on quasi-sovereign and special solicitude alone. We identified no environmental cases that relied on special solicitude alone and only one non-environmental case that did so. Broken down by media, nine of seventeen decisions found state standing in the air context, three of four decisions found state standing in the water context, one of two decisions found state standing in the hazardous waste context, four of eight decisions found state standing in the environmental review context, five of seven decisions found state standing in the wildlife context, and two of three decisions found state standing in the energy and extraction context. The only decision arising in the environmental, social, governance investment context found no state standing. The attached appendix summarizes each decision's standing analysis.

In this section, we analyze these decisions and what they—and recent activity before the Supreme Court—may portend for state standing. In Part III.A, we explain how states have often successfully used financial injuries in establishing standing to sue the federal government, often analogizing such injuries to the harms to Massachusetts as a landowner. Such theories, however, have come under increasing attack by the federal government, as further discussed below. In Part III.B, we analyze cases in which courts have considered state quasi-sovereign injuries and, picking up the debate between Justice Stevens and Chief Justice Roberts in *Massachusetts*, we consider potential limitations on this standing approach. Finally, in Part III.C, we assess courts'

80. *Id.*

81. Our research focused on cases citing *Massachusetts* or discussing the concept of special solicitude, involving state petitioners and plaintiffs and environmental subject matter. We also reviewed state standing cases in the non-environmental context that have doctrinal significance, as discussed herein.

treatment of "special solicitude" since *Massachusetts* and offer thoughts on its import for future cases.

A. *Standing Based on Proprietary and Pocketbook Injuries Since Massachusetts*

Direct financial injuries have long sufficed to establish standing for states and private litigants alike. Indeed, as Justice Stevens acknowledged in his recent book, there is little doubt that the alleged, and well-documented, injury to Massachusetts's concrete interests "as a landowner" (sea level rise swallowing Massachusetts's coastal land and Massachusetts-owned infrastructure) factored heavily into the Court's holding in *Massachusetts*.[82] Courts since *Massachusetts* have followed its lead in this regard, finding myriad pocketbook harms to be cognizable injuries for standing purposes, including various types of proprietary harms and costly regulatory burdens. Perhaps in response to states' success in this area, however, the federal government—in particular, the U.S. Solicitor General in cases before the Supreme Court—has sought to cabin the extent to which states can rely on economic harm in establishing standing to challenge federal agency actions or inaction.

Over the last seventeen years, courts across the country have repeatedly found state standing based on economic harms—a seemingly uncontroversial approach to establishing standing. These findings have generally centered on two types of harms: (1) harm to states' proprietary interests and (2) economic impacts from changes to, or increases in, state regulatory burdens.

First, as in *Massachusetts*, harm to states' proprietary interests—including harms to state-owned land and other pocketbook injuries—has routinely conferred standing. In more than a dozen environmental cases since *Massachusetts*, courts found standing based on proprietary harms alone. For example, in *New Mexico ex rel. Richardson v. BLM*,[83] the Tenth Circuit held that New Mexico had standing to challenge a decision to open public lands to oil and gas drilling where the state had alleged harm to its lands and a financial burden through costs of lost resources such as water supplies, noting that states may even have cognizable, concrete environmental interests in lands they do not own (quasi-sovereign interests discussed further *infra* Part III.B). In *Air Alliance Houston v. EPA*,[84] the D.C. Circuit held that states had standing to challenge EPA's delay of its chemical accident safety rule based on "proprietary interests due to the expenditures states have previously made and may incur again when responding to chemical releases during the delay period"—"precisely the kind of 'pocketbook' injury," the court explained, "that is incurred by the State itself."[85] And, following the reasoning in *Massachusetts*,

82. John Paul Stevens, The Making of a Justice 464 (2019).

83. 565 F. 3d 683, 696 n.13 (10th Cir. 2009).

84. 906 F. 3d 1049 (D.C. Cir. 2018).

85. *Id.* at 1059–60 (first citing Final Reply Brief of State Petitioners at 22–26, Air Alliance Houston v. EPA, 906 F. 3d 1049 (D.C. Cir. 2018) (No. 17–1155); and then citing

the D.C. Circuit in *NRDC v. Wheeler*[86] similarly concluded that New York had standing to challenge an EPA guidance document loosening restrictions on hydrofluorocarbons (HFCs)—a potent greenhouse gas—on the ground that an increase in HFC emissions would exacerbate climate change, thereby threatening New York's proprietary interest in its coastal lands.[87] In two additional environmental cases, courts found standing where plaintiffs alleged both regulatory costs and harm to the state's interest as a property owner.[88] Even where

Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 602 (D.C. Cir. 2018)).

86. 955 F. 3d 68, 77–78 (D.C. Cir. 2020).

87. *See also* California v. EPA, 72 F. 4th 308 (D.C. Cir. 2023) (holding petitioners had standing to challenge allegedly inadequate EPA aircraft greenhouse gas regulation because, as in *Massachusetts*, action would contribute to loss of coastal land in Massachusetts due to climate change); Clean Wis. v. EPA, 964 F. 3d 1145, 1158–60 (D.C. Cir. 2020) (holding Illinois and Chicago had standing to challenge EPA ozone attainment designation for neighboring state because, as in *Massachusetts*, action would result in harm to plants and trees located in state-and city-owned parks—particularized harms to Illinois and Chicago as landowners); NRDC v. Nat'l Highway Traffic Safety Admin., 894 F. 3d 95 (2d Cir. 2018) (holding states had standing to challenge delay in penalty increase for motor vehicle manufacturers that failed to comply with fuel economy standards based on the state's alleged environmental harms); Sierra Forest Legacy v. Sherman, 646 F. 3d 1161, 1178–79 (9th Cir. 2011) (holding California had standing to challenge national forest management guidelines where California had proprietary interests from direct harm and spillover effects of actions on federal lands, which implicated "wildlife, water, State-owned land, and public trust lands"); NRDC v. EPA, 542 F. 3d 1235, 1248–49 (9th Cir. 2008) (finding state standing to compel EPA to promulgate stormwater standards based on the states' "proprietary interest in protecting their waterways"); Louisiana v. Biden, 622 F. Supp. 3d 267, 283–85 (W.D. La. 2022) (holding states had standing to challenge pause of new oil and gas leases based on alleged loss of proceeds from bonuses, land rents, royalties, and other income and loss of jobs and economic damage from paused lease sales); Bullock v. BLM, 489 F. Supp. 3d 1112, 1123–24 (D. Mont. 2020) (holding Montana had standing to challenge appointment of Bureau of Land Management Director in part because of alleged harm to fish and wildlife habitat, cultural resources, and recreational uses on federal and state-owned and state-managed lands within Montana's borders); NRDC v. U.S. Dep't of the Interior, 397 F. Supp. 3d 430 (S.D.N.Y. 2019) (holding New York and other states had standing to challenge agency action based on allegations that it created substantial risk that migratory birds owned by the state would be killed be private actors—an injury to their proprietary interest in wildlife within their borders); Otter v. Salazar, No. 1:11–cv–00358–CWD, 2012 WL 3257843 (D. Idaho Aug. 8, 2012) (finding standing to challenge a rule listing species as endangered where the rule and subsequent critical habitat designation would restrict use of state-owned land). *But see* Indiana v. EPA, 796 F. 3d 803 (7th Cir. 2015) (holding that Indiana had standing for Clean Air Act claim based on regulatory burdens, but noting that, while Massachusetts actually owned some of its coastal property, Indiana did not own its air).

88. California v. Bernhardt, 460 F. Supp. 3d 875 (N.D. Cal. 2020) (holding that California and other states had standing to challenge Endangered Species Act rules based in part on alleged biological harms, including the loss of biological diversity, and economic harms, including greater burdens on the states to protect species); Colorado v. U.S. Fish and Wildlife Serv., 362 F. Supp. 3d 951 (D. Colo. 2018) (holding that Colorado and Utah had standing to challenge species listing based on allegations of environmental, economic, and regulatory injury to government-owned property and other proprietary interests, such as curtailment of state planning efforts, conservation programs, and general governance).

courts found standing lacking, they often distinguished the state petitioner in *Massachusetts* from the state plaintiffs at issue on the ground that Massachusetts had demonstrated injury to the state as a landowner.[89]

Second, seven of the identified environmental cases found states had standing to sue the federal government when alleged regulatory burdens increased costs to states,[90] such as when federal action or inaction necessitated more stringent state controls[91] or imposed other costs, like administrative,

89. *See* Michigan v. EPA, 581 F. 3d 524, 525–26, 529 (7th Cir. 2009) (holding Michigan lacked standing to challenge EPA redesignation of certain land under Clean Air Act's Prevention of Significant Deterioration program to better protect it from pollution sources in Michigan and Wisconsin, where, among other things, unlike the threat to state coastal lands in *Massachusetts*, "Michigan's air can only benefit from the redesignation"); Citizens Against Ruining the Env't v. EPA, 535 F. 3d 670, 675–77 (7th Cir. 2008) (holding Illinois Attorney General lacked standing to challenge EPA failure to object to Illinois air permits where, among other things, unlike in *Massachusetts* where state had demonstrated injury to itself as a landowner, it was unclear what injury Illinois was alleging and the interests of its residents "would seem to be represented" by state permitting entity); Env't Integrity Project v. McCarthy, 319 F.R.D. 8, 14–16, 16 n.6 (D.D.C. 2016) (holding North Dakota lacked standing to intervene in support of revised standards governing oil and gas handling and disposal under Resource Conservation and Recovery Act because, among other things, North Dakota was still required to show—but had not shown—injury in fact, as Massachusetts had done in identifying harm to its coastal property); Gov't of Manitoba *ex rel.* Schmitt v. Bernhardt, 923 F. 3d 173, 176–77, 181–82 (D.C. Cir. 2019) (holding Missouri lacked *parens patriae* standing to challenge under National Environmental Policy Act (NEPA) and Administrative Procedure Act (APA) approval of water development project and distinguishing *Massachusetts* on the ground that Massachusetts had asserted its own direct injury and statutory right); Del. Dep't of Nat. Res. and Env't Control v. FERC, 558 F. 3d 575, 575–76, 579 n.6 (D.C. Cir. 2009) (holding Delaware agency lacked standing to challenge approval of gas terminal under Natural Gas Act where, among other things, the state had not demonstrated injury, unlike *Massachusetts* where the state had provided declarations demonstrating harms from climate change attributable to the challenged EPA decision); *see also* Ohio v. EPA, 98 F. 4th 288, 299–305 (D.C. Cir. 2024) (finding no state standing where, unlike in *Massachusetts*, petitioners had not made any showing that favorable court decision would redress alleged economic harm in light of intervening actions of third-party manufacturers subject to the challenged rule).

90. Arguably, as discussed *infra*, these injuries may also qualify as harms to states in their sovereign capacities in the sense that the challenged action forces the hand of states in their capacity as regulator to undertake more or different regulatory burdens; but they certainly impose economic consequences on states themselves as well.

91. *See* Indiana v. EPA, 796 F. 3d 803 (7th Cir. 2015) (finding standing to challenge Illinois's revision of Clean Air Act state implementation plan because continued nonattainment in the Chicago area would force Indiana to undertake additional actions to achieve attainment, like more vehicle emissions testing); Delaware Dep't of Natural Res. and Env't Control v. EPA, 785 F. 3d 1, 8–10 (D.C. Cir. 2015) (finding standing based on declarations of state officials explaining that highly polluting backup generators would increase operations due to EPA rule setting operating limits for such generators, thereby contributing to Delaware's nonattainment status and associated regulatory burdens under the Clean Air Act, as well as medical costs borne by the state); California v. BLM, 2020 U.S. Dist. LEXIS 53958, at *13 (N.D. Cal. Mar. 27, 2020) (finding standing to challenge repeal of rule restricting hydrofracturing on public lands in part based on economic injury, because

compliance, or rebuilding costs, on states themselves.[92] In *National Association of Clean Air Agencies v. EPA*,[93] for example, the D.C. Circuit held that a group of states had standing to challenge EPA's failure to lower nitrogen oxide emissions allocations because, as a result of that failure, states would have to impose stricter controls on emissions from other sources—a regulatory burden they would not otherwise face. In two additional cases, courts recognized such burdens as cognizable, but declined to find standing where the injuries were not redressable by the relief requested.[94]

Courts have rejected claims of pocketbook injury where the causal chain between the challenged action and the claimed harm was too hypothetical, attenuated, or indirect,[95] or where states alleged only a generalized impact on a state's

rule would increase regulatory burdens on California—a "pocketbook injury" suffered by the state itself).

92. New Jersey v. EPA, 989 F. 3d 1038, 1045–49 (D.C. Cir. 2021) (New Jersey had standing to challenge EPA reporting rule under Clean Air Act because inadequate requirements imposed "administrative costs and burdens" on the state to ensure it complied with program requirements and made "the state's task of devising an adequate state implementation plan more difficult and onerous" (internal quotation marks omitted)); Kentucky v. Fed. Highway Admin., No. 5:23-CV-162-BJB, 2024 WL 1402443, at *2 (W.D. Ky. Apr. 1, 2024) (holding states had standing to challenge Federal Highway Administration rule requiring declining vehicle carbon dioxide emissions where rule directly regulated and imposed compliance costs on states); Louisiana v. Dep't of Homeland Sec., No. CV 23–1839, Slip. Op. at 12 (E.D. La., Mar. 28, 2024) (holding states had standing to challenge federal flood risk rating where states had plausibly alleged that resulting increases in insurance rates would cause policyholders to drop insurance policies and thereby increase post-flood rebuilding costs for states); Texas v. EPA, 662 F. Supp. 3d 739, 744, 746, 751 (S.D. Tex. 2023) (finding in granting preliminary injunction that states had standing to challenge EPA definition of "waters of the United States" in part based on mitigation and compliance costs associated with the rule) (quoting 33 U.S.C. § 1362(7)); West Virginia v. EPA, No. 3:23-CV-032, 2023 WL 2914389 (D.N.D. Apr. 12, 2023) (states had standing to challenge EPA definition of "waters of the United States" in part based on states' costs of compliance and injury to states as landowners of waters deemed jurisdictional under the rule).

93. 489 F. 3d 1221, 1223–24, 1227–28 (D.C. Cir. 2007).

94. *See* Sturgeon v. Masica, 768 F. 3d 1066, 1073–75 (9th Cir. 2014) (finding no standing where (i) though increased regulatory burdens caused by challenged permit requirement "clearly constitute injuries in fact," a favorable ruling would not remedy those already suffered injuries, and (ii) though "a closer question" Alaska had not demonstrated proprietary harm to its lands and waters), *vacated sub nom.* Sturgeon v. Frost, 577 U.S. 424 (2016), *rev'd on other grounds*, 587 U.S. 28 (2019); *see also* Michigan v. EPA, 581 F. 3d 524 (7th Cir. 2009) (finding no cognizable injury, and concluding that, even if Michigan suffered a cognizable injury, the alleged injuries were not redressable by Michigan's proposed alternative compliance mechanism).

95. *See* Texas v. Sec. Exch. Comm'n, No. 23–60079, 2024 WL 2106183, at *2 (5th Cir. May 10, 2024) (holding plaintiff states did not have standing to challenge rule requiring funds to disclose votes on environmental, social, and governance matters where no evidence regulated parties would pass costs on to state investors); Louisiana *ex rel.* Landry v. Biden, 64 F. 4th 674, 677–78, 682–84 (5th Cir. 2023) (holding plaintiff states did not have standing to challenge interim estimate of social cost of greenhouse gases because possibility of regulation in the future was too speculative); Louisiana *ex rel.* La. Dep't of Wildlife &

economy or tax revenues.[96] For example, in *Missouri v. Biden*,[97] an Eighth Circuit panel held that Missouri and other states lacked standing to challenge a federal interagency working group's interim estimate of the social cost of greenhouse gases. The court explained that allegations of monetary injury, including costs to states as purchasers of allegedly more heavily regulated goods and services and loss of future tax revenues in an allegedly more heavily regulated economy, relied on a "highly attenuated chain of possibilities" and thus did not amount to a concrete injury.[98] In the vast majority of environmental cases that consider the question, however, economic harm to states—in one form or another—has constituted a cognizable injury for standing purposes.

In an effort to curtail reliance on this pocketbook approach, the U.S. Solicitor General has recently urged the Supreme Court to rein in the extent to which economic harm can provide a basis for state standing in order to curb challenges federal agency actions or inaction. In *United States v. Texas*,[99] the Court took up the question of state standing in considering a challenge by Texas and Louisiana to new immigration enforcement guidelines issued under the Biden Administration. The United States had argued that the states lacked standing because, among other things, a federal policy's incidental effects on a state—there, the costs Texas and Louisiana would shoulder because of fewer deportations under the new policy—are not judicially cognizable injuries.[100] Citing *Massachusetts v. Mellon*, the United States suggested that different rules should apply to states than to private litigants, even where economic harms exist. "[W]hen a State sues the United States, additional principles come into play," the Solicitor General argued.[101] Although the United States ultimately hinged its argument on the distinction between direct and indirect effects,

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Fisheries v. NOAA, 70 F. 4th 872, 875–77 (5th Cir. 2023) (holding Louisiana did not have standing to challenge rule requiring turtle protections on shrimping boats where Louisiana had failed to show economic injury specific to Louisiana's shrimping industry); Kentucky v. EPA, No. 3:23-cv-00007-GFVT, 2023 WL 3326102, at *1–4 (E.D. Ky. May 9, 2023) (finding in denying preliminary injunction that states did not have standing to challenge EPA definition of "waters of the United States" where compliance costs and potential injuries to the states as landowner were too speculative given evidence showing limited changes to jurisdiction) (quoting 33 U.S.C. § 1362(7)); Env't Integrity Project v. McCarthy, 319 F.R.D. 8, 16–17 (D.D.C. 2016) (holding North Dakota did not have standing to intervene to defend EPA's failure to revise oil and gas disposal standards where claims that more stringent regulations would harm its oil and gas industry and reduce its tax revenues were speculative).

96. *See* Wyoming v. U.S. Dep't of Interior, 674 F. 3d 1220, 1233–34 (10th Cir. 2012) (finding no standing where record lacked evidence that challenged regulations impacted Wyoming's promotion of tourism, reduced sales revenue, reduced park entries, or reduced tax revenue).

97. 52 F. 4th 362 (8th Cir. 2022).

98. *Id.* at 365–68 (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 410 (2013)).

99. 599 U.S. 670, 673–74 (2023).

100. Brief for the Petitioners at 11–13, United States v. Texas, 599 U.S. 670 (2023) (No. 22–58), 2022 WL 4278395, at *11–13 (quoting Raines v. Byrd, 521 U.S. 811, 819 (1997)).

101. *Id.* at 12 (citing Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923)).

it more broadly registered its dismay that state lawsuits against the federal government had proliferated, citing dozens of recent multistate lawsuits filed against the Biden and Trump Administrations.[102] If incidental effects on state coffers "satisfy Article III," the United States implored, "what limits on state standing remain?"[103]

The Court did not endorse the Solicitor General's view, although it did find that the states lacked standing in the case. In a narrow opinion cabined to the immigration context, the Court (8–1) sided with the United States. Writing for the majority, Justice Kavanaugh explained that a party—private citizen and state alike—"lacks standing when he himself is neither prosecuted nor threatened with prosecution."[104] In a footnote, however, the Court alluded to the broader arguments against standing for states, in particular, made by the United States: "To be sure," the Court explained, "States sometimes have standing to sue the United States or an executive agency or officer."[105] But a state's claim for standing "can become more attenuated" where it relies on "indirect effects on state revenues or state spending" that "frequently" arise in "our system of dual federal and state sovereignty."[106] The Court also rejected Texas's reliance on *Massachusetts* as supporting its standing, distinguishing *Massachusetts* on the ground that "[t]he issue there involved a challenge to the denial of a statutorily authorized petition for rulemaking, not a challenge to the exercise of the Executive's enforcement discretion"—a unique context that, as described further below, entails additional hurdles to judicial review.[107]

Justice Gorsuch penned an opinion concurring in the judgment, joined by Justices Thomas and Barrett, in which he concluded that Texas and Louisiana had failed to demonstrate redressability.[108] In so opining, Gorsuch expressed "doubts" about *Massachusetts*'s reliance on "special solicitude" and questioned whether "lower courts should just leave that idea on the shelf in future" cases.[109]

Justice Alito vigorously dissented on the question of injury. Calling *Massachusetts* "important precedent," Alito contended that "even if we do not view Texas's standing argument with any 'special solicitude,' we should at least refrain from treating it with special hostility" by preventing states from relying on costs inflicted by federal policies.[110]

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102. *Id.* at 16.

103. *Id.* at 15–16 (quoting Arizona v. Biden, 40 F. 4th 375, 386 (6th Cir. 2022) (Sutton, C.J.)).

104. Texas, 599 U.S. at 674 (quoting Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973)).

105. *Id.* at 680, n.3 (citing New York v. U.S., 505 U.S. 144 (1992)).

106. *Id.* (first citing Massachusetts v. Laird, 400 U.S. 886 (1970); and then citing Florida v. Mellon, 273 U.S. 12, 16–18 (1927)).

107. *Id.* at 685, n.6 (citing Massachusetts v. EPA, 549 U.S. 497, 520, 526–27 (2007)). As discussed below, Part III.B, *infra*, state litigation against the federal government in the enforcement context can face additional obstacles.

108. *Id.* at 686 (Gorsuch, J., concurring).

109. *Id.* at 688–89 (quoting Massachusetts, 549 U.S. at 520).

110. *Id.* at 723 (Alito, J., dissenting) (quoting 549 U.S. at 520).

After *Texas*'s narrow holding, it is likely that financial injuries will continue to provide sufficient harm for states to establish standing to challenge federal actions (or inaction). Indeed, in the same term, in *Biden v. Nebraska*,[111] the Court held that the Secretary of Education's cancellation of student debt caused Missouri direct economic harm sufficient to confer standing. Writing for the Court, Chief Justice Roberts concluded that a Missouri nonprofit government corporation would, as a result of the cancellation, lose $44 million a year in fees it otherwise would have earned to administer student loans.[112] The Court held that this "financial harm is an injury in fact directly traceable to the Secretary's plan."[113] Thus, despite the position of the U.S. Solicitor General, pocketbook injuries remain a viable, if somewhat contentious, path to state standing.

B. *Standing Based on Quasi-sovereign Injuries Since Massachusetts*

As discussed above, Massachusetts's proprietary interest in its state-owned coastal land (and, perhaps to a lesser extent, its sovereign interest in enacting state laws to limit motor vehicle greenhouse gas emissions) played an important role in the Supreme Court's standing analysis in that case. But the *Massachusetts* decision went beyond proprietary harms, too. To what extent was Massachusetts's standing grounded in its proprietary interest versus its quasi-sovereign interests in protecting the health and welfare of its residents from climate change harms? Because the majority's standing discussion invokes both (as well as the "special solicitude" owed a state, as discussed further below), courts have proffered varied interpretations, with one court even concluding—we believe, incorrectly—that Massachusetts's quasi-sovereign interest did not figure into the Court's standing holding at all.[114]

In this section, we discuss the role that quasi-sovereign interests played in the Court's holding in *Massachusetts* and then examine approaches states have used after that decision to base their standing on quasi-sovereign interests in challenging federal action or inaction. As discussed below, states have enjoyed some success in establishing standing based on quasi-sovereign interests in cases against the federal government by arguing that Congress authorized states to sue federal agencies under the statute in question. Thus far, states have had less success in establishing standing by drawing on the distinction Justice Stevens made in *Massachusetts* that states can rely on quasi-sovereign interests when suing the federal government to invoke the protections of federal law as opposed to seeking to avoid its application. And when the challenged federal conduct involves the nonenforcement of federal statutes (as opposed to a decision by a federal agency not to regulate), states have

111. 143 S. Ct. 2355, 2365–66 (2023).

112. *Id.* at 2366.

113. *Id.*

114. *See* Gov't of Manitoba *ex rel.* Schmitt v. Bernhardt, 923 F. 3d 173 (D.C. Cir. 2019), discussed *infra*.

faced the additional hurdle of overcoming the presumption that the exercise of enforcement discretion is not subject to judicial review.

1. Quasi-sovereign Interests in Massachusetts

Justice Stevens's recent book, *The Making of a Justice*, explains that he viewed Massachusetts's quasi-sovereign interests as distinct from its proprietary interests—that is, as a separate theory of injury.[115] Specifically, the Court referred to Massachusetts's "well-founded desire to preserve its sovereign territory today"[116] as well as "severe and irreversible changes to natural ecosystems," "a significant reduction in water storage in winter snowpack in mountainous regions with direct and important economic impacts," and "increase in the spread of disease."[117] And of the proprietary and quasi-sovereign interests, Justice Stevens highlighted the quasi-sovereign injury aspect of the Court's opinion as having "made new law" by relying on the Commonwealth's interest in "protecting its citizens" from climate change harms to establish standing.[118] Indeed, according to Professor Richard Lazarus, during the drafting process Justice Stevens modified the opinion in several places "to put more weight on the special status of a state, like Massachusetts, to protect its sovereign territory from climate change."[119]

These reflections shed further light on footnote 17 of the majority opinion, in which Justice Stevens rebutted the dissent's argument that "our cases cast significant doubt on a State's standing to assert a quasi-sovereign interest—as opposed to a direct injury—against the Federal Government." 549 U.S. at 539 (Roberts, C.J., dissenting). As noted above, Chief Justice Roberts's dissent cited *Massachusetts v. Mellon*,[120] a case in which the Supreme Court held that the "citizens of Massachusetts are also citizens of the United States" and that Massachusetts generally cannot, as *parens patriae,* "institute judicial proceedings to protect the citizens of the United States from the operation of the statutes thereof."[121]

115. *See* John Paul Stevens, The Making of a Justice 464 (2019).

116. That Justice Stevens was referring to Massachusetts' quasi-sovereign—not proprietary—interest was made clear by the sentence that followed, which referred specifically to the fact that the Commonwealth owned a great deal of the affected territory, a fact that "only reinforces" that the plaintiffs had a concrete stake in the case. Massachusetts v. EPA, 549 U.S. 496, 519.

117. *Id.* at 521 (citing MacCracken Decl. ¶¶ 5(d), 28) (internal quotations omitted).

118. Stevens, *supra* note 116.

119. Richard J. Lazarus, The Rule of Five 249 (2019).

120. 262 U.S. 447 (1923).

121. *Id.* at 485. Although the dissent also cited Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Baez, in which the Court observed in a footnote that states cannot sue the federal government in their *parens patriae* capacity, that case (similar to Georgia v. Tennessee Copper Co., 237 U.S. 474 (1915)) was between a government plaintiff and private party defendants. 458 U.S. 592, 610 n.16 (1982).

In a lengthy footnote in *Massachusetts*, Justice Stevens distinguished *Mellon* on two grounds. First, like *Georgia v. Tennessee Copper Co.*—the case that Justice Kennedy flagged at oral argument—the plaintiffs in *Massachusetts v. EPA* sought to protect against "the substantial impairment of the health and prosperity of the towns and cities of the state."[122] By contrast, the *Mellon* court acknowledged that the case did not involve "quasi-sovereign rights actually invaded or threatened."[123]

Second, and perhaps more importantly given that *Georgia v. Tennessee Copper Co.* did not involve a state suing the federal government, Justice Stevens noted in the same footnote that Massachusetts had sued EPA to *invoke* the protection of federal law, rather than to *avoid* its application.[124] While in *Mellon*, Massachusetts sued the federal government to eliminate the obligation of its citizens (who were also U.S. citizens) to pay for a federal program to benefit them, *Massachusetts* dealt with the claim that EPA had abdicated its responsibility under the Clean Air Act to regulate greenhouse gases from motor vehicles, which the state petitioners alleged were harming their residents.[125] Justice Stevens further cited a post-*Mellon* decision, *Georgia v. Pennsylvania R.R. Co.*,[126] as recognizing that there was a "critical difference" between a state suing the federal government to protect its citizens from the operation of federal law and asserting its rights under federal law.[127]

An additional ground that Justice Stevens could have cited—but did not cite—as a basis to distinguish *Mellon* was that the case involved a constitutional, rather than a statutory, challenge, as in *Massachusetts*. Constitutional claims, by contrast, such as Texas's recent challenge of the Indian Child Welfare Act under the Equal Protection Clause,[128] do not involve a situation in which a state is invoking the protection of federal law or require a court to evaluate the

122. *Id.* at 520 n.17 (quoting Missouri v. Illinois, 180 U.S. 208, 240–41 (1901)).

123. *Id.* (quoting Mellon, 262 U.S. at 484–85) (emphasis omitted).

124. *Id.* at 520 n.17.

125. Mellon, 262 U.S. at 478; Massachusetts, 549 U.S. at 519–20 (referring to "sovereign prerogatives . . . now lodged in the Federal Government").

126. 324 U.S. 439 (1945).

127. 549 U.S. at 521 n.17. It should be noted, however, that this case involved a lawsuit by a state against a private railroad company, so it did not involve the same situation as in *Mellon*. And although not cited by Justice Stevens in footnote 17, a Ninth Circuit panel drew on this same distinction several decades earlier in rejecting the federal government's argument that a state transportation agency could not rely on *parens patriae* standing in a lawsuit against the FCC. Wash. Utilities and Transp. Comm'n v. FCC, 513 F. 2d 1142 (9th Cir. 1975). In distinguishing *Mellon*, the court explained that the state agency did "not attack the constitutionality of the Communications Act on any ground; rather, it relies upon the federal statute, and seeks to vindicate the congressional will by preventing what it asserts to be a violation of that statute by the administrative agency charged with its enforcement." *Id.* at 1153.

128. Haaland v. Brackeen, 599 U.S. 255, 294–95 (2023) (holding that Texas lacked the ability to challenge as *parens patriae* the statute on Equal Protection grounds).

statute to determine whether Congress intended to afford a state the authority to sue the federal government on behalf of its residents.[129]

Justice Stevens's recent book has eliminated any remaining doubt that quasi-sovereign interests played a role in the Court's standing holding. As noted at the outset, however, the nature of the interplay between proprietary and quasi-sovereign interests in *Massachusetts* leaves open for interpretation the relative importance of each interest. And as discussed in the prior section and below, courts have often avoided the question altogether by focusing on whether states have shown standing based on financial injury.

2. Quasi-sovereign Interests Post-Massachusetts

Following *Massachusetts*, states asserting quasi-sovereign interests in lawsuits against the federal government have used two main approaches to contend with *Mellon*: (a) arguing that, under the applicable statute, Congress removed any obstacle to the state suing the federal government on behalf of its citizens; and (b) invoking the distinction made by Justice Stevens in footnote 17 of *Massachusetts* to argue that *Mellon* does not preclude *parens patriae* standing where a state seeks to invoke the protection of federal law on behalf of its citizens. States have enjoyed some limited successes under these approaches, with the former approach being somewhat more successful to date. In this second category of cases, there is an intersection with cases in which states have brought challenges in the enforcement context, which involve an additional hurdle of convincing courts that the agency action is reviewable.

Prior to turning to discussing cases that demonstrate these two main approaches, we first note briefly that some courts have simply noted the lack of uniform approach to determining state standing to sue the federal government based on quasi-sovereign interests and then based their holding on the lack of evidence in the record to support any such harms.[130]

a. Congressional Abrogation of the Mellon Bar

Some states have successfully argued that, in the federal law at issue, Congress lifted (or abrogated) the "*Mellon* bar" against state *parens patriae* standing to sue the federal government. In fact, one of the leading opinions in this area was penned by Justice Scalia, one of the *Massachusetts* dissenters, decades prior when he served on the D.C. Circuit. In *Maryland People's Counsel v. FERC*,[131] Judge Scalia, writing for the court, first held that *Mellon* established a prudential—not constitutional—limit on standing. Next, he found that Congress had abrogated that prudential bar in the Natural Gas Act when it included language in the statute that authorized lawsuits by "any interested State" or "any representative of interested consumers or security

129. *See* discussion in Part III.B.2, *infra*.

130. *See, e.g.*, Texas v. Sec. Exch. Comm'n, 2024 WL 2106183, at *6–8; Louisiana v. Dep't of Homeland Sec., No. CV 23–1839, 2024 WL 1328434, at *5–6 (E.D. La. Mar. 28, 2024).

131. 760 F. 2d 318 (D.C. Cir. 1985).

holders."[132] As a result, the Act authorized Maryland to sue FERC on behalf of citizens over the legality of a federal natural gas marketing program.

More recently, in a decision in the environmental law context, *Hanford Challenge v. Moniz*,[133] a federal district court found that Washington had standing as *parens patriae* to sue the Department of Energy under the Resource Conservation and Recovery Act (RCRA). The state had brought a citizen suit under RCRA's imminent and substantial endangerment provision for threatened harm to workers from the handling, treatment, and disposal of hazardous waste at the Hanford Nuclear Site. The court reasoned—consistent with *Maryland People's Counsel*—that the *parens patriae* bar in *Mellon* was a prudential limit. And the court read *Massachusetts* as having "acknowledged a state's ability to sue the federal government under a federal statute in seeking to protect its quasi-sovereign interests concerning greenhouse gas emissions."[134] Next, the court found that the citizen suit language in RCRA, which broadly authorized "any person" to sue the United States, had removed the *Mellon* bar. Furthermore, the state had sufficiently alleged a quasi-sovereign interest—the health and well-being of its residents that worked at the Hanford site—to have standing to sue.[135]

By contrast, in *Government of Manitoba ex rel. Schmitt v. Bernhardt*,[136] the D.C. Circuit rejected Missouri's argument that Congress had abrogated the prudential standing bar for *parens patriae* standing in the Administrative Procedure Act (APA). There, Missouri sued the Bureau of Land Reclamation over its approval of a water development project that the state believed violated the National Environmental Policy Act (NEPA). Although the D.C. Circuit observed that it had previously recognized that the *Mellon* case established a prudential, not constitutional, standing rule, it reasoned that Congress had not abrogated the *Mellon* rule when it enacted the APA. Unlike the Natural Gas Act in *Maryland People's Counsel*, "the APA evince[d] no congressional intent to authorize a State as *parens patriae* to sue the federal government."[137] The APA's judicial review provision merely authorized suit by a "person" to a variety of federal statutes. The court noted in a footnote that Missouri had not argued that the other applicable statute, NEPA, authorized it to sue the federal government in a *parens patriae* capacity, so it did not evaluate whether Congress had abrogated the prudential bar in NEPA.[138]

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132. *Id.* at 320.

133. 218 F. Supp. 3d 1171, 1182 (E.D. Wash. 2016).

134. *Id.* at 1178.

135. *Id.* at 1177–82. Although *Hanford Challenge* also presented a different factual scenario in which the state sued the United States as a property owner—not as a regulator—the court did not expressly note this as relevant to its standing analysis, other than in rejecting DOE's argument that Congress tasked it with regulating worker health and safety. *Id.* at 1178–79.

136. 923 F. 3d 173 (D.C. Cir. 2019).

137. *Id.* at 181.

138. *Id.* at 181, n.4; *see also* New York v. U.S. Dep't of Labor, 477 F. Supp. 3d 1, 9, n.6 (S.D.N.Y. 2020) (declining to rule on New York's ability, *parens patriae*, to sue the

One year later, in *Clean Wisconsin v. EPA*,[139] the D.C. Circuit considered *parens patriae* standing further, but, as discussed in the previous section, held that the State of Illinois and City of Chicago established standing based on proprietary harms. In light of this ruling, the court declined to address whether Congress abrogated the *Mellon* rule in the Clean Air Act when it authorized states (as citizens) to sue the federal government.[140]

Although there are only a few cases in which courts have considered the abrogation theory, states have had some success in pressing this argument. The statutory language in *Maryland People's Counsel* expressly referred to a state suing in a representative capacity, whereas the district court in *Hanford Challenge* found that the broader language in RCRA's citizen suit provision sufficed to evidence abrogation. Although the *Manitoba* court found the APA's general language to be insufficient,[141] the D.C. Circuit has not opined on whether Congress abrogated the *Mellon* bar in the Clean Air Act and NEPA.

b. The Invocation vs. Avoidance Distinction (Massachusetts Footnote 17)

Another approach states have attempted in arguing for *parens patriae* standing against the federal government is to apply Justice Stevens' invocation versus avoidance distinction in footnote 17 of *Massachusetts*. Several courts have addressed this distinction, although states have been met with mixed results in pressing this argument.

For example, in *Texas v. EPA*, the state petitioners sought to invalidate EPA regulations subjecting their states to stationary source permitting requirements for greenhouse gases under the Clean Air Act.[142] Texas argued that, like Massachusetts, it had quasi-sovereign interests in regulating air quality within its borders. The court rejected Texas's argument, reasoning that *Massachusetts* was inapposite because Texas sought to "block operation of the Act, and not "to ensure enforcement of the Act."[143] Similarly, in *Michigan v. EPA*, a Seventh Circuit panel drew upon this distinction in holding that Michigan lacked stand-

Department of Labor under the APA in light of injury to state's tax revenue, but noting that *Manitoba* "did not adopt a bright-line rule that APA suits can never be brought in a state's *parens patriae* capacity, but rather indicated that the question may turn on congressional intent as expressed in the *underlying* statute that the litigant claims was violated." (emphasis original)).

139. 964 F. 3d 1145, 1159 (D.C. Cir. 2020).

140. *Id.* at 1160; *see also* Air Alliance Houston, 906 F. 3d at 1060 (declining to decide whether Congress abrogated the prudential bar on state *parens patriae* standing in the Clean Air Act in light of finding that state petitioners established standing based on direct financial injury stemming from EPA rule delaying effective date of safety protections to prevent and mitigate harms from accidents at facilities handling hazardous chemicals).

141. As discussed in Part III.C, *infra*, several courts within the Fifth Circuit have read the APA's judicial review provision as providing the type of procedural right alluded to in *Massachusetts* as one of the elements of special solicitude. These cases have not discussed *Mellon* at all.

142. 726 F. 3d 180 (D.C. Cir. 2013).

143. *Id.* at 199 (citing Massachusetts, 497 U.S. at 520 n.17).

ing to challenge EPA's decision to designate certain areas of tribal land in the state as Class I status for purposes of regulation under the Clean Air Act's Prevention of Significant Deterioration (PSD) program.[144] *Massachusetts* did not support Michigan's standing in the case, the court concluded, because, "in contrast to that case, in which Massachusetts's coastal lands were threatened by rising sea levels, Michigan's air can only benefit from the redesignation of Community lands to Class I status."[145] And, more recently, in *Louisiana v. National Oceanic & Atmospheric Administration*,[146] a Fifth Circuit panel cited this distinction in discussing why Louisiana lacked standing to challenge a National Marine Fisheries Service rule that required certain shrimping vessels in state waters to use turtle excluder devices. Though the court ultimately did not rest its holding on the *Mellon* bar, the court expressed doubts that the state could assert *parens patriae* standing against the federal agency.[147] In drawing a contrast with *Massachusetts*, it noted that "Massachusetts did not 'dispute that the Clean Air Act applie[d] to its citizens; it rather [sought] to assert its rights under the Act."[148] By contrast, Louisiana's *parens patriae* argument fell into the first category, and not the second.[149]

On the other hand, several courts have declined to recognize the invocation versus avoidance distinction that Justice Stevens made in *Massachusetts*. For example, in the *Manitoba* case discussed above, the D.C. Circuit, in addition to rejecting the state of Missouri's argument that Congress abrogated the *Mellon* bar in the APA, likewise was not persuaded by Missouri's attempt to distinguish *Mellon* using *Massachusetts* footnote 17.[150] Contrary to *Massachusetts* and the reasoning of the panel in the 2013 *Texas* case discussed above, the *Manitoba* court opined that allowing a state to sue as *parens patriae* to invoke the protections of federal law as opposed to avoiding its application "makes little sense in light of the vertical federalism interest underlying the *Mellon*

144. Michigan v. EPA, 581 F. 3d 524, 527–31 (7th Cir. 2009).

145. *Id.*

146. 70 F. 4th 872, 880–82 (5th Cir. 2023).

147. *Id.* at 882 n.5

148. *Id.*

149. *Id.*; *see also* Nat. Res. Defense Council v. EPA, 542 F. 3d 1235, 1248 n.8 (9th Cir. 2008) (rejecting argument by industry intervenor-respondents in lawsuit to compel EPA to promulgate effluent limitation guidelines under the Clean Water Act that states were "barred from litigating as *parens patrie* [sic] to enforce a federal statute against the federal government" (citing Massachusetts v. EPA, 549 U.S. 497, 519–20 (2007)); Indiana v. EPA, 796 F. 3d 803, 810 (7th Cir. 2015) (observing that, under *Massachusetts*, states could sue in certain instances to protect their quasi-sovereign interests, but declining to decide whether Indiana could establish standing based on that theory to challenge EPA's approval of Illinois's relaxed inspection and maintenance program, which allegedly would have caused diminished air quality in Indiana).

150. It is unclear to what extent the *Manitoba* court's view in this regard was premised on its assumption—contrary to Justice Stevens' recollection in his book—that Massachusetts' standing had been established *solely* on grounds of injury to it as a landowner. *See* Gov't of Manitoba *ex rel.* Schmitt v. Bernhardt, 923 F. 3d 173, 182 (D.C. Cir. 2019).

bar."[151] This is because, the court stated, "the supremacy of federal law means that the federal government's *parens patriae* authority should not, as a rule, be subject to the ability of states to intervene to represent the same interest of the same citizens."[152] As discussed above, however, such a rationale requires one to accept that there will be scenarios in which the federal government's abdication of its duties resulting in harm to a state's residents cannot be remedied by that state, absent a showing of direct economic harm to the state itself.

A variant on the invocation versus avoidance theory—but still grounded in footnote 17 of *Massachusetts* distinguishing *Mellon*—is the approach taken by the Sixth Circuit in the 2022 case of *Biden v. Kentucky*.[153] In that case, which involved a state challenge to a Biden Administration directive that employees of federal contractors be vaccinated against COVID-19, the Sixth Circuit rejected the *Manitoba* court's view of the extent that *Mellon* limits state lawsuits against the federal government.[154] Drawing upon another aspect of footnote 17 in *Massachusetts* noted above—that *Mellon* did not involve "quasi-sovereign rights actually invaded or threatened"—the Sixth Circuit reasoned that the *Manitoba* court had conflated two types of *parens patriae* lawsuits: one brought by a state solely on behalf of third parties (prohibited under *Mellon*) and another brought by a state on the basis of some injury to its *own* interests, separate and apart from its citizens' interests,[155] which would be permissible under *Mellon*. By way of example of the latter type of lawsuit, the Sixth Circuit cited a case, such as a public nuisance action, "in which the a states sues to prevent pollution that not only injures its citizens but also invades the states' prerogative to superintend the public health."[156] Applying that view in the government contractor vaccine mandate case, the court found that Kentucky was not impermissibly suing on behalf of contractor employees that lived in Kentucky, but based on its quasi-sovereign interest in "the regulation of the public health of the state citizens in general and the decision whether to mandate vaccination in particular."[157] Courts thus have recognized different aspects of Justice Stevens's footnote 17 in *Massachusetts* in determining whether state lawsuits against the federal government can proceed consistent with *Mellon*.

151. *Id.* at 183.

152. *Id.* (citing Pennsylvania *ex rel.* Snapp v. Kleppe, 533 F. 2d 668, 676–77 (D.C. Cir. 1976)) (quotations omitted); *see also* Louisiana v. Biden, 575 F. Supp. 3d 680, 688–89 (W.D. La. 2021) (citing *Mellon* and *Snapp* as establishing a bar against any *parens patriae* lawsuits against the federal government and declining to decide whether *Massachusetts* had created an exception to that bar in context of a challenge to Executive Order requiring COVID vaccinations for federal contractors).

153. Biden v. Kentucky, 23 F. 4th 585 (6th Cir. 2022).

154. *Id.* at 598.

155. *Id.* at 596 (citing Chapman v. Tristar Products, Inc., 940 F. 3d 299, 305 (6th Cir. 2019)).

156. *Id.* (citing Georgia v. Tennessee Copper, 206 U.S. 230 (1907)).

157. *Id.* at 599.

c. Lawsuits Against the Federal Government in the Enforcement Context

A related area of cases involves a situation in which a state seeks to invoke the protections of federal law in the enforcement context. In other words, while *Massachusetts* involved a challenge to a federal agency's decision *not to regulate*, states have also sought to challenge federal government decisions *not to enforce* federal law. These cases, which have occurred in both the environmental and immigration contexts, require litigants to first overcome the presumption that government decisions related to enforcement discretion are not typically subject to judicial review.[158] Courts have distinguished, however, between a "single-shot non-enforcement decision," which they have found generally unreviewable, and "an agency's adoption of a general enforcement policy," which "is subject to judicial review."[159] And in that latter context, the question of *parens patriae* standing—in particular, the distinction between a state suing on behalf of its citizens to invoke the protections of federal law versus seeking to avoid its application—arises once again.

Take, for example, EPA's nonenforcement of the so-called "glider rule." There, a group of states and environmental groups filed suit to challenge an EPA memorandum issued at the direction of then-Administrator Scott Pruitt that relaxed restrictions on the production and sale of "gliders"—new heavy-duty trucks manufactured with highly polluting, refurbished engines.[160] The memo effectively suspended a 2016 air pollution rule's annual 300-unit-per-manufacturer limit on glider production for 2018 and 2019, while EPA considered whether to modify or repeal the 2016 rule.[161] EPA's action enabled glider manufacturers to put many thousands more of these highly polluting trucks on the road than would have been allowed under the 2016 rule, starting immediately, before any formal process to modify or repeal the 2016 rule had been completed.[162] Regarding standing, state petitioners argued that the excess emissions from these trucks would cause hundreds of premature deaths and thousands of illnesses in their states, injuring their quasi-sovereign interests in the "quality of air within their domains" and in "protecting their residents

158. *See* 5 U.S.C. § 701(a)(2) (judicial review of agency action under APA not available if agency action is committed to agency discretion by law); Heckler v. Chaney, 470 U.S. 821, 832 (1985) (although most agency determinations are presumed to be reviewable under the APA, "an agency's decision not to take enforcement action should be presumed immune from judicial review.").

159. *See e.g.*, OSG Bulk Ships, Inc. v. United States, 132 F. 3d 808, 811 (D.C. Cir. 1998).

160. Memorandum from Susan Parker Bodine, Assistant Adm'r, Office of Enforcement and Compliance Assurance to Bill Wehrum, Assistant Adm'r, Office of Air and Radiation on Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles (July 6, 2018), available at: https://www.epa.gov/sites/default/files/2018–07/documents/glidernoactionassurance070618.pdf [https://perma.cc/X725–43MA].

161. State of California, et al.'s Emergency Motion for Summary Vacatur, or in the Alternative, for Stay Pending Judicial Review at 1, State of California v. EPA, Case No. 18–1192, Doc. No. 1741540 (D.C. Cir. Jul. 19, 2018)

162. *Id.*

from air pollution."[163] Separately, the states asserted that they would suffer harm because EPA's action would lead to more ozone pollution, making it more onerous to comply with national air quality standards.[164] The D.C. Circuit administratively stayed the memorandum while it considered the petitioners' motions, and EPA subsequently withdrew the memo before the court issued a decision on the merits of the motions.[165]

Although the states' standing to sue was never formally briefed or decided given EPA's withdrawal of the glider memo, the case is instructive for considering whether there should be a legal distinction between a state suing on behalf of its citizens to invoke the protections of federal law versus seeking to avoid its application.[166] EPA's rationale in exempting glider trucks from more stringent air pollution regulation was solely an economic one: to ease the compliance burden for certain manufacturers who had lobbied the Trump Administration. But given EPA's charge under the relevant section of the Clean Air Act to limit air pollution from new motor vehicles that endangers public health and welfare, the argument for exclusive federal *parens patriae* power in such an instance would be extraordinarily weak. If EPA unlawfully declines to protect the health and welfare of U.S. residents, why should a state be barred from challenging that failure to protect its residents?[167]

Indeed, the Supreme Court's decision last term in *United States v. Texas*,[168] discussed in the preceding section, leaves the door open to such a standing theory. In particular, the Court's opinion in *Texas* acknowledged that a state may be able to establish standing against a federal agency that "'has consciously and expressly adopted a general policy that is so extreme as to amount to an

163. *Id.* at 25–26 (citing Massachusetts v. EPA, 549 U.S. at 518–19) (internal quotations omitted).

164. *Id.* at 30 (citing West Virginia v. EPA, 362 F. 3d 861, 868 (D.C. Cir. 2004)).

165. *See* Order in Env't Def. Fund v. EPA, Case No. 18–1190, Doc. No. 1741224 (D.C. Cir. July 18, 2018).

166. The glider memorandum litigation also had an important factual difference from *Mellon* in that it did involve allegations of "quasi-sovereign rights actually invaded or threatened," 262 U.S. at 485.

167. Another example involved EPA's COVID-19 enforcement policy. That policy, issued in March 2020, provided that EPA would exercise discretion not to enforce if a regulated entity failed to comply with monitoring, reporting, or recordkeeping requirements under federal environmental laws due to COVID-19. *See* Memorandum from Susan Parker Bodine to All Governmental and Private Sector Partners on COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program (Mar. 26, 2020), https://www.epa.gov/sites/default/files/2020–03/documents/oecamemooncovid19implications.pdf [https://perma.cc/B7NH-ZAYB]. A group of states sued EPA over that policy, alleging that the policy threatened harm to their proprietary, informational, and quasi-sovereign interests. *See* Complaint at 23–31, New York v. EPA, No. 20-CV-3714 (S.D.N.Y. May 13, 2020). After the states filed a motion for a preliminary injunction, EPA announced it would end the policy as of August 31, 2020. The states voluntarily dismissed the case after EPA terminated the policy.

168. 599 U.S. 670 (2023).

abdication of its statutory responsibilities.'"[169] Arguably, the glider truck example and similar abdication of environmental protection obligations would meet that standard.[170]

3. Takeaways and Additional Thoughts

We see two main takeaways in the *Massachusetts* and *Mellon* lines of cases: first, as alluded to in the immediately preceding section, litigants—and courts—have gravitated toward more direct, or pocketbook, injuries to states, perhaps in light of uncertainty regarding when states may rely on *parens patriae* standing to sue the federal government.[171] With the United States's recent attacks on the pocketbook theory, however, state litigants may begin to focus more on *parens patriae* theories, arguing that *Mellon* does not apply, and correspondingly courts may issue rulings on those theories.[172]

Second, courts have shown a willingness to allow state *parens patriae* lawsuits to proceed against the federal government in certain instances. Thus far, the more successful approach has been to argue that Congress lifted the *Mellon* bar by including language in the applicable statute that authorized a state to sue the federal government on behalf of its residents. As discussed above, states have successfully advanced this argument in the context of the Natural Gas Act (*Maryland People's Counsel*) and RCRA (*Hanford Challenge*). Although it found no abrogation with respect to the APA, in the *Manitoba* case, the D.C. Circuit has specifically reserved decision on whether Congress abrogated the *Mellon* bar in the Clean Air Act and NEPA.

The second approach—in which a state seeks to draw on Justice Stevens's distinguishing of *Mellon* in footnote 17 of *Massachusetts*—has met with more

169. *Id.* at 682–83 (quoting Heckler v. Chaney, 470 U.S. 821, 833 (1985)); *see also* Note, *An Abdication Approach to State Standing*, 132 HARV. L. REV. 1301, 1306 (2019) (advocating for "abdication standing," under which states would have a concrete interest in challenging a unilateral executive decision not to enforce federal law in instances when the federal government exercises jurisdiction over a particular policy area to the exclusion of states).

170. *An Abdication Approach to State Standing*, *supra* note 169, at 1306 (citing *Heckler v. Chaney*). And anticipating developments in case law that could cut back on the ability of states to use proprietary or pocketbook injury to establish standing against the federal government, the commentator notes similarly that "proprietary harms may not always be apparent, or may be too attenuated from the alleged inaction to be cognizable. In these cases, abdication standing proposes that states could articulate an injury based on the breach of a federal guarantee to the states that abdication inevitably constitutes." "Most importantly, [the state] does not experience the protection promised to it when it entered into the constitutional compact or when its representatives in Congress agreed, on behalf of its citizens, to surrender state prerogatives for the benefits of national uniformity."

171. *See* Part III.A, *supra*; *see also* New York v. Scalia, 464 F. Supp. 3d 528, 546 (S.D.N.Y. 2020) (declining to rule on *parens patriae* standing and observing that "[a] court—and especially a district court—should be reluctant to opine on an unsettled issue of law when the court can resolve a case on an alternative ground." (citation omitted)).

172. In our experience, states as prudent litigators often assert multiple standing theories in cases brought against the federal government, rather than placing their eggs in one basket.

limited success, although as discussed above several courts have found the distinction to be legally meaningful. Moreover, it is possible that courts could revisit this argument in light of the federal government's attempts to curtail states' ability to use pocketbook injuries to establish standing.

In our view, it makes sense that there would be a legal difference from a situation in which a state sues the federal government to preclude application of federal law to its citizens versus one in which the basis of the state's suit is that the federal government is not implementing federal law to protect those citizens. Given that *parens patriae* translates into "parent of the country," a state lawsuit brought against the federal government in that latter scenario could be likened to addressing parental neglect (the federal parent is neglecting to protect the state's residents, justifying the ability of that state to step in and compel the federal parent to perform its duty). Undoubtedly, this analogy only goes so far, but it provides a principled basis having its roots in the idea of *parens patriae* to distinguish—as Justice Stevens did in footnote 17—between a situation where a state is suing the federal government to avoid the application of federal law versus seeking to compel its application.[173] Moreover, in addition to being inequitable, a wholesale bar on *parens patriae* state standing would fail to consider that the *Mellon* decision was issued before cooperative federalism programs like the Clean Air Act were established, under which Congress has directed states and the federal government to work together to achieve public ends.[174] The Sixth Circuit's use of the "quasi-sovereign interest not threatened" language in *Massachusetts*' footnote 17 as a basis to distinguish *parens patriae* lawsuits that may be brought against the federal government consistent with *Mellon* offers another promising area for state litigants.

C. *Special Solicitude*

Perhaps the most debated aspect of the Supreme Court's standing analysis in *Massachusetts* concerns the meaning of "special solicitude," a term Justice Stevens used in discussing the standard by which the Court would decide whether the *Massachusetts* plaintiffs had established standing to sue EPA.[175] This

173. As discussed in Part III.B *infra*, this reading aligns with one concept of what Justice Stevens meant by the term "special solicitude."

174. *See* Ernest A. Young, *Federal Courts, Practice, & Procedure: State Spending: State Standing and Cooperative Federalism*, 94 Notre Dame L. Rev. 1893, 1917–18 (May 2019) ("The Court decided *Mellon* in the heyday of dual federalism . . . a decade and a half before the 1937 'switch in time' that ushered in an age of concurrent federal and state regulatory responsibilities."). Citing footnote 17 in *Massachusetts v. EPA*, 549 U.S. 497 (2007), Professor Young concludes that "[s]o long as they can meet the traditional criteria for standing, states may sue to vindicate the public interest as they see it, even when in conflict with the views of federal officials and even when their claims rest on federal law." *Id.* at 1918.

175. *See, e.g.*, New York v. Scalia, 464 F. Supp. 3d 528, 541 (S.D.N.Y. 2020) ("The depth of this 'special solicitude' and its impact on other doctrines, such as the state's ability to bring suits on behalf of its citizens as *parens patriae*, is unclear" (citations and internal quotations omitted)).

Part examines this aspect of *Massachusetts*, discusses the different approaches courts have taken in applying special solicitude post-*Massachusetts*, and offers some thoughts on the way courts should consider applying this concept in lawsuits going forward. Specifically, we discuss whether special solicitude is more warranted where states are seeking to vindicate quasi-sovereign or sovereign interests compared to proprietary interests and whether courts could be further guided by the invocation versus avoidance distinction discussed above in Part III.B. We further consider whether courts should require the establishment of a procedural right for special solicitude to apply.

1. Special Solicitude in Massachusetts

In the Court's standing analysis, Justice Stevens did not again refer to special solicitude after introducing the concept up front. But it carried some force, as he expressly conducted the standing analysis with the preceding special solicitude discussion "in mind."[176] And the opinion indeed reflects some concrete clues about what role that consideration played.

First, special solicitude appeared to assist Massachusetts in establishing injury. In its discussion of injury-in-fact, the Court rejected the notion that the widely shared nature of climate change harms precluded a finding that Massachusetts had established cognizable injury.[177] Some commentators have opined that this conclusion flowed from Justice Stevens's citation in his special solicitude discussion to *Georgia v. Tennessee Copper*, in which a state was taking action to protect its residents from widespread harms.[178] In other words, consistent with the *parens patriae* theory discussed above, where states are plaintiffs, generalized injuries may suffice.

Next, with respect to the elements of causation and remedy, the Court arguably applied "special solicitude" to employ a less exacting standard to Massachusetts. Regarding causation (traceability), Justice Stevens reasoned that, because EPA's failure to regulate greenhouse gas emissions from motor vehicles—a large source of those emissions—contributed to Massachusetts' injuries, the traceability element had been met. Similarly, the fact that EPA's regulation of motor vehicle greenhouse gases would slow global warming

176. 549 U.S. at 520.

177. *Id.* at 522 ("[W]here a harm is concrete, though widely shared, the Court has found injury in fact" (citing Fed. Election Comm'n v. Atkins, 524 U.S. 11, 24 (1998) (internal quotations omitted)).

178. *See* Calvin Massey, *State Standing After* Massachusetts v. EPA, 61 Fla. L. Rev. 249, 252 (2009) ("The most persuasive understanding of *Massachusetts v. EPA* is that it permits states, as *parens patriae*, to assert generalized claims of injury suffered in common by all of its citizens that would not be judicially cognizable if asserted by any individual citizen."); *see also* Albert C. Lin, *Uncooperative Environmental Federalism: State Suits Against the Federal Government in an Age of Political Polarization*, 88 Geo. Wash. L. Rev. 890, 927–28 (2020) ("Under one reading, *Massachusetts v. EPA* recognized the standing of states—but not individuals—to assert claims against the federal government on the basis of generalized injury to public health and well-being.").

sufficed for meeting the redressability prong. Massachusetts did not need to demonstrate that such regulation would by itself reverse global warming. Indeed, that approach—following the Court's reliance in its special solicitude analysis of Massachusetts's procedural right under the Clean Air Act—is also consistent with the recognition by Justice Scalia in *Lujan* that a party asserting a procedural right conferred by Congress "can assert that right without meeting all the normal standards for redressability and immediacy."[179] And though *Lujan* involved a private litigant, it casts doubt on the dissent's criticism that Stevens's causation and remedy analysis amounted to "self-professed relaxation of those Article III requirements" and the byproduct of "a new doctrine of state standing."[180]

As next discussed, courts have since pored over the meaning of *Massachusetts* clues on the import of special solicitude.

2. Post-Massachusetts Developments

As discussed below, courts have interpreted and applied the concept of "special solicitude" in various ways. After *Massachusetts*, several courts have expressed uncertainty about the parameters of special solicitude. For example, in *Wyoming v. United States Dep't of Interior*,[181] a Tenth Circuit panel noted "the lack of guidance on how lower courts are to apply the special solicitude doctrine to standing questions."[182] Courts appear to agree, however, on several principles relating to special solicitude. First, special solicitude does not obviate the need for states to demonstrate injury-in-fact, causation, and redressability—at least to some degree.[183] Second, special solicitude may

179. Lujan, 504 U.S. 555, 589 n.7 (1992) (Stevens, J., concurring).

180. 549 U.S. at 548 (Roberts, C.J., dissenting).

181. 674 F. 3d 1220 (10th Cir. 2012).

182. *Id.* at 1238; *see also* California v. Trump, No. 19–960, 2020 U.S. Dist. LEXIS 58154, at *17 (D.D.C. Apr. 2, 2020) (citing *Wyoming*).

183. *See, e.g.*, Ohio v. EPA, 98 F. 4th at 303–04 ("The 'special solicitude' afforded to states can relax standing requirements only so far," and therefore could not assist states in overcoming a lack of evidence that their alleged injuries would be redressed by a favorable court decision); Delaware Dep't of Nat. Res. and Env't Control v. FERC, 558 F. 3d 575 (D.C. Cir. 2009) (rejecting Delaware's special solicitude argument in context of lawsuit on FERC order that conditionally approved the siting and construction of a liquid natural gas terminal; stating that *Massachusetts* did not change the requirement that a state plaintiff demonstrate concrete harms flowing from the challenged decision); Missouri v. Biden, 558 F. Supp. 3d 754, 768–69 (E.D. Mo. 2021) (States lacked standing to challenge the aspect of President's Executive Order requiring agencies to use the social cost of greenhouse gases; distinguishing *Massachusetts* and noting that special solicitude for states does not excuse them from satisfying Article III's standing requirements), *aff'd*, 52 F. 4th 362 (8th Cir. 2023); Env't Integrity Project v. McCarthy, 319 F.R.D. 8 (D.D.C. 2016) (North Dakota did not establish standing to intervene in support of EPA in environmental group lawsuit regarding agency's failure to revise standards under RCRA governing the handling and disposal of oil and gas wastes; special solicitude could not cure speculative nature of state's injuries).

enable states to demonstrate standing in certain situations in which private litigants could not.[184]

In discussing some of the post-*Massachusetts* cases below, we examine two specific questions that courts have confronted: When does special solicitude apply? And, what does special solicitude mean in practice (in other words, how does it affect the court's application of the standing analysis)? As discussed below, courts have answered these questions differently.

a. When Does Special Solicitude Apply?

Confusion about when to apply special solicitude to state standing may stem in part from the discussion in *Massachusetts* in which the Court appeared to link together two concepts—procedural rights granted by Congress and the status of states in our federal system—that are not necessarily logically connected. As one commentator has observed, "[t]his lack of clarity [has] generated a series of questions for judges, litigants, and academics: Did special solicitude require the presence of both a quasi-sovereign state plaintiff and an injured procedural right?"[185]

On the one hand, most courts that have considered the question have decided that, for special solicitude to apply, both a procedural right conferred by Congress and a state's quasi-sovereign interest in the litigation must be present—concepts that, as next explained—are not logically linked.[186] As discussed in the following section, in several cases principally within the Fifth Circuit, courts that have found special solicitude applies have not considered whether *Mellon* bars a state from establishing standing based on its quasi-sovereign interests.[187]

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184. *See*, *e.g.*, California v. Trump, 613 F. Supp. 3d 231, 241–42 (D.D.C. 2020) (discussing cases).

185. Note, *An Abdication Approach to State Standing*, 132 Harv. L. Rev. 1301, 1306 (2019).

186. *See, e.g.*, New Jersey v. EPA, 989 F. 3d 1038, 1045 (D.C. Cir. 2021) (in challenge to EPA rule concerning reporting and recordkeeping requirements under the Clean Air Act, New Jersey was entitled to special solicitude in standing analysis because it had quasi-sovereign interests in reducing air pollution and a procedural right to challenge the rule); Texas v. United States, 809 F. 3d 134, 150–51 (5th Cir. 2015) (court considering states' challenge to federal government's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program characterized *Massachusetts* as establishing a two-prong test for special solicitude: the existence of a procedural right to sue and a quasi-sovereign interest that is being injured); s*ee also* California v. EPA, 385 F. Supp. 3d 903, 910 (N.D. Cal. 2019) (states had special solicitude to challenge EPA failure to disapprove state plans that lacked emission guidelines for methane emitted by landfills; Congress afforded a procedural right under the Clean Air Act and the states sought to protect similar quasi-sovereign interests as in *Massachusetts*).

187. *See* Part III.B.2, *infra*. One explanation is that those courts may have viewed the existence of a procedural right as effectively evidencing Congressional abrogation of the *Mellon* bar. But none of the decisions expressly drew that connection.

On the other hand, the legal theories are conceptually distinct. The idea that states should be afforded special consideration in their ability to sue the federal government because they surrendered certain sovereign rights to gain admittance to the union does not appear to turn on whether Congress has separately provided a mechanism for states (or others) to sue. One case illustrates the lack of inherent link between the two concepts. In *Native Village of Kivalina v. ExxonMobil Corp.*,[188] a common law tort case brought against several major oil companies for climate change harms, the court considered whether a Tribe was entitled to special solicitude under *Massachusetts*. It first concluded that, unlike in *Massachusetts*, the *Kivalina* plaintiffs' lawsuit was based on common law nuisance and did not involve a procedural right under an environmental statute.[189] The court then rejected the Tribe's argument that it could sue based on its quasi-sovereign interests, reasoning that "[t]he special solicitude recognized by the [*Massachusetts*] Court is predicated on the rights a State relinquished to the federal government taken as it enters the Union," and that the Tribe had not surrendered such rights.[190] If instead the plaintiff in *Kivalina* had been a state, it arguably could have satisfied the second aspect, but not the first. In other words, the *Kivalina* court declined to link the lack of a procedural right to the existence of a state litigant and its surrender of sovereign rights.

Furthermore, the procedural right recognized in the *Lujan* case and cited by Justice Stevens in *Massachusetts*, which eased the burden of showing causation and remedy related to the alleged injury, is not limited to state plaintiffs. Indeed, *Lujan* involved a citizen suit brought by an environmental group under the Endangered Species Act, not a state-led lawsuit against the federal government. Although it is true that many lawsuits that states bring against the federal government, including those under the APA or environmental statutes, involve the exercise of procedural rights, there appears to be no reason to keep the two inextricably linked.[191]

188. 663 F. Supp. 2d 863, 882 (N.D. Cal. 2009), *aff'd*, 696 F. 3d 849 (9th Cir. 2012).

189. *Id.* at 882.

190. *Id.*

191. Perhaps in recognition of this fact, several commentators have suggested ideas for limiting application of special solicitude. *See* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 Duke L.J. 2023, 2038 (2008) (arguing argues for special solicitude in instances in which state regulation is preempted, reasoning that when Congress disables states from regulating, states assume a "sovereign interest in ensuring that the federal government performs its regulatory responsibilities"); *see also* Jonathan Nash, *Sovereign Preemption State Standing,* 112 NW U. L. Rev. 201, 201 (2017) (states should have standing to sue the federal government based on quasi-sovereign interest where state law is preempted and federal government "underenforces the federal law that Congress enacted to address that very same area."). Another commentator recently proposed that special solicitude be limited to instances in which states are asserting an environmental injury affecting their quasi-sovereign interests. Dorothea Allocca, Note, *Special State Standing is Environmental: Clarifying* Massachusetts v. EPA, 45 Wm. & Mary Env't L. & Pol'y Rev. 193 (2020).

b. What are the Practical Implications of Special Solicitude?

Despite all the ink spilled on special solicitude, it is still unclear to what extent special solicitude has made the difference in a state establishing standing post-*Massachusetts*. In most cases, courts have tended to mention special solicitude when setting out the standard for standing or invoking the concept as buttressing their conclusion that a state indeed had met the traditional test for demonstrating standing. Our review only found one case, which did not arise in the environmental context, in which a court appeared to have deemed special solicitude the deciding factor in whether a state had standing. There are some additional cases in which courts (primarily in the Fifth Circuit) that found special solicitude applied did not address whether the state could base its standing on its quasi-sovereign interests or was precluded from doing so under *Mellon*.

Typically, courts have cited special solicitude as additional support for the conclusion that a state had demonstrated standing under the *Lujan* three-prong test, both in the environmental and non-environmental contexts. For example, in *Texas v. United States*,[192] a multistate lawsuit challenging the Biden Administration's Deferred Action for Childhood Arrivals (DACA) program, the court invoked special solicitude in the redressability context: "especially with the benefit of special solicitude," there was some evidence that DACA families would leave if the program ended, thereby demonstrating that the states' injury would be redressed by a favorable decision.[193]

192. 50 F. 4th 498 (5th Cir. 2022).

193. *Id.* at 520; *see also* Texas v. Biden, 10 F. 4th 538, 549 (5th Cir. 2021) (in deciding standing to challenge suspension of the federal government's "Remain in Mexico" migrant protection protocol, special solicitude "remove[d] any lingering doubt" that the state had demonstrated traceability and redressability); New Mexico v. Dep't of Interior, 854 F. 3d 1207, 1215 (10th Cir. 2017) (New Mexico had standing to challenge DOI regulations concerning the process under which Indian tribes and states negotiate compacts to allow gambling on tribal lands; court noted that its holding was "bolstered by our recognition that, as a state, New Mexico is entitled to special solicitude on the issue of standing."); Nat'l Ass'n of Clean Air Agencies v. EPA, 489 F. 3d 1221, 1228 (D.C. Cir. 2007) ("Because there is a substantial probability that EPA's action will harm the interests of [the plaintiffs'] state agency members, NACAA has standing to challenge the Final Rule and we have jurisdiction to consider the merits of the petition." *Id.* at 1228 (citing Massachusetts' "special solicitude" language)); Louisiana v. Becerra, 577 F. Supp. 3d 483, 493 (W.D. La. 2022) (challenging an interim final rule requiring Head Start volunteers and contractors to get COVID-19 vaccinations and wear masks, any "infirmity" in states' traceability and redressability showings was cured by special solicitude); Louisiana v. Biden, 543 F. Supp. 3d 388, 406 (W.D. La. 2021) (states demonstrated standing to challenge President's directive that BLM pause new oil and gas leasing on public lands and offshore waters pending an environmental review and "any infirmity in Plaintiff States' demonstration of traceability or redressability are remedied by Plaintiff States' special solicitude."); Bullock v. U.S. BLM, 489 F. Supp. 3d 1112, 1121 (D. Mont. 2020) (Montana had standing to challenge whether Acting BLM Director was serving in violation of the Appointments Clause of the U.S. Constitution; special solicitude "remove[d] any doubt as to Montana's rights to bring these claims.").

The only case we found in which special solicitude appeared to carry the day in establishing state standing was an earlier *Texas v. United States* case,[194] which involved a multistate challenge to the Obama Administration's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. The Fifth Circuit panel's standing analysis decision relied heavily on *Massachusetts*, finding that Texas had a similar quasi-sovereign interest.[195] The court also concluded that the APA provided a similar procedural right to challenge federal agency action as the Clean Air Act did in *Massachusetts*.[196] In summarizing its standing analysis, the court expressly acknowledged that "our determination that Texas has standing is based in part on the special solicitude we afford it under *Massachusetts v. EPA*" and further noted that, "[w]ithout special solicitude, it would be difficult for states to establish standing" to challenge federal immigration policies.[197] The court then invoked special solicitude in explaining how Texas's asserted injury was both traceable to the DAPA program and would be remedied by vacatur of the program.[198]

Although the DAPA case may have been the only one we found in which a court expressly stated that special solicitude made the difference in the standing inquiry, it is worth noting that in that case, as well as several other cases (mostly from the Fifth Circuit), courts finding special solicitude did not consider whether *Mellon* barred the state plaintiffs from proceeding as *parens patriae* against the federal government. For example, in litigation over the most recent federal rule concerning the jurisdiction of the Clean Water Act, two federal district courts found that states were entitled to special solicitude to protect quasi-sovereign interests in regulating the land and water with their borders, citing the APA's judicial review provision as conferring a procedural right on states (and other parties) to challenge federal regulations.[199] To be

194. 809 F. 3d 134 (5th Cir. 2015).

195. *Id.* at 153–55 ("the direct, substantial pressure directed at the states and the fact that they have surrendered some of their control over immigration to the federal government mean this case is sufficiently similar to *Massachusetts*"). The court also held that Texas had shown a pocketbook injury because issuing driver's licenses to DAPA recipients would cost the state money. *Id.* at 155–56.

196. *Id.* at 152–53.

197. *Id.* at 162 (internal quotations omitted). The court stated its view that it would be "seldom" the case that a lawsuit brought by a state would involve both quasi-sovereign interests and a procedural right, a view that has not been our experience in the environmental context. *Id.*

198. *Id.* at 160–61 (citing Massachusetts v. EPA, 549 U.S. 497, 518 (2007)).

199. Texas v. EPA, 692 F. Supp. 3d 739, 749 (S.D. Tex. 2023); West Virginia v. EPA, 669 F. Supp. 3d 781 (D.N.D. 2023). In addition to their quasi-sovereign interests, the courts cited the state plaintiffs' declarations describing mitigation and compliance costs the states would allegedly incur due to the challenged rule. Texas, 692 F. Supp. 3d at 751; West Virginia, 669 F. Supp. 3d at 817; *see also* Texas v. United States, 50 F. 4th 498 (5th Cir. 2022) (not addressing *Mellon* in context of finding Texas had standing against the federal government in DACA litigation based in part on quasi-sovereign interests); Texas v. United States, 809 F. 3d 134 (5th Cir. 2015) (same, in the DAPA context).

clear, these courts did not explicitly link special solicitude and *Mellon*, but the lack of any discussion of *Mellon* in a case in which a state is relying at least in part on a quasi-sovereign interest in litigating against the federal government is a notable contrast to the cases discussed earlier in this section.[200]

3. Takeaways and Additional Thoughts

The parameters of special solicitude are still being defined. While Justices Gorsuch, Thomas, and Barrett may not find it "hard to think that lower courts should just leave [special solicitude] on the shelf," courts have instead generally agreed that the principle should give state litigants a leg up on proving standing in certain situations, though they have not agreed on what those should be.[201] As discussed in the preceding section, courts seem most comfortable with the notion that special solicitude should tip the balance toward state standing in a close case.

Although courts have typically required the combination of a quasi-sovereign interest and procedural right for special solicitude to apply, these two concepts are legally distinct. In that vein, Justice Stevens's invocation-versus-avoidance framework for *parens patriae* standing could be used to guide courts in deciding whether special solicitude should apply. In other words, where a state files suit to ensure its citizens are being afforded the protections of federal law that the federal government is failing to provide, it should be given special consideration in whether the injury it has articulated is sufficient for standing. Such an approach squares with Justice Stevens's notion that as part of the grand bargain for creating our union, the states rely in part on the federal government to implement and enforce federal law to protect the citizens of every state.[202] It is also consistent with his distinction of *Mellon* in footnote 17, discussed in detail above, because states act as a catalyst to get the federal government to do its job. Indeed, as one commentator has observed, such action by states can "play[] an especially important federalism function," because "states, as implementers of federal policy, have a right to challenge 'the faithfulness of the executive to the statutory scheme' they have consented to facilitate."[203] In addition, pursuant to *Lujan* and *Massachusetts* itself, a state

200. The most recent Fifth Circuit decision, *Louisiana v. NOAA*, (discussed in Part II.B, *supra*), *did* reference the *Mellon* bar as another reason to be skeptical that the state could bring in lawsuit against federal agencies. 70 F. 4th 872, 882 n.5 (5th Cir. 2023). It did not, however, say anything about the absence of any discussion of the *Mellon* bar by prior Fifth Circuit panels in the DAPA or DACA cases.

201. United States v. Texas, 599 U.S. 670, 689 (Gorsuch, J., concurring).

202. Massachusetts v. EPA, 549 U.S. 497, 519 (2007); *see also* Texas v. United States, 809 F. 3d at 153 (states contesting federal immigration policy "cannot establish their own classifications of aliens, just as Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions . . . Both these plaintiff states and Massachusetts now rely on the federal government to protect their interests" (citing Massachusetts, 549 U.S. at 519)).

203. *An Abdication Approach to State Standing*, *supra* note 179, at 1311 (quoting Bulman-Pozman, n. 94); *see also* Seth Davis, *The New Public Standing*, 71 Stan. L. Rev. 1229,

(or a private litigant) seeking to enforce a procedural right could meet the causation and redressability elements with a lesser showing (regardless of whether its interest was sovereign, quasi-sovereign, or proprietary in nature).

IV. Conclusion

Although *Massachusetts v. EPA* is well known for having laid the foundation for EPA's regulation of greenhouse gases under the Clean Air Act, the decision's contribution to standing doctrine also has been significant. The parameters of some aspects of the decision—notably quasi-sovereign interests and special solicitude—continue to be debated. But, there is no question that the case strengthened the hand of states suing the federal government. States have been very successful in citing the Court's proprietary standing ruling in asserting financial injury as a basis for standing in challenging federal government actions or inaction. Rather than accept the U.S. Solicitor General's invitation to treat states with "special hostility" in the standing inquiry, courts should instead continue the longstanding approach of recognizing financial injuries to states—whether proprietary or regulatory—as a viable basis for state standing against the federal government. To the extent that our system of cooperative federalism may make it easier for states to demonstrate financial harm from a federal rule, that is a feature of the system that should be respected, not a bug.

Furthermore, *Massachusetts* and its progeny provide a roadmap for states to establish standing against the federal government on the grounds of quasi-sovereign interests. Those interests are most compelling, we believe, where states that are suing federal agencies to invoke—rather than avoid—the protection of federal law for their residents. In other words, stepping into the shoes of the federal government where it has failed to uphold its end of the federalism grand bargain. The justification for invoking the "*Mellon* bar" to preclude states from vindicating their residents' interests in such a case—be it a refusal to regulate or to enforce federal law—is very weak under such circumstances. And the avoidance versus invocation distinction could also help courts afford states "special solicitude" in any given case. In short, as courts have recognized since *Massachusetts*, economic and quasi-sovereign harms and special solicitude all have important roles to play in state standing.

1240 (May 2019) (observing that because Massachusetts presumably did not need "special solicitude" to establish standing on financial injury grounds, "[t]he Court's discussion of the Commonwealth's sovereign interest in the 'exercise of its police powers' and its quasi-sovereign interest in the 'health and welfare of its citizens' might ground special solicitude to sue the federal government in the structure of federalism and the unique political accountability of state officials").

Appendix

Post-Massachusetts Environmental State Standing Decisions

a. Air Pollution and Climate Change Cases

In *National Association of Clear Air Agencies v. EPA*, 489 F. 3d 1221, 1227–28 (D.C. Cir. 2007), a D.C. Circuit panel held that a national trade association representing state and local clean air agencies had standing to challenge a U.S. EPA rule that failed to lower NOx emissions from aircraft. Noting that, under *Massachusetts*, states are "entitled to special solicitude in . . . standing analysis," the court concluded that there was a substantial probability that EPA's action will harm the interests of the association's state agency members. *Id.* at 228 (quoting *Massachusetts*, 549 U.S. at 520). By failing to lower the allowable NOx emissions allocated to one source, the court reasoned, the rule requires states to impose stricter controls on emissions from other individual sources—a regulatory burden they would not otherwise face. *Id.*

In *Citizens Against Ruining the Environment v. EPA*, 535 F. 3d 670, 675–77 (7th Cir. 2008), a Seventh Circuit held that the Illinois Attorney General's office lacked standing to challenge EPA's failure to object to certain air pollution permits issued by the Illinois Environmental Protection Agency. The Court held that the Attorney General had failed to make a timely or convincing argument that the state had standing in its sovereign capacity, as it was unclear how the state *itself* would be harmed by EPA's failure to object to the state-issued operating permits at issue. *Id.* at 675–76. The court also rejected the Attorney General's claim of standing in a *parens patriae* capacity, concluding that, under *Massachusetts v. Mellon*, the Attorney General could not bring a lawsuit against the federal government on behalf of Illinois' citizens. *Id.* at 676. The court distinguished *Massachusetts* on the ground that Massachusetts had demonstrated injury to the state as a landowner, whereas in this case, it was unclear what injury Illinois was alleging and any interests of its residents "would seem to be represented" by the entity that issued the state permits underlying the dispute. *Id.* at 677.

In *Michigan v. EPA*, 581 F. 3d 524, 527–31 (7th Cir. 2009), a Seventh Circuit panel held that another state, Michigan, lacked standing to challenge EPA's decision to redesignate certain areas of tribal land to better protect those lands from Michigan and Wisconsin pollution sources under the Clean Air Act's Prevention of Significant Deterioration program. The court held that Michigan's claim that EPA used an incorrect process to redesignate the tribe's land could not establish standing absent some concrete interest affected by the deprivation. *Id.* at 528. The imposition of heightened restrictions on Michigan sources, which followed from the redesignation under the Clean Air Act, was not a cognizable injury. *Id.* at 528–29. And even if it were, the court reasoned—citing *Massachusetts v. Mellon*—that Michigan would not be the proper party to allege that injury because a state cannot sue the federal government based

on a *parens patriae* theory. *Id.* at 529. The court also rejected the argument that *Massachusetts v. EPA* supported Michigan's standing in the case because, "in contrast to that case, in which Massachusetts's coastal lands were threatened by rising sea levels, Michigan's air can only benefit from the redesignation of Community lands to Class I status." *Id.* Finally, the court rejected as "not . . . germane" to Michigan's challenge the claim that redesignation created "complications and unworkable conflicts" in its air pollution programs. *Id.*

In *North Carolina v. EPA*, 587 F. 3d 422, 425–29 (D.C. Cir. 2009), a D.C. Circuit panel held that North Carolina lacked standing to sue EPA over its rule that withdrew part of Georgia from having to enact more stringent pollution limits to address ozone pollution in downwind areas. The D.C. Circuit's decision turned on its conclusion that North Carolina had failed to demonstrate redressability because it had failed to show that vacating the withdrawal rule was likely to enable North Carolina to meet (or come into "attainment" with) the ozone standard. *Id.* at 428–29. In so holding, the D.C. Circuit acknowledged that North Carolina's situation was similar in many respects to that of the Massachusetts plaintiffs in *Massachusetts*. *Id.* at 426. As in *Massachusetts*, North Carolina had challenged EPA's rule pursuant to section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), in order to reduce its air pollution, which entitled North Carolina to "special solicitude" in the standing analysis. North Carolina contended that it had standing because it was having difficulty meeting federal eight-hour ozone standards due to emissions from Georgia. *Id.* at 426. The court ultimately concluded, however, that because Georgia was likely to comply with the EPA rule by allowing sources to purchase pollution allowances, rather than requiring them to reduce their emissions, North Carolina had not shown that a favorable decision would redress its injury. *Id.* at 427–29.

In *Texas v. EPA*, 726 F. 3d 180 (D.C. Cir. 2013), a D.C. Circuit panel found that states lacked standing—this time, to challenge five EPA Clean Air Act rules following *Massachusetts*'s holding that greenhouse gases qualify as an "air pollutant" under the statute. Texas, Wyoming, and industry groups claimed that the rules injured them by requiring them to update their state implementation plans to enable issuance of permits for major sources under the Prevention of Significant Deterioration program. *Id.* at 183. The court disagreed, concluding that the statute's permitting requirements were self-executing, regardless of whether states had updated their plans. *Id.* at 197–98. Accordingly, the plaintiffs could not demonstrate how they have been injured by rules enabling issuance of required permits. *Id.* at 198. The court also concluded that petitioners had not demonstrated how the rules would redress their purported injuries; to the contrary, vacatur of the challenged rules would mean neither the states nor EPA could issue permits, barring construction of major emitting facilities and exacerbating the states' injuries. *Id.* For the same reason, the court rejected the claim that the rules injured their "quasi-sovereign interests" in regulating air quality within their borders. *Id.* Finally, the court concluded

that petitioners failed to show how the "special solicitude" due to states applies to block operation of the Act, emphasizing that "nothing in the Court's opinion [in *Massachusetts v. EPA*] remotely suggests that states are somehow exempt from the burden of establishing a concrete and particularized injury in fact." *Id.* at 199 (quoting *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F. 3d 102, 148 (D.C. Cir. 2012)). Then-Judge Kavanaugh filed a dissent disagreeing with the court's interpretation of the CAA. *See id.* at 200 (Kavanaugh, J., dissenting).

In *Delaware Department of Natural Resources and Environmental Control v. EPA*, 785 F. 3d 1, 8–10 (D.C. Cir. 2015), a D.C. Circuit panel held that a state agency had standing to challenge certain aspects of an EPA rule concerning operating limits for non-controlled backup generators. *Id.* at 10. Though the court observed that the state's standing proof in its opening brief was "thin," noting that it had not offered any "specific evidence that the winds carry pollutants from backup generators into the state, or in what quantity, or with what frequency," the court found that Delaware had a reasonable basis to believe that its standing to sue was self-evident in light of evidence in the record that emissions from backup generators contributed to ozone pollution and that Delaware's failure to meet air quality standards in parts of the state (i.e., its nonattainment status) was due largely to pollution from upwind sources. *Id.* at 8–9. Therefore, the court exercised its discretion to consider additional information the state agency had submitted with its reply brief, including the declarations of state officials explaining why nearby out-of-state backup generators that would likely increase their operations due to the rule would, in turn, harm the state's air quality. *Id.* at 8–10. The court declined to find standing, however, for portions of the rule governing areas for which Delaware had no credible claim of harm to state air quality. *Id.* at 10.

In *Indiana v. EPA*, 796 F. 3d 803, 809–11 (7th Cir. 2015), a Seventh Circuit panel held that Indiana had standing to challenge Illinois's revision of its state implementation plan (SIP) under the Clean Air Act. The court rejected Indiana's argument that EPA's approval of Illinois's relaxed program would make it harder for certain areas of Indiana to attain the ozone standards in the near future. *Id.* at 809. Those areas' nonattainment status, though cognizable, was not traceable to EPA's approval. *Id.* The court nonetheless found standing based on economic harm to the state itself, citing *Massachusetts*, 549 U.S. at 520 n.17. Although *Mellon* precluded Indiana from relying upon alleged economic harms to Indiana businesses from more stringent regulatory requirements, the state could sue based on the fact that continued nonattainment in the Chicago area would force Indiana to undertake additional actions to achieve attainment, like more vehicle emissions testing. *Id.* at 809–10. In a footnote, the court addressed but declined to resolve Indiana's additional argument that it had standing because of anticipated harm to air quality in Indiana. *Id.* at 810 n.5. The court noted that type of injury would normally give the state standing

as *parens patriae*, but not against the United States. *Id.* (citing *Massachusetts*, 549 U.S. at 520–23). Here, the court noted that *Massachusetts* suggested that certain *parens patriae* suits against EPA might be viable. *Id.* On the one hand, *Massachusetts* did instruct that states have "special solicitude" to sue the United States if a quasi-sovereign interest of the state is at stake. *Id.* On the other hand, while Massachusetts actually owned some of its coastal property, Indiana did not own its air. *Id.*

In *Air Alliance Houston v. EPA*, 906 F. 3d 1049, 1059–60 (D.C. Cir. 2018), a D.C. Circuit panel held that states had standing to challenge an EPA rule that delayed the effective date of additional safety protections to prevent and mitigate harms from accidents at facilities handling hazardous chemicals. The D.C. Circuit held that the states established standing based on "proprietary interests due to the expenditures states have previously made and may incur again when responding to chemical releases during the delay period," citing specific examples of costs incurred by states during past accidents. *Id.* "Monetary expenditures to mitigate and recover from harms that could have been prevented absent the Delay Rule," the court reasoned, "are precisely the kind of 'pocketbook' injury that is incurred by the State itself." *Id.* In light of this showing, the Court declined to reach the states' alternative standing argument that under the Clean Air Act, Congress abrogated the prudential bar on state *parens patriae* standing. *Id.*

In *California v. EPA*, 385 F. Supp. 3d 903, 909–11 (N.D. Cal. 2019), the district court held that California and six other states had standing to challenge EPA's failure to perform its nondiscretionary duty to approve or disapprove of state plans addressing emissions guidelines within the timeline set by the Clean Air Act. The court concluded that, as in *Massachusetts*, the states were entitled to "special solicitude," and the Clean Air Act gave Massachusetts a right to challenge EPA's failure to perform a non-discretionary duty. *Id.* at 910 (citing *Massachusetts*, 549 U.S. at 518). Of relevance to the court was that neither party disputed that solid waste landfills—the subject of the overdue state plans—were the "third-largest" domestic human source of methane. *Id.* EPA even detailed in its guidance the harms caused by methane emissions, and EPA had long ago determined that municipal solid waste landfills endanger public health or welfare. *Id.* Congress's expression of need for regulations in such circumstances, the court reasoned, supports the causal connection between the absence of those regulations and environmental harm. *Id.* at 911 (quoting *NRDC v. EPA*, 542 F. 3d 1235, 1248 (9th Cir. 2008)).

In *NRDC v. Wheeler*, 955 F. 3d 68, 77–78 (D.C. Cir. 2020), a D.C. Circuit panel found that the State of New York established standing to challenge an EPA guidance document that expanded the scope of entities exempt from a regulation limiting the use of hydrofluorocarbons (HFCs). Citing *Massachusetts*, 549 U.S. at 519, the court reasoned that the challenged guidance document, which was—in effect—a rule, would lead to an increase in HFC

emissions which would, in turn, lead to an increase in climate change, thereby threatening New York's proprietary interest in its coastal lands. *NRDC*, 955 F. 3d at 77. Vacatur of the guidance would redress that injury by reducing HFC emissions. *Id.*

In *Clean Wisconsin v. EPA*, 964 F. 3d 1145, 1158–60 (D.C. Cir. 2020), a D.C. Circuit panel found that Illinois and the City of Chicago had standing to challenge EPA's designation of a neighboring state as in attainment with Clean Air Act standards for ozone. They noted that, under *Mellon*, 262 U.S. at 485, "state governments cannot sue the federal government on behalf of their injured state citizens," but that the *Mellon* bar does not apply when a state sues in its capacity as a state rather than a representative of its citizens." *Clean Wisconsin*, 964 F. 3d at 1158. Thus, "[a] government that demonstrates direct harm to its economic, environmental, or administrative interests as a result of federal action may have standing to sue the federal government"—like Massachusetts's "particularized injury in its capacity as a landowner" or a city's allegations of economic injury stemming from the environmental impact of a challenged project. *Id.* The court noted that the petitioners' declaration referencing general harm to vegetation "sounds in the language of *parens patriae*," but that a supplemental declaration alleging that EPA's action would result in harm to plants and trees located in state and municipal-owned parks set forth particularized injuries to Illinois and Chicago as landowners. *Id.* at 1159–60. Though it observed that the *Mellon* bar speaks to prudential standing, the court expressly declined to address whether Congress, in the Clean Air Act, abrogated the *Mellon* rule when it authorized states to sue the federal government. *Id.* at 1161.

In *New Jersey v. EPA*, 989 F. 3d 1038, 1045–49 (D.C. Cir. 2021), a D.C. Circuit panel ruled in favor of state standing, finding New Jersey had standing to challenge an EPA rule concerning reporting and recordkeeping pursuant to a permitting program under the Clean Air Act—the New Source Review (NSR) program. The D.C. Circuit began its standing analysis by noting that New Jersey was "entitled to special solicitude" in the standing analysis because it has "quasi-sovereign interests" in reducing air pollution and a procedural right to challenge the Rule under the Clean Air Act. *Id.* at 1045. The court further noted that "although the Rule itself does not formally regulate petitioner, it directly implicates petitioner's ability to comply with its statutory obligations in administering the NSR program." *Id.* The court then found that New Jersey had identified two independently sufficient injuries: First, the Rule's inadequate recordkeeping and reporting requirements impaired New Jersey's delegated authority to implement its program to prevent significant deterioration (PSD) of air quality by necessitating additional "administrative costs and burdens" to ensure in-state sources comply with the PSD program. *Id.* at 1046. In so holding, the court reasoned that, "EPA's actions injure states when those actions necessitate changes to state laws and make 'the states

task of devising an adequate [state implementation plan]' 'more difficult and onerous.'" *Id.* (quoting *West Virginia v. EPA*, 362 F. 3d 861, 868 (D.C. Cir. 2004)). Second, the Rule harmed New Jersey's ability to attain the National Ambient Air Quality Standards due to unlawful emissions from upwind states because (1) the rule's inadequate recordkeeping and reporting requirements make NSR enforcement more difficult in upwind states; (2) inadequate NSR enforcement increases the risk of unlawful cross-state emissions; and (3) such cross-state emissions risk hampering petitioner's efforts to attain and maintain the NAAQS. *Id.* at 1047–48. Judge Walker penned a lengthy dissent arguing that New Jersey had not shown EPA's rule would cause injurious underreporting of undetected major changes, even though "courts owe states 'special solicitude' in EPA emissions cases." *Id.* (Walker, J., dissenting) (citing *Massachusetts*, 549 U.S. at 520).

In *Louisiana v. Biden*, 585 F. Supp. 3d 840, 852–59 (W.D. La. 2022), the district court found that Louisiana and other states had standing to seek a preliminary injunction on the implementation of an executive order reinstating the Federal Interagency Working Group (IWG) on Social Costs of Greenhouse Gas Emissions (SC-GHG) and ordering the IWG to publish interim estimates for the social cost of various greenhouse gases. The court identified a harm to Louisiana's sovereign interest (on the theory that SC-GHG estimates would impose new obligations on the states should they choose to continue participating in cooperative federalism programs) and a direct injury (on the theory that use of the SC-GHG would increase regulatory burdens and negatively impact revenues from oil and gas on which the states relied). *Id.* at 858. The Fifth Circuit stayed the district court's order pending appeal, concluding that the plaintiff states lack standing and so were unlikely to succeed on the merits. Order, *Louisiana v. Biden*, No. 22–30087, at *2 (5th Cir. Mar. 16, 2022). The "increased regulatory burdens that *may* result from the consideration of SC-GHG and interim estimates" in future federal rulemakings are "at this point, merely hypothetical," the court explained. *Id.* And the plaintiffs had not demonstrated redressability because federal agencies consider many other factors beyond the SC-GHG in deciding whether and how to regulate. *Id.* Plaintiffs' complaint amounted to a "generalized grievance" that fails to satisfy Article III standing. *Id.* Upon hearing the case, the Fifth Circuit confirmed that the plaintiff-states did not have standing to bring their claim as the possibility of regulation in the future is too speculative. *Louisiana v. Biden*, 64 F. 4th 674, 682–84 & n.52 (5th Cir. 2023). The court also found this case "lack[ed] the hallmarks of a State's 'special solicitude'" because there was no direct impact on the States' law or policy. *Id.* at 683. Without proof of an actual injury, the States lacked standing. *Id.*

In *Missouri v. Biden*, 52 F. 4th 362 (8th Cir. 2022), *cert denied Missouri vs. Biden*, U.S., No. 22–1248 (Oct. 10, 2023), an Eighth Circuit panel held that a group of states led by Missouri did not have standing to challenge the same

executive order reinstating the IWG's SC-GHG. The court concluded that the states' allegation of direct monetary injury (i.e., costs to states as purchasers of more heavily regulated goods and services and loss of future tax revenues from a more heavily regulated economy) did not amount to a concrete injury. *Id.* at 368. Such harms relied on a "highly attenuated chain of possibilities," including whether an agency will rely on the SC-GHG in crafting a rule and disregard any objections to its methodology, and whether that eventual rule will harm the agency. *Id.* The court also rejected the states' claim of sovereign injury to their role as regulators in cooperative federalism programs. *Id.* The court observed that "[w]hether and when alleged sovereign injuries can constitute the concrete and particularized injury in fact required for Article III standing is a controversial, unsettled question, as the Supreme Court's 5 to 4 decision in *Massachusetts* . . . makes clear." *Id.* at 369 (citation omitted). But "[e]ven if the States as sovereigns are entitled to some undefined 'special solicitude' in the standing analysis," the states in this case had not met the basic requirements of Article III standing because the challenged actions do not impose any burdens on the states. *Id.* Finally, the court rejected the states' claim of procedural injury because a procedural right by itself is insufficient to confer standing absent some related specific harm, and the states had not established that the IWG is an agency subject to notice and comment requirements under the Administrative Procedure Act, 5 U.S.C. § 551(1). *Id.* at 371.

In *California v. EPA*, 72 F. 4th 308 (D.C. Cir. 2023), a D.C. Circuit panel found that Massachusetts and thus plaintiff-states had standing to challenge EPA's "Aircraft Rule" regulating airplane emissions under the Clean Air Act. The Court quickly dealt with standing by recognizing the analogous facts between the case and *Massachusetts v. EPA* and found the cases "nearly identical" for standing purposes. *Id.* at 313. According to the court, "[i]f Massachusetts had standing in *Massachusetts v. EPA*, then it necessarily has standing here." *Id.* The injury in the case is the potential loss of coastal land by Massachusetts due to climate change, and just like in *Massachusetts*, this injury is traceable to the failure of the Rule to be more stringent, and the relief sought by the states would reduce the injury at least to some extent. *Id.* The court did not discuss states' "special solicitude."

In *Ohio v. EPA*, 98 F. 4th 288, 299–305 (D.C. Cir. 2024), a D.C. Circuit panel found that Ohio and sixteen other states had not established standing to challenge EPA's reinstatement of a 2013 decision to waive federal preemption of California regulations regarding motor vehicle emissions under the federal Clean Air Act. The court concluded that the states had not demonstrated that their claimed economic injuries—increased costs of conventional vehicles, reductions in fuel tax revenue, and harms to state electricity grids from increased electric vehicles—were redressable by the court. *Id.* at 300–02. The court explained that the states' claimed injuries hinged on the actions of third parties—the automobile manufacturers subject to the waiver and more

stringent California standards. *Id.* at 302. But the states had failed to point to any evidence demonstrating that manufacturers would change course with respect to relevant motor vehicle model years as a result of the court's decision. *Id.* In so holding, the court acknowledged the "'greater leeway' afforded to states seeking to protect quasi-sovereign interests," but concluded that such special solicitude "cannot save defective standing claims when, as here, the record is 'almost completely silent' with respect to an element of a state's standing." *Id.* at 303–04 (quoting *Alaska v. USDA*, 17 F. 4th 1224, 1230 (D.C. Cir. 2021)). The court did, however, conclude that the states had standing to raise a constitutional "equal sovereignty" challenge to the waiver reinstatement because their constitutional injury could be redressed even absent evidence of economic injury. *Id.* at 306–08.

In *Kentucky v. Fed. Highway Admin.*, No. 5:23-CV-162-BJB, 2024 WL 1402443, at *2 (W.D. Ky. Apr. 1, 2024), the district court held that Kentucky and twenty other states had standing to sue to prevent enforcement of a Federal Highway Administration rule requiring states to set declining targets for tailpipe carbon dioxide emissions from motor vehicles on the National Highway System. The court focused on the evidence needed to establish standing and ultimately concluded based on the factual record that Kentucky would incur compliance costs as a result of the rule, which imposes legal obligations directly on states themselves. *Id.* at *3–4.

b. Water Cases

In *Natural Resources Defense Council v. EPA*, 542 F. 3d 1235, 1248–49 (9th Cir. 2008), a Ninth Circuit panel found that Connecticut and New York had standing to compel EPA to promulgate effluent limitation guidelines and new source performance standards for stormwater pollution from the construction and development industry. The court concluded that the states' "proprietary interest in protecting their waterways" constituted a sufficient injury in fact, and the states' declarations and Congress's passage of the Clean Water Act demonstrated that the lack of national standards caused pollution that harmed their waterways. *Id.* In a footnote, the court rejected the argument that states are barred from litigating as *parens patriae* to enforce a federal statute against the federal government. *Id.* at 1249 n.8. Citing *Massachusetts*'s application of "special solicitude," the court noted that the states in *NRDC* also had a quasi-sovereign interest in protecting their waterways from out-of-state pollution. *Id.*

In *Texas v. EPA*, 662 F. Supp. 3d 739 (S.D. Tex. 2023), and in *West Virginia v. EPA*, 669 F. Supp. 3d 781 (D.N.D. 2023), two district courts found states had standing to bring challenges against the EPA's "waters of the United States" regulation given states' special solicitude in protecting quasi-sovereign interests. The Southern District of Texas granted a preliminary injunction for plaintiff-states, finding that the states have standing in their "special solicitude" to protect the "quasi-sovereign interests in regulating the land and water with

their borders." *Texas*, 662 F. Supp. 3d at 749–51. In addition to the states' special solicitude, the Court reviewed Texas's declarations claiming that mitigation and compliance costs associated with the rule would injure the state. *Id.* at 751. Similarly, in *West Virginia*, the court found a cognizable harm in these same quasi-sovereign interests and issued a preliminary injunction. *West Virginia*, 669 F. Supp. 3d at 797–98. In fact, the District of North Dakota quoted the court in *Texas* to acknowledge that states' special solicitude and sovereign interests are impacted by the rule. *Id.* The court then identified additional injuries to plaintiff-states in the costs the states will be subjected to in complying with the rule, as well as the injury to states as landowners whose waters will now be under Clean Water Act jurisdiction. *Id.* at 798.

In *Kentucky v. EPA*, No. 3:23-CV-00007-GFVT, 2023 WL 3326102 (E.D. Ky. May 9, 2023), the district court found that the states did not have standing in their pursuit of an emergency injunction pending appeal against the same "waters of the United States" regulation. Responding to the states' argument that their special solicitude grants them standing in protecting their quasi-sovereign interest over their water and land, the Court found the evidence supported only de minimis changes in jurisdiction under the new rule, meaning the infringement on states' sovereignty was not "certainly impending." The Court went on to find that economic injuries based on complying with the rule, as well as potential injuries to the states as landowners, were also too speculative and not "certainly impending" given the evidence showed such limited changes to jurisdiction under the new rule. *Id.* at *3–4.

c. Hazardous Waste Cases

In *Environmental Integrity Project v. McCarthy*, 319 F.R.D. 8, at *13–15 (D.D.C. 2016), the district court found that North Dakota lacked standing to intervene in support of EPA in a lawsuit challenging EPA's failure to revise standards governing the handling and disposal of oil and gas waste under the Resource Conservation and Recovery Act (RCRA). North Dakota's argument that more stringent EPA regulations would threaten its oil and gas industry, reduce its tax intake, and interfere with its sovereign rights to regulate within its own borders were speculative. *Id.* at *14. The mere possibility of future regulation did not give rise to a cognizable interest under Article III. *Id.* The court also rejected North Dakota's argument that it was entitled to special solicitude in demonstrating standing under *Massachusetts*. *Id.* at 16 n.6. North Dakota was still required to show an injury in fact, as Massachusetts had done in identifying harm to its coastal property. *Id.* But North Dakota had "not alleged an analogous injury in fact to the earth and air within its domain." *Id.* (quoting *Massachusetts*, 549 U.S. at 519) (cleaned up).

In *Hanford Challenge v. Moniz*, 218 F. Supp. 3d 1171 (E.D. Wash. 2016), the district court held that the state of Washington had standing to sue the Department of Energy under RCRA related to threatened harm to workers from the handling, treatment, and disposal of hazardous waste at the Hanford

Nuclear Site. In so holding, the court initially rejected the argument that the *parens patriae* bar announced in *Mellon* was not a prudential limit that could be abrogated by Congress, noting that *Massachusetts* acknowledged a state's ability to sue the federal government under a federal statute to protect its quasi-sovereign interests. *Id.* at 1177–78. The court concluded that, under RCRA, Congress overrode any *parens patriae* prudential standing limitation. *Id.* at 1178. Next, the court found "little merit to the DOE's argument that the State is barred from asserting its RCRA claim because the State seeks to interfere with federal powers" given RCRA's citizen suit provision plainly authorizing states to bring cases against the federal government *parens patriae*. *Id.* at 1178–79. Progressing to whether Washington had established standing, the court characterized *parens patriae* standing as an additional "means of establishing an injury where one would otherwise not exist," but said that to do so a state must demonstrate an injury sought to be addressed by RCRA, articulate an interest apart from particular private parties, and identify a quasi-sovereign interest in bringing the action notwithstanding the "special solicitude" afforded to the state. *Id.* at 1180 (quoting *Massachusetts*, 549 U..S. at 520). In this case, the court concluded, Washington had sufficiently alleged a quasi-sovereign interest—the health and well-being of its residents that work within its borders, including future workers at the Hanford site—to have standing to sue. *Id.* at 1182.

d. Environmental Review and Land Management Cases

In *New Mexico ex rel. Richardson v. BLM*, 565 F. 3d 683, 696 n.13 (10th Cir. 2009), a Tenth Circuit panel found, in a long footnote, that New Mexico had standing to challenge the Bureau of Land Management's (BLM) decision to open up federal lands in the Otero Mesa to oil and gas drilling under the National Environmental Policy Act (NEPA). "In determining that New Mexico has standing because of the threat of environmental damage to lands within its boundaries," the court "consider[ed] that states have special solicitude to raise injuries to their quasi-sovereign interest in lands within their borders. *Id.* (citing *Massachusetts*, 549 U.S. at 519–20). New Mexico had sufficiently alleged cognizable harm to its lands as well as a financial burden through the costs of lost resources such as water from the Salt Basin Aquifer that BLM's decision imperiled. *Id.* In so holding, the court characterized *Massachusetts* as allowing standing to sue for relief from pending environmental harm that is sufficiently concrete and recognized that states may have concrete environmental interests in lands they do not own. *Id.*

In *Sierra Forest Legacy v. Sherman*, 646 F. 3d 1161, 1178–79 (9th Cir. 2011), a Ninth Circuit panel similarly found that the State of California had standing to challenge United States Forest Service's (USFS) national forest management guidelines for 11.5 million acres in the Sierra Nevada region under NEPA and the National Forest Management Act. The court began by noting broadly that California, "like all states," did not have *parens patriae* standing against

the federal government. *Id.* at 1178. But the court also emphasized that states' "well-founded desire to preserve [their] sovereign territory supports federal jurisdiction," *id.* (quoting *Massachusetts*, 549 U.S. at 519), and that political bodies may "uniquely" sue to protect their proprietary interests that may be "congruent" with those of its citizens, *id.* (quoting *City of Sausalito v. O'Neill*, 386 F. 3d 1186, 1197 (9th Cir. 2004)). In this case, California had proprietary interests from direct harm and spillover effects of actions on federal lands, which implicated "wildlife, water, State-owned land, and public trust lands in and around the Sierra Nevada." *Id.* The potential injury to California's "concrete interests spanning its entire territory" was "neither vague nor speculative." *Id.* at 1178–79. The court also recognized California's procedural injury from adoption of the management plan. *Id.* at 1179.

In *Wyoming v. United States Dep't of Interior*, 674 F. 3d 1220, 1230–35 (10th Cir. 2012), a Tenth Circuit panel found that the State of Wyoming did not have standing to challenge a regulation restricting snowmobile use in Yellowstone and Grand Tetons National Parks under NEPA, the Administrative Procedures Act, and other statutes. The court began its standing discussion by noting that Wyoming agreed that it could not bring an action *parens patriae*. *Id.* at 1231; *see also id.* at 1232. Then, the court rejected Wyoming's contention that the rule resulted in economic loss and adverse displacement effects that violated their sovereign and proprietary interests. *Id.* at 1231–32. The court found no evidence in the record that the regulations impacted Wyoming's promotion of tourism, reduced sales revenue, reduced park entries, or reduced tax revenue. *Id.* at 1233–34. In so holding, the court noted that "finding standing where a federal regulation would have solely a 'generalized impact' on the economy of a state or a state's general tax revenues" would "create a dangerous precedent," but left open a path for state standing where a state demonstrated 'a fairly direct link between the state's status as a . . . recipient of revenues and the legislative or administrative action being challenged.'" *Id.* at 1234 (citing *Pennsylvania v. Kleppe*, 533 F. 2d 668, 672 (D.C. Cir. 1976)). And the court found no concrete evidence that snowmobiles would be displaced from the parks to other land within the state. *Id.* at 1236. Likewise, Wyoming failed to show that the Department of Interior violated NEPA in a way that created an increased risk of environmental harm—the procedural injury against which NEPA protects. *Id.* at 1237. Because Wyoming failed to establish a concrete injury, the court rejected its claim that it was entitled to "special solicitude," noting "the lack of guidance on how lower courts are to apply the special solicitude doctrine to standing questions." *Id.* at 1238 (citing *Delaware v. Dep't of Natural Res. & Envt'l Control v. FERC*, 558 F. 3d 575, 579 n.6 (D.C. Cir. 2009)).

In *Government of Manitoba ex rel. Schmitt v. Bernhardt*, 923 F. 3d 173, 177–83 (D.C. Cir. 2019), a D.C. Circuit panel held that the State of Missouri lacked standing to challenge under NEPA and the APA the Bureau of Land Reclamation's approval of a water development project. The court rejected

Missouri's claimed direct injury (harm to its riverfront property) because it had failed to press the claim in the district court. *Id.* at 179. And the court also rejected Missouri's claim of *parens patriae* standing, noting that Missouri "faces an uphill claim" because the *Mellon* bar "declares that a State lacks standing as *parens patriae* to bring an action against the federal government." *Id.* at 179 (citing *Mellon*, 262 U.S. at 485–86). Although the court recognized that *Mellon* established a prudential (not constitutional) standing rule, Congress had not abrogated the *Mellon* rule when it created a general cause of action under the APA. *Id.* at 180 (distinguishing Natural Gas Act's authorization for states to sue the federal government in *parens patriae* capacity). The court noted in a footnote that Missouri had not argued that NEPA authorized it to sue the federal government in *parens patriae* capacity. *Id.* at 181 n.4. Finally, the court rejected the argument that *Massachusetts* authorized its lawsuit against BLM by creating an exception to the *Mellon* rule. *Id.* at 181–83. The court emphasized that *Massachusetts*'s discussion of quasi-sovereign interests in affording special solicitude to the state had created "some confusion." *Id.* at 182 (citing *Massachusetts*, 549 U.S. at 519–20). But *Massachusetts* was not a *parens patriae* case, the court noted, because Massachusetts had asserted its own direct injury and statutory right. *Id.* The court reasoned that *Massachusetts*'s discussion of *Mellon* preserves the bar on *parens patriae* lawsuits and only allows states to sue based on their rights under federal law, "not a *parens patriae* lawsuit at all." *Id.* (citation omitted). The court also noted that to read *Massachusetts* as allowing *parens patriae* suits against the United States would "make[] little sense in light of the vertical federalism interest underlying the *Mellon* bar." *Id.* at 183. "It is the State's representation that usurps the role of the federal government, not the legal theory underlying its complaint," the court explained. *Id.*

In 2020, in *California v. BLM*, 612 F. Supp. 3d 925, 934–36 (N.D. Cal. 2020), the district court found that California had standing to challenge a BLM rule that repealed a regulation restricting hydrofracturing on public lands. The court began by noting that states have "special solicitude" in the standing analysis and can sue to assert their quasi-sovereign interests in the health, physical, and economic wellbeing of their residents. *Id.* (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982)). It then found that California had successfully alleged both economic injury and procedural injury. *Id.* Regarding the former, because the challenged rule eliminated an additional layer of regulatory protection on federal lands in California that supplemented the state's hydrofracturing regulations, responsibility for ensuring compliance with regulatory requirements would fall entirely on California and place additional burdens on the state's resources. *Id.* Such monetary expenses, the court found, constituted a "pocketbook injury" suffered by the state itself. *Id.* at 935 (quoting *Air Alliance Houston v. EPA*, 906 F. 3d 1049, 1059–60 (D.C. Cir. 2018)). California also successfully demonstrated a procedural injury sufficient to confer standing, the court concluded, by alleging that BLM failed to comply

with NEPA in promulgating a rule that removed numerous provisions designed to protect the environment, thus increasing the risk to the environment. *Id.*

In *Alaska v. USDA,* 17 F. 4th 1224, 1226–27 (D.C. Cir. 2021), a D.C. Circuit panel dismissed as moot Alaska's challenge to the U.S. Forest Service Roadless Rule, which applied to limit development in two national forests in Alaska. In so holding, however, the court concluded that Alaska failed to introduce any evidence before the district court regarding what injury, if any, it suffered from the rule's application to one of its national forests. *Id.* at 1230. The court acknowledged that "states have greater leeway in showing standing given the 'special solicitude' they receive for matters involving their 'quasi-sovereign interests,'" but concluded that Alaska still had to show actual harm and not merely allege it at this stage of litigation. *Id.* (quoting *Massachusetts*, 549 U.S. at 520).

In *Arizona v. Mayorkas*, 600 F. Supp. 3d 994 (D. Ariz. 2022), the district court concluded that Arizona had standing to challenge under NEPA a series of immigration policies that, the state claimed, would bring more trash, emissions, and population growth and harm native species. The court had initially denied Arizona's motion for preliminary injunction, *Arizona v. Mayorkas*, 584 F. Supp. 3d 783, 794–802 (D. Ariz. 2022) (appeal dismissed), but, after full briefing and argument, found that Arizona had standing to challenge under NEPA one of the challenged policies because, as the Fifth Circuit had recently held in *Texas v. Biden*, 20 F. 4th 928, 966 (5th Cir. 2021), the presence or absence of the policy was the but-for cause of whether certain aliens remained in the United States or were returned to Mexico. *Arizona v. Mayorkas*, 600 F. Supp. 3d at 1001. Arizona lacked standing to pursue its other claims, however. *Id.* at 1003–06. Drawing on the Sixth Circuit's standing analysis in *Arizona v. Biden*, 31 F. 4th 469, 747–75 (6th Cir. 2022), the court concluded that the state's claims "hinge[d]" on the actions of too many third parties to have requisite imminence or causation. *Id.* at 1006. The court also noted that it was unclear whether "special solicitude" applies to causation and, even if it does, it does not liberate the states from establishing causation and redressability. *Id.* at 1001.

e. Wildlife Cases

In *Otter v. Salazar*, 2012 U.S. Dist. LEXIS 111743, at *30–35 (D. Idaho Aug. 8, 2012), the district court found that the State of Idaho had standing to challenge under the Endangered Species Act (ESA) and the APA a rule listing a grass species as endangered. The court emphasized the special solicitude afforded to states in the standing analysis, repeating the *Georgia v. Tennessee Copper* passage quoted in *Massachusetts* regarding states' unique interests in their capacity as quasi-sovereign. *Otter*, 2012 U.S. Dist. LEXIS 111743, at *31–32 (quoting *Georgia v. Tennessee Copper Co*., 206 U.S. 230, 237 (1907)). The court then found both actual and procedural injuries. The rule and subsequent critical habitat designation stemming from it would restrict use of more than 60,000 acres in Idaho, much of which was owned by the state. *Id.* at *32–33. The court also found a procedural injury from the Secretary of the

Interior's failure to comply with certain procedures under the ESA, potentially changing the outcome of the rulemaking process and threatening the state's land management authority. *Id.* at *34.

In *Sturgeon v. Mascia*, 768 F. 3d 1066 (9th Cir. 2014) (vacated on other grounds), a Ninth Circuit panel concluded that the State of Alaska lacked standing to intervene in a case challenging, under the Alaska National Interest Lands Conservation Act (ANILCA), the National Park Service's (NPS) guidelines prohibiting the operation of hovercrafts on rivers, part of which fell within a national preserve. *Id.* at 1072–75. Alaska challenged NPS's authority to require state researchers to obtain a permit before conducting a study on chum and sockeye salmon on the Alagnak River, part of which falls within the Katmai National Park and Preserve. *Id.* at 1069. Alaska claimed that the regulations requiring a permit increased the staff time and expense and delayed the state research project; interfered with its sovereign right to manage lands and waters; and chilled its citizens' ability to enjoy "the rights and benefits flowing" from the state's management of its own resources. *Id.* at 1072. As to the first claimed injury, the court found that the increased burdens imposed by the NPS permit requirement—including handling of research specimens and cataloguing, labeling, and reporting requirements "clearly constitute injuries in fact." *Id.* at 1073. Nonetheless, the court found that a favorable ruling would not redress these injuries because Alaska sought an injunction on future application of the regulations, which would not remedy the injuries Alaska already suffered in completing its study. Alaska's second claimed injury—harm to its sovereign and proprietary interests in its lands and waters—presented "a closer question" but also failed because Alaska did not identify any conflict between the guidelines and Alaska's own statutes and regulations or otherwise show how the requirement interfered with the state's control of its lands and waters. *Id.* at 1073–74. Acknowledging the "special solicitude" accorded states, the court emphasized that states still must show injury in fact. *Id.* at 1074. Finally, the court rejected Alaska's claimed procedural injury on the ground that Alaska again failed to identify any concrete interest threatened by denial of its petition for new administrative proceedings. *Id.* at 1075.

In *Colorado v. U.S. Fish and Wildlife Serv.*, 362 F. Supp. 3d 951, 963–65 (D. Colo. 2018), the district court Colorado held that the states of Colorado and Utah had standing to challenge the Fish and Wildlife Service's rule listing the sage grouse as an endangered species. The court found that the states and local government plaintiffs had alleged specific facts highlighting impediments to their sovereign and proprietary interests attributable to the rule. *Id.* Acknowledging that states have special status in the standing inquiry, the court explained that the states in this case alleged increased risk of environmental, economic, and regulatory injury to government-owned property and other proprietary interests, such as curtailment of state planning efforts, conservation programs, and general governance. *Id.*

In *NRDC v. DOI*, 397 F. Supp. 3d 430, 438–44 (S.D.N.Y. 2019), the U.S. District Court for the Southern District of New York found that New York and other states had standing to challenge DOI's interpretation that the Migratory Bird Treaty Act, 16 U.S.C. § 703, does not prohibit incidental take of migratory birds. The court found that the challenged agency action (the so-called "Jorjani opinion") created substantial risk that migratory birds owned by the states will be killed by private actors—an injury to its proprietary interest in wildlife within its borders. *Id.* at 439. For example, the court explained that under New York law, the State owns all game and wildlife in the state not owned by private interests, including well over 300 species that migrate through the state. *Id.* By barring criminal prosecution for taking migratory birds, the Jorjani opinion eliminated the primary incentive private actors had to take precautionary measures to minimize or prevent bird deaths or to avoid altogether certain industrial activities that create a risk of such deaths. *Id.* The court also found that the states demonstrated causation and redressability because the alleged injury was the predictable effect of the challenged government action on the decisions of third parties. *Id.* at 441.

In *Bullock v. U.S. BLM*, 489 F. Supp. 3d 1112 (D. Mont. 2020), the U.S. District Court for the District of Montana held that Montana had standing to challenge whether William Pendley, Acting BLM Director, was serving in violation of the Appointments Clause of the U.S. Constitution. The court first noted that Montana likely would have standing based on the impacts of one of the policies adopted during Pendley's tenure on lands within Montana's borders, but declined to resolve the issue in light of other sufficient bases for standing. *Id.* at 1120. Specifically, the court recognized that states are entitled to "special solicitude in the standing analysis to recognize their quasi-sovereign status." *Id.* at 1121. In this case, the court held, Montana suffered a procedural injury because Pendley had allegedly unlawfully reviewed and resolved its protests on two Resource Management Plans. *Id.* at 1122–23. And the harm to fish and wildlife habitat, cultural resources, and recreational uses on federal and state-owned and state managed lands near those lands will take place within Montana's borders, presenting a "potent concern for Montana as a quasi-sovereign with traditional state interests over its land, water, air, and wildlife." *Id.* at 1123 (citing *Tennessee Copper*, 206 U.S. at 237). The court separately found standing based on Montana's "'special position and interest' as a State." *Id.* at 1123–24. The court explained that BLM manages 27 million acres of land in the state, nearly a third of its land mass and that Pendley's alleged unlawful management of that land harms concretely Montana's interest in land, water, air, and wildlife within its domain and the state's interest in enforcing its environmental laws. *Id.* at 1124. The "special solicitude" granted to states, independent of the procedural injury alleged, reinforced Montana's standing to bring its claims. *Id.*

In *California v. Bernhardt*, 460 F. Supp. 3d 875, 884–92 (N.D. Cal. 2020), the district court concluded that states had standing to challenge three rules

revising longstanding Endangered Species Act regulations, denying DOI's motion to dismiss. A group of states led by California, Massachusetts, and Maryland challenged three rules issued under ESA governing species listing, interagency consultation, and protections for threatened species. *Id.* at 883. The court began its standing analysis by noting that states are due "special solicitude" in the standing analysis. *Id.* at 885. The court then went onto find that the states successfully established both substantive and procedural injuries. As to substantive injuries, the states alleged that the rules violated ESA's language, structure, and purpose and these violations would result in concrete injuries, detailing (1) the species and land in each state subject to ESA regulations, (2) the rules' weakening of ESA safeguards, and (3) the expected biological harms (e.g., loss of biological diversity) and economic harms (e.g., greater burdens on the states to step into the shoes of DOI to protect species) resulting from the weakened protections. *Id.* at 885–88. The states had sufficiently alleged an enhanced risk of biodiversity loss and degradation of fish and wildlife natural resources following from DOI's weakening of ESA safeguards designed to protect endangered species located in the states. *Id.* at 887–88. Citing *Massachusetts*, 549 U.S. at 523, the court explained the rules caused this increased risk and their vacatur would lessen it, thus satisfying the causation and redressability prongs of the standing inquiry. *Bernhardt*, 460 U.S. at 888–89. As to procedural injury, the court found that the states alleged cognizable procedural harms as the states had alleged specific facts about the species, critical habitats, facilities and projects subject to the regulations, a reasonable risk that the rules would threaten their natural resources, and a risk that the rules would result in economic harm to the states that would need to fill the regulatory gap. *Id.* at 889–92.

In *Louisiana v. National Oceanic & Atmospheric Administration*, 70 F. 4th 872, 884 (5th Cir. 2023), the Fifth Circuit found the state of Louisiana did not have standing to challenge a National Marine Fisheries Service rule that required "turtle excluder devices" on shrimping boats. The State argued it had standing under a *parens patriae* theory based on its quasi-sovereign interests in the economic well-being of the State. While the Fifth Circuit agreed that a state can assert standing under this theory "in a representative capacity to vindicate an injury to a 'sufficiently substantial segment of its population,'" it found the State failed to present evidence to support its argument. *Id.* at 878, 881. The evidence did not support an economic injury specifically for Louisiana nor for a sufficient segment of its population, but instead the evidence only showed that the shrimping industry across Gulf of Mexico would be affected; without evidence of the rule affecting Louisiana's specific shrimping industry, the court found there was no cognizable injury under this theory. *Id.* at 881. Louisiana had cited its "special solicitude" to support its *parens patriae* argument, but the court noted such invocation could not save Louisiana because it does not lessen the requirement that an injury be concrete and particularized. *Id.* at 882.

f. Energy and Extraction Cases

In *Delaware Department of Natural Resources and Environmental Control v. FERC*, 558 F. 3d 575, 578–79 (D.C. Cir. 2009), a D.C. Circuit panel found that a state environmental agency lacked standing to challenge FERC orders under the Natural Gas Act that conditionally approved the siting and construction of a liquid natural gas terminal on the Delaware River. Given that Delaware could and, in fact, already did, block the project pursuant to the Coastal Zone Management Act and the Clean Air Act, FERC's alleged ultra vires approval of the terminal did not result in any injury in fact to the state. *Id.* at 578. Delaware's alleged concern that it would face increasing political pressure to reverse its previous decision rejecting the project did not state a cognizable injury. *Id.* The state agency's contention that it suffered a procedural injury by FERC's approval of the project notwithstanding, Delaware's previous rejection failed because it was not related to any concrete substantive interest. *Id.* at 578–79. The D.C. Circuit also rejected Delaware's contention that the "special solicitude" due to it under *Massachusetts* afforded it standing. *Id.* at 579 n.6. State plaintiffs must still show harm, the court reasoned, and in *Massachusetts* the state provided declarations demonstrating harms from climate change attributable to EPA's decision. *Id.*

In *NRDC et al. v. NHTSA*, 894 F. 3d 95, 103–05 (2d Cir. 2018), a Second Circuit panel concluded that states had standing to challenge NHTSA's rule delaying a penalty increase on manufacturers of motor vehicles that failed to comply with fuel economy standards under the Energy Policy and Conservation Act. The court explained that "the Supreme Court has specifically recognized states' standing to sue in cases implicating environmental harms," and that the fact "[t]hat a state's own territory is the 'territory alleged to be affected' by the challenged action 'reinforces the conclusion that its stake in the outcome of the case is sufficiently concrete to warrant the exercise of federal judicial power.'" *Id.* at 103–04 (quoting *Massachusetts*, 549 U.S. at 519). These principles and the states' declarations led the court to conclude the states had established an injury in fact. The Court further found the traceability and redressability prongs met, reasoning that "[t]he removal of the increased penalty easily satisfies the standing requirements of causation and redressability" because financial incentives deter unlawful conduct. *Id.* at 104–05.

In *Louisiana v. Biden*, 622 F. Supp. 3d 267, 285–86 (W.D. La. 2022), the district court found that thirteen states had standing to challenge—under the APA, the outer Continental Shelf Lands Act, and the Mineral Leasing Act—an executive order pausing new oil and gas leases on federal lands and offshore waters. The court had initially granted Louisiana's motion for preliminary injunction, finding that the states had alleged sufficient injury (alleged loss of proceeds, royalties, and other income from oil and gas lease sales) for standing purposes and that special solicitude also warranted finding standing. *See Louisiana v. Biden*, 543 F. Supp. 3d 388, 403–04 (W.D. La. 2021). After

the Fifth Circuit vacated the preliminary injunction on other grounds, *State of Louisiana v. Biden*, 45 F. 4th 841 (5th Cir. 2022), the court issued its decision on the merits, again concluding that the plaintiff states had established standing. *Louisiana v. Biden*, 622 F. Supp. 3d at 285–86. The court began the standing discussion by highlighting the "special solicitude" afforded to states "in satisfying [the] burden to demonstrate the traceability and redressability elements of the traditional standing inquiry" whenever states "allege that a defendant violated a congressionally accorded procedural right that affects the state's 'quasi-sovereign' interests in, for instance, its physical territory or lawmaking function." *Id.* at 284 (quoting *Massachusetts*, 549 U.S. at 519). The court concluded that the states' alleged loss of proceeds from bonuses, land rents, royalties, and other income and the loss of jobs and economic damage from the paused lease sales—allegations supported by declarations—were concrete, particularized and imminent, traceable to the challenged action, and redressable by its vacatur. *Id.* at 285–86. And, as it did in granting the preliminary injunction, the court again concluded that even though the states had proven standing "through the normal inquiry, they can also establish standing as a result of special solicitude" because the APA bestowed on them a right and the challenged action affects the states' sovereign interests—for example, damage to economics, loss of jobs, funding for coastal erosion, and funding for state and local governments. *Id.* at 286.

g. Environmental, Social, and Governance Matters

In *Texas v. Sec. Exch. Comm'n*, No. 23–60079, 2024 WL 2106183 (5th Cir. May 10, 2024), a Fifth Circuit panel held that Texas, Louisiana, Utah, and West Virginia had not established standing to challenge a Securities and Exchange Commission (SEC) rule requiring funds to disclose votes on environmental, social, and governance (ESG) matters. The court concluded that the states had not pointed to any evidence that their alleged threatened future economic injury—passthrough to state investors of funds' regulatory costs in complying with the rule—would come to pass. *Id.* at *2. The court also rejected the states' *parens patriae* theory, premised on the "states' 'quasi-sovereign interest' in their citizens' economic well-being." *Id.* The court explained that "[g]enerally, a state cannot bring a *parens patriae* suit against the federal government" and noted that circuits are split "on whether and to what extent states can still bring a *parens patriae* suit against the federal government when a state asserts its own sovereign or quasi-sovereign interest." *Id.* The court declined to wade into that debate, concluding that there was insufficient record evidence that the SEC rule infringed on the states' alleged quasi-sovereign interest in any event. *Id.*