Article

Not-So-Special Solicitude

Katherine Mims Crocker†

In a high-profile 2023 case about state standing to sue in federal court, Justice Gorsuch deemed it "hard not to wonder why" the majority said "nothing about 'special solicitude.'" The silence was indeed surprising, for in a landmark decision several years earlier, the Supreme Court had declared that states were "entitled to special solicitude"—presumably meaning some sort of preferential treatment—"in [the] standing analysis." And since then, commentators have depicted the concept as permitting opportunistic states to wage ideological crusades in courts across the country, especially through administrative-law attacks on federal-government defendants.

But what if "special solicitude" is not so special after all? With a deep dive into appellate caselaw, this Article argues just that. After discussing how special solicitude has faded from explicit prominence in Supreme Court precedent, the Article analyzes the Court's state-standing decisions to determine whether

† Professor of Law, Texas A&M University School of Law; Faculty Director, Center on the Structural Constitution, Texas A&M University School of Law; Affiliate, Stanford Constitutional Law Center, Stanford Law School. For helpful comments and conversations, thank you to Jonathan Adler, Will Baude, Aaron Bruhl, Amanda Frost, Tara Leigh Grove, Matt Hall, Jake Hamburger, Alli Orr Larsen, Jonathan Nash, Bob Pushaw, Richard Re, Erica Shuler, Jonathan Siegel, Robert Westley, and participants in the Standing Doctrine Conference hosted by the Constitutional Law Institute at the University of Chicago Law School, the 2023 Southeastern Junior/Senior Conference hosted by the University of Florida Levin College of Law, the 2024 Junior Faculty Federal Courts Workshop hosted by the George Washington University Law School, the 2024 Administrative Law New Scholarship Roundtable hosted by Notre Dame Law School, the 2024 Constitutional Law Colloquium hosted by Florida State University College of Law and Loyola University Chicago School of Law, and faculty workshops at Texas A&M and William & Mary Law School. For excellent research assistance, thank you to Kevin Ingenito and Bobby Nevin.

the concept has exerted implicit influence. To the contrary, the Court has narrowed multiple aspects of justiciability law that state-standing skeptics have long criticized as faulty for the nation's federalist structure, including in key cases from the last two years.

The Article then catalogues each and every state-standing case from the federal courts of appeals to discuss special solicitude. This examination finds no consensus about what the concept means—but again concludes that it appears to lack doctrinal significance. Courts often deny state standing or pronounce special solicitude extraneous to the analysis. And even where courts purport to apply it, special solicitude rarely if ever makes a dispositive difference in state-standing cases.

At the very least, this Article argues, special solicitude plays a smaller part in federal-courts doctrine than conventional wisdom assumes. Accordingly, scholars and other stakeholders hoping to improve this important area of constitutional law should focus less on special solicitude as a doctrinal matter and more on other areas of potential reform.

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INTRODUCTION

Since the 2007 Supreme Court case *Massachusetts v. Environmental Protection Agency* declared that states were "entitled to special solicitude in [the] standing analysis," commentators have depicted the concept as allowing state plaintiffs to bring suits willy-nilly in federal court, often against the federal government and for purely political reasons.[1] Last year, for instance, Professors Samuel L. Bray and William Baude said that "special solicitude" has "produc[ed] a barrage" (even an "explo[sion]") of suits against ideological opponents featuring "tenuous" (even "extravagant") standing theories.[2] "[T]here is danger in countenancing" such theories, they said, "lest state standing be allowed to transform the role of the federal judiciary."[3]

Bray and Baude are scholars of the highest caliber, not prone to hyperbole. And their criticisms sound in a common refrain. "There is good reason to think that this special solicitude stuff has kind of gotten out of hand," Professor Jonathan H. Adler told the *New York Times*.[4] For "[s]tate politicians are using state standing as a way of waging what are political or policy battles against the current administration in court as opposed to through the political process."[5] Some recent suits on the Supreme Court's docket seemed like "state standing on steroids," Professor Tara Leigh Grove said, contending that "[s]tates

1. 549 U.S. 497, 520 (2007); *see, e.g.*, William Baude & Samuel L. Bray, Comment, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 154 (2023) [hereinafter Baude & Bray Comment] (describing how in the aftermath of *Massachusetts v. Environmental Protection Agency* (*Massachusetts v. EPA*), "[s]tates—often large coalitions of states, all represented by attorneys general from the opposite political party of the President—now file suits challenging any important action taken by the executive branch").

2. Brief for Samuel L. Bray & William Baude as Amici Curiae in Support of Petitioners at 2, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (No. 22-506) [hereinafter Bray & Baude Brief].

3. *Id.*

4. Adam Liptak, *Student Loan Case Before Supreme Court Poses Pressing Question: Who Can Sue?*, N.Y. TIMES (Feb. 26, 2023), https://www.nytimes.com/2023/02/26/us/politics/biden-student-loans-supreme-court.html [https://perma.cc/B5GS-3LEG].

5. *Id.*

should not get special power to sue the federal executive branch."[6] Similar comments abound.[7]

But what if "special solicitude" for state standing is not so special after all?

The 2022–2023 Supreme Court term (known as October Term, or "OT," 2022) promised to provide important rulings on controversial issues at the forefront of national consciousness—like voting rights, affirmative action, and the so-called rules of the internet.[8] But three of the most closely watched cases—on

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6. *Id.*

7. *See, e.g.*, Federalist Soc'y, *Do States Enjoy a Special Solicitude?*, YOUTUBE (Nov. 9, 2023), https://www.youtube.com/watch?v=ICBsnZWM8DU (comments of Professor Christopher J. Walker) ("[After *Massachusetts v. EPA*], the academic commentary from originalists and from right-of-center scholars was scathing that this upended the standing doctrine. . . . And . . . today, . . . you see this kind of rising up perhaps again of special solicitude standing, where states aren't treated like normal litigants."); *id.* ("And to be clear, states have had exceptions for certain types of standing . . . long before *Massachusetts v. EPA* . . . but I do think *Massachusetts v. EPA* really kind of just blew it all up."); *id.* (comments of Judge Jennifer Walker Elrod) ("Okay, well, Chris seems to think *Massachusetts v. EPA* was the end of the world."); *see also, e.g.*, Dorothea Allocca, Note, *Special State Standing Is Environmental: Clarifying* Massachusetts v. EPA, 45 WM. & MARY ENV'T L. & POL'Y REV. 193, 212 (2020) ("[S]tates like Texas have weaponized special state standing to interfere with federal policy making . . . ."); Elysa M. Dishman, *Generals of the Resistance: Multistate Actions and Nationwide Injunctions*, 54 ARIZ. ST. L.J. 359, 413 (2022) ("[S]tates should have the same standing requirements as private plaintiffs instead of relying on special solicitude to gain access to federal courts. States should not enjoy greater access to nationwide injunctions [against the federal government] because they can more easily establish standing in federal courts."); Mark L. Earley, *"Special Solicitude": The Growing Power of State Attorneys General*, 52 U. RICH. L. REV. 561, 565, 567 (2018) ("[*Massachusetts v. EPA*] opened the flood gates to the state attorneys general being a powerful check on any perceived abuse of executive or federal power. . . . [Among other possible perspectives,] one might view [this] as the grotesque free fall of an orderly administration of government that is now hopelessly divided, reflecting a divided nation no longer able to govern itself in the traditional means to which we have become accustomed."); Rosio Flores, Note, *State Standing: Watering Down Article III with Special Solicitude*, 47 SW. L. REV. 471, 474 (2018) ("[S]pecial solicitude improperly lowers standing requirements for state petitioners and allows states to bring national political debates to the courts.").

8. *See* Melissa Quinn, *Supreme Court's New Term Brings Fresh Opportunity for Conservative Majority to Flex Its Muscle*, CBS NEWS (Oct. 3, 2022), https://www.cbsnews.com/news/supreme-court-2022-new-term-conservative-majority-ketanji-brown-jackson [https://perma.cc/8LQN-MHTN] ("The Supreme Court is set to . . . kick off its new nine-month term, one that is expected to bring another round of divisive decisions on hot-button issues like affirmative

rights to custody over Native American children, the federal government's immigration-enforcement priorities, and the president's student-loan cancellation program—turned as an initial matter on a more esoteric issue.[9] Bubbling below the surface of many prominent disputes in recent years, state standing, which helps determine whether and to what extent states can sue as plaintiffs in federal court, continues to divide the bench and bedevil the bar. Indeed, the Court considered state standing again in a headline-grabbing case published just months ago—one concerning allegations of inappropriate federal-government influence over social-media platforms' content-moderation decisions.[10]

While state standing's public profile remains lower than the merits issues in the Court's marquee cases, the doctrine has become a topic of significant scholarly concern.[11] Many writings supply important historical and theoretical commentary.[12] The

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action [and] voting rights."); *see also* David McCabe, *Supreme Court Poised to Reconsider Key Tenets of Online Speech*, N.Y. TIMES (Jan. 19, 2023), https://www.nytimes.com/2023/01/19/technology/supreme-court-online-free-speech-social-media.html [https://perma.cc/V8JY-WFFN] ("[T]he Supreme Court is poised to reconsider [crucial tenets under which giant social networks have operated], potentially leading to the most significant reset of the doctrines governing online speech since U.S. officials and courts decided to apply few regulations to the web in the 1990s.").

9. *See* Haaland v. Brackeen, 143 S. Ct. 1609, 1632 n.5, 1640–41 (2023) (considering state standing); United States v. Texas, 143 S. Ct. 1964, 1970–72 (2023) (same); Biden v. Nebraska, 143 S. Ct. 2355, 2365–68 (2023) (same); *see also infra* Part II.C (discussing these cases in detail).

10. *See* Murthy v. Missouri, 144 S. Ct. 1972, 1985 (2024) ("We begin—and end—with standing. At this stage, neither the individual nor the state plaintiffs have established standing to seek an injunction against any defendant."); *see also infra* Part II.C (discussing this case in detail).

11. *See* Tara Leigh Grove, *Foreword: Some Puzzles of State Standing*, 94 NOTRE DAME L. REV. 1883, 1883 (2019) ("[I]n recent years, there has been an explosion in literature on [the question when states should have standing]. Yet, even today, there seem to be as many questions as answers." (footnote omitted)).

12. *See, e.g.*, Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1269–91 (2019) (detailing "arguments that states should be treated with special disfavor in the standing analysis when they sue the federal government based upon financial injuries" and contending that no alternative arguments "make a decisive case for special solicitude in every case in which a state sues the federal government based upon a financial injury"); Seth Davis, *The Private Rights of Public Governments*, 94 NOTRE DAME L. REV. 2091, 2108–25 (2019) [hereinafter Davis, *Private Rights*] (arguing that courts should consider questions of special disfavor or special solicitude only after determining whether a state has

present project examines state standing from a more practical perspective, asking how the notorious special-solicitude concept has influenced judicial decisions as a doctrinal matter—and especially to what extent it has made a dispositive difference. The time is ripe. Not only is this one of the first academic articles to analyze the Supreme Court's most recent state-standing cases; it offers a detailed exploration of a topic that has attracted the attention of multiple Justices along the way.

This Article contains four parts and an appendix. Part I introduces how special solicitude has faded from explicit prominence in Supreme Court precedent after *Massachusetts v. EPA*. Part II explores to what extent the concept has made an implicit impact on Supreme Court decisions since then. At bottom, the concept appears to have affected the outcome in few if any cases. And the Court has cut back on some of the most controversial

standing under the typical rules that apply to private parties); Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 885–89 (2016) (arguing that states should have no special ability to challenge the federal executive's implementation of federal law); F. Andrew Hessick & William P. Marshall, *State Standing to Constrain the President*, 21 CHAP. L. REV. 83, 107–08 (2018) (proposing that courts demand some indicia of bipartisanship before relaxing the injury-in-fact requirement for states); Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?:* Massachusetts v. EPA*'s New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1775–80 (2008) (proposing that courts relax the immediacy and redressability requirements for standing when states sue as *parens patriae* to protect the public health, citizen welfare, or natural resources); Calvin Massey, *State Standing After* Massachusetts v. EPA, 61 FLA. L. REV. 249, 260–84 (2009) (presenting a detailed model of *Massachusetts v. EPA*'s two-tiered conception of Article III cases or controversies for individual litigants compared to states); Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201, 235, 245 (2017) [hereinafter Nash, *Sovereign Preemption*] (arguing that states but not individuals have a justiciable stake in challenging the federal executive branch's perceived underenforcement of congressional directives); Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1073–74 (2010) (arguing that states should have greater solicitude to challenge the federal government where it has preempted state law and failed to regulate in its place); Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 686–87 (2016) (arguing that states' ability litigate public interests "should be unremarkable"); Dru Stevenson, *Special Solicitude for State Standing:* Massachusetts v. EPA, 112 PENN. ST. L. REV. 1, 19–73 (2007) (providing background on special solicitude for state standing and discussing impacts on state attorneys general, activist groups, and federal litigation); Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1921–24 (2019) (arguing that states provide "a particularly attractive means of aggregating diffuse claims").

aspects of state-standing law, including in key decisions from the last two years. Part III turns to the lower courts, analyzing how federal courts of appeals have used (or not used) special solicitude as part of standing doctrine to decide an exhaustive catalogue of sixty-plus cases in fifteen-plus years. There is no consensus about what the concept means, but special solicitude as a doctrinal matter has rarely if ever controlled a decision's outcome. Part IV crystallizes this project's contributions, signposts paths for future research into state standing's complex inputs and implications, and posits alternative areas of potential improvement. Finally, a case appendix collects information about the circuit-court opinions discussed in Part III.

It should prove helpful at the outset to emphasize what this Article does and does not do. First, this project uses a qualitative lens to examine how judicial opinions talk about and apply special solicitude as a matter of legal doctrine. It does not use a quantitative lens to compare standing grant rates across types of plaintiffs or time, nor does it (therefore) fully capture how courts might use special solicitude in a less doctrinal, more "vibey" way. The latter would be a useful undertaking; this project is just not that one.

Second, this project remains agnostic about the appropriate aggregate amount of state standing in the federal judicial system. As an initial matter, I am skeptical that the question is especially helpful, for case-by-case context is important in that some situations present suitable circumstances for state standing while others do not (as I have argued in previous work and also argue below).[13] More pragmatically, this project seeks to speak about the doctrinal place of special solicitude to readers who hold a range of positions on state litigation, and making unnecessary arguments about the more general topic might distract or detract from that particular goal.

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13. *See* Katherine Mims Crocker, *An Organizational Account of State Standing*, 94 NOTRE DAME L. REV. 2057, 2069–89 (2019) [hereinafter Crocker, *Organizational Account*] (pointing out situations, in the course of comparing state standing and organizational standing, where state standing is more appropriate or less appropriate than others); Katherine Mims Crocker, Note, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051, 2077–100 (2011) [hereinafter Crocker, *Sovereign Standing*] (arguing that a particular doctrine barring state standing is inapplicable to claims premised on sovereign interests); *infra* Part IV.B (discussing potential reforms).

Finally, this project neither defends special solicitude nor contends that the concept's relative doctrinal insignificance means we should ignore it. Instead, this project argues that special solicitude is legally unfounded and practically detrimental, such that the Supreme Court should renounce it—but that until then, scholars concerned about courts and constitutional structure and other stakeholders concerned about political wins and losses should shift greater attention toward alternative, potentially more impactful issues and interventions.

What does all this mean? Imagine that you, a conservative, have been wringing your hands over blue states suing to force huge changes in environmental law, which you oppose because of the potential economic effects. Or imagine that you, a progressive, have been losing sleep over red states suing to stop federal programs designed to assist disadvantaged populations, which you support because of persistent social inequalities. Perhaps these worries are well-founded; perhaps states should not act as plaintiffs in such politically charged circumstances. The point here, however, is that contra conventional wisdom, special solicitude does not appear to be a consequential contributor to the doctrinal architecture that allows them to do so.

I. SPECIAL SOLICITUDE FROM SIGNIFICANCE TO SILENCE

The Supreme Court (mostly) locates the rule that plaintiffs in federal court must possess standing—a personal stake in the litigation—in Article III's limitation of jurisdiction to "cases" and "controversies."[14] The Court characterizes standing as "built on separation-of-powers principles," with the overarching purpose of "prevent[ing] the judicial process from being used to usurp the powers of the political branches."[15] The historical bases, logical coherence, and normative wisdom of the Court's standing

14. U.S. CONST. art. III, § 2; *see* Baude & Bray Comment, *supra* note 1, at 155 ("Since the Founding, members of the Supreme Court have insisted that this [language] means that they must act through certain forms—they cannot issue advisory opinions in response to executive inquiry, and they cannot opine on disputes when they do not have the power to issue binding relief." (footnote omitted)); *see also* Katherine Mims Crocker, *A Prudential Take on a Prudential Takings Doctrine*, 117 MICH. L. REV. ONLINE 39, 49–51 (2018) (describing the recent turn away from "prudential"—as opposed to "constitutional"—justiciability principles).

15. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013).

jurisprudence are all disputed.[16] But this project accepts the doctrine in general to scrutinize an important aspect for state plaintiffs in particular.

As the landmark 1992 case *Lujan v. Defenders of Wildlife* put it, the "irreducible constitutional minimum" of standing comprises injury in fact, causation, and redressability.[17] The injury element requires the "invasion of a legally protected interest" that is "concrete and particularized" and "'actual or imminent, not conjectural or hypothetical.'"[18] The causation element requires "a causal connection between the injury and the conduct complained of," such that the injury is "'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'"[19] The redressability element requires that it "be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[20] Under the "one-plaintiff rule," moreover, only "one party must demonstrate Article III standing for each claim for relief."[21]

With that brief and partial primer, we can begin exploring the doctrinal role of special solicitude in state-standing cases. The concept comes from the 2007 case *Massachusetts v. EPA*,

16. For a few classics, see generally William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988) (criticizing the structure of standing doctrine and proposing that standing should "simply be a question on the merits of plaintiff's claim"), Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191 (2014) (arguing against an approach to standing based on the "adequa[cy of a plaintiff's] stake in seeking judicial relief" and in favor of an approach based on "a relative assessment of superiority"), and Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004) (arguing that history neither compels nor defeats the modern Supreme Court's vision of standing).

17. 504 U.S. 555, 560–61 (1992).

18. *Id.* at 560 (internal quotation marks omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

19. *Id.* at 560–61 (alterations in original) (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41–42 (1976)).

20. *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

21. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2379 n.6 (2020). For analyses of the one-plaintiff rule, see generally Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481 (2017) (discussing the rule's development and arguing that it "is erroneous in light of principle, precedent, and policy"), and Riley T. Keenan, *Minimal Justiciability*, 109 MINN. L. REV. (forthcoming 2025) (offering "a model of justiciability in multiparty cases that explains" the rule).

which cryptically declared states "entitled to special solicitude in [the] standing analysis."[22]

A. CURRENT CONVERSATION

When the Justices granted writs of certiorari to decide three cases involving state standing in OT 2022, Supreme Court watchers began buzzing about how special solicitude might factor into the decisions.[23] The concept seemed significant when it arose in 2007,[24] but since then, the Court had stayed mostly silent about it. Nevertheless, many commentators thought special solicitude could play a starring part in the later drama.[25]

As it turned out, special solicitude became a point of debate among the opinions in just one case: *United States v. Texas*. There, Texas and Louisiana sued the Biden administration over immigration-enforcement guidelines providing that the Department of Homeland Security would "prioritize the arrest and removal" of "suspected terrorists or dangerous criminals."[26] Citing statutory provisions with purportedly mandatory language, the states sought a ruling "order[ing] the Department to alter its arrest policy" to detain more individuals.[27]

The majority opinion—by Justice Kavanaugh for a coalition joined by Chief Justice Roberts and Justices Sotomayor, Kagan, and Jackson—rejected standing on grounds specific to the non-enforcement context. The district court found that the federal

22. 549 U.S. 497, 520 (2007).

23. *See, e.g.*, Barbara Ann Atwood, *Standing Matters:* Brackeen*, Article III, and the Lure of the Merits*, 23 J. APP. PRAC. & PROCESS 105, 139–40 (2023) (discussing state-standing issues in *Haaland v. Brackeen*); *A Seat at the Sitting—December 2022*, THE FEDERALIST SOC'Y (Nov. 22, 2022), https://fedsoc.org/events/a-seat-at-the-sitting-december-2022 [https://perma.cc/83JR-WWPK] (comments of Professor Ilya Somin) (discussing how *United States v. Texas* raised special-solicitude questions); Kimberly Wehle, Panel at the Administrative Law Review Symposium: The Implications of Limiting Agency Authority, *in* 8 ADMIN. L. REV. ACCORD 131, 175–76 (2023) (discussing whether the Court would "gloss over standing" or "beef[] up the authority of the states" in cases before it).

24. *See, e.g.*, Kathryn A. Watts & Amy J. Wildermuth, Massachusetts v. EPA*: Breaking New Ground on Issues Other Than Global Warming*, 102 NW. U. L. REV. 1029, 1030 (2008) (arguing that *Massachusetts v. EPA* would likely have "long-term significance" for state standing).

25. *See* Liptak, *supra* note 4 (discussing the potential relevance of special solicitude to upcoming cases and including comments from scholars).

26. United States v. Texas, 143 S. Ct. 1964, 1968 (2023).

27. *Id.* at 1969–70.

government's failure to arrest more noncitizens caused monetary costs to flow to the state plaintiffs.[28] But the Supreme Court reasoned that while "[m]onetary costs are of course an injury," an injury would not count for standing unless it was "traditionally redressable in federal court."[29] Invoking precedent stating that "'a citizen lacks standing to contest'" non-prosecution decisions, and worrying about judicial incursions on executive discretion, the Court concluded that the suit was "not the kind" a federal court could adjudicate.[30]

There is good reason to be "skeptical," as Justice Barrett wrote separately, about whether much of the majority's reasoning was actually "rooted in Article III standing doctrine" (as opposed to, say, substantive problems with the plaintiffs' legal theory).[31] What matters most for present purposes, though, is a point that Justice Gorsuch made in his concurrence in the judgment, which Justices Thomas and Barrett joined.[32] Contending that the difficulty with standing here was redressability, not injury, Gorsuch raised the specter of special solicitude.[33]

To explain "why . . . federal courts have not traditionally entertained lawsuits of this kind," the majority stated that "when the Executive Branch elects *not* to arrest or prosecute, it does not exercise coercive power over an individual's liberty or property."[34] True enough, Gorsuch observed.[35] But "if an exercise of coercive power matters so much," how could one justify *Massachusetts v. EPA*, which recognized state standing to challenge a federal agency's refusal to regulate certain environmental emissions?[36] The Court there "chose to overlook this difficulty in part because it thought the State's claim of standing deserved 'special solicitude,'" Gorsuch remarked.[37] He suggested that this concept "'ha[d] no basis in our jurisprudence'" when *Massachusetts v. EPA* came down in 2007 and had not "played a meaningful role

28. *Id.* at 1970.

29. *Id.*

30. *Id.* at 1970–71 (quoting Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973)).

31. *Id.* at 1988 (Barrett, J., concurring).

32. *See id.* at 1976 (Gorsuch, J., concurring).

33. *Id.* at 1976–78.

34. *Id.* at 1971 (majority opinion).

35. *Id.* at 1977 (Gorsuch, J., concurring).

36. *Id.* (citing Massachusetts v. EPA, 549 U.S. 497, 516–26 (2007)).

37. *Id.* (quoting Massachusetts v. EPA, 549 U.S. at 520).

in this Court's decisions in the years since."[38] Nevertheless, Gorsuch found it "hard not to wonder why the Court sa[id] nothing about 'special solicitude' in this case"—and "hard not to think, too, that lower courts should just leave that idea on the shelf in future ones."[39]

B. INITIAL ARTICULATION

To understand the current conversation, we must return to special solicitude's origin: the 2007 case *Massachusetts v. EPA*, which concerned a challenge to EPA's refusal to regulate greenhouse gas emissions from new automobiles under the Clean Air Act.[40]

The political atmosphere was heated. The Clinton-era EPA had begun taking steps toward regulating greenhouse gas emissions, but as the presidential term wound down, the agency put the project on pause.[41] As Professor Jody Freeman explains, the powers-that-be assumed Vice President Al Gore would win the 2000 presidential election and that "his team would have time to decide whether and how to regulate greenhouse gases."[42] But Gore did not win, and with the change in administration came a change in outlook.[43] When the George W. Bush-era EPA denied the pivotal rulemaking petition in 2003, it cited, among other considerations, the slight but increasingly prominent skepticism about the source of climate change.[44] "Denying the petition spurred a coalition of plaintiffs, including several states, cities, and environmental and public health organizations, to join the

38. *Id.* (alteration in original) (quoting Massachusetts v. EPA, 549 U.S. at 536 (Roberts, C.J., dissenting)).

39. *Id.*

40. 549 U.S. at 505.

41. Jody Freeman, *The Environmental Protection Agency's Role in U.S. Climate Policy—A Fifty Year Appraisal*, 31 DUKE ENV'T L. & POL'Y F. 1, 32–35 (2020).

42. *Id.* at 36.

43. *See id.* at 36–42 (explaining how the George W. Bush administration reversed its initial support for certain climate regulations).

44. *See* Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,930 (Sept. 8, 2003) ("The science of climate change is extraordinarily complex and still evolving. Although there have been substantial advances in climate change science, there continue to be important uncertainties in our understanding of the factors that may affect future climate change and how it should be addressed."); *see also* Freeman, *supra* note 41, at 42–43 (summarizing EPA's reasons for denying the petition).

original petitioners in the case that would become *Massachusetts v. EPA*."[45]

Justice Stevens wrote the majority opinion for himself and Justices Kennedy, Souter, Ginsburg, and Breyer.[46] The Court addressed standing before getting to the merits conclusion that EPA acted in an arbitrary and capricious manner by failing to provide a "reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change."[47] The Court first recited the usual *Lujan* formulation but also included the proviso from that case that "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests'—here, the right to challenge agency action unlawfully withheld—'can assert that right without meeting all the normal standards for redressability and immediacy.'"[48] All a plaintiff raising a procedural right needed to establish standing, the Court said, was "some possibility that the requested relief w[ould] prompt the injury-causing party to reconsider" its actions.[49]

The Court chose to focus on "the special position and interest of Massachusetts," declaring it "of considerable relevance that the party seeking review" was "a sovereign State."[50] But why? Stevens pointed to the 1907 case *Georgia v. Tennessee Copper Co.* for the proposition that "States are not normal litigants for the purposes of invoking federal jurisdiction."[51] Noting that *Tennessee Copper* concerned a state seeking "to protect its citizens from air pollution originating outside its borders," the *Massachusetts v. EPA* majority quoted the following excerpt from Justice Holmes's majority opinion:

> The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its

45. Freeman, *supra* note 41, at 44.

46. Massachusetts v. EPA, 549 U.S. 497, 504 (2007).

47. *Id.* at 534.

48. *Id.* at 517–18 (citations omitted) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992)).

49. *Id.* at 518.

50. *Id.*

51. *Id.* (citing Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907)).

> domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.[52]

"Just as Georgia's independent interest 'in all the earth and air within its domain' supported federal jurisdiction a century ago," *Massachusetts v. EPA* said, "so too does Massachusetts' well-founded desire to preserve its sovereign territory today."[53] Moreover, the Court continued, "[t]hat Massachusetts does in fact own a great deal of 'the territory alleged to be affected' only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power."[54]

Here the Court observed that "[w]hen a State enters the Union, it surrenders certain sovereign prerogatives"—like using military force, negotiating foreign treaties, and exercising police powers in some domains—to the federal government.[55] Per this system, the Court said, Congress had "ordered EPA to protect Massachusetts" under the Clean Air Act—and had "recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious."[56] Then came the key line: "*Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis*."[57]

The Court proceeded to find the tripartite standing test satisfied. For injury, it relied on affidavits to conclude that rising sea levels were attributable to global warming and had "already begun to swallow Massachusetts' coastal land."[58] Because Massachusetts held title to much of this property, it had alleged sufficient injury "in its capacity as a landowner."[59] Moreover, the Court foretold, "[t]he severity of that injury will only increase over the course of the next century," leading to remediation costs that could "run well into the hundreds of millions of dollars."[60] For causation and redressability, the Court rejected EPA's arguments, respectively, that refusing to regulate did not harm

52. *Id.* at 518–19 (quoting *Tenn. Copper*, 206 U.S. at 237).
53. *Id.* at 519 (quoting *Tenn. Copper*, 206 U.S. at 237).
54. *Id.* (quoting *Tenn. Copper*, 206 U.S. at 237).
55. *Id.*
56. *Id.* at 519–20.
57. *Id.* at 520 (emphasis added).
58. *Id.* at 522.
59. *Id.*
60. *Id.* at 522–23.

Massachusetts enough to provide standing and that overturning this refusal would not do enough to remedy any such harm.[61] Tentative steps toward improvement were sufficient, the Court reasoned, for agencies "do not generally resolve massive problems in one fell regulatory swoop."[62] And in any event, "reducing domestic automobile emissions" would "hardly" represent "a tentative step" toward lowering carbon-dioxide levels in the atmosphere.[63]

In dissent, Chief Justice Roberts—joined by Justices Scalia, Thomas, and Alito—slammed special solicitude, writing that "[r]elaxing Article III standing requirements because asserted injuries are pressed by a State . . . has no basis in our jurisprudence."[64] In particular, Roberts contended, the distinction that *Tennessee Copper* drew was about remedies, not standing. *Tennessee Copper* "explained that while '[t]he very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief [were] wanting,' a State 'is not lightly to be required to give up *quasi*-sovereign rights for pay.'"[65] Accordingly, Roberts wrote, "while a complaining private litigant would have to make do with a *legal* remedy—one 'for pay'—the State was entitled to *equitable* relief."[66] Moreover, Roberts argued, the majority's logic "falter[ed] on its own terms" because the Court tied special solicitude to quasi-sovereign interests but then analyzed standing with respect to the state's land ownership (which is not a quasi-sovereign interest).[67] And in any event, how special solicitude applied as a doctrinal matter was "not at all clear."[68]

The dissent also accused the majority of disregarding the so-called *Mellon* bar, a jurisdictional rule from the 1923 case *Massachusetts v. Mellon*, that "while a State might assert a quasi-sovereign right as *parens patriae* 'for the protection of its citizens, it is no part of its duty or power to enforce their rights in

61. *Id.* at 523–26.

62. *Id.* at 524.

63. *Id.* at 524–25.

64. *Id.* at 536 (Roberts, C.J., dissenting).

65. *Id.* at 537–38 (alterations in original) (quoting 206 U.S. 230, 237 (1907)).

66. *Id.* at 538.

67. *Id.* at 539; *see also infra* Part II.A (discussing the different types of interests that can give rise to state standing).

68. Massachusetts v. EPA, 549 U.S. at 540 (Roberts, C.J., dissenting).

respect of their relations with the Federal Government'" because "'[i]n that field it is the United States, and not the State, which represents them.'"[69]

II. SPECIAL SOLICITUDE IN THE SUPREME COURT

Justice Gorsuch's claims about special solicitude in *United States v. Texas* depend on what *Massachusetts v. EPA* meant in articulating the idea. Special solicitude is an infamously mysterious concept, and academic interpretations range far and wide.[70] This project does not purport to solve this (likely unsolvable) mystery.[71] Fortunately, all we need to begin investigating how courts have used (or not used) special solicitude is a rough cut of what it *might* mean, and three possibilities prove useful.

First, special solicitude could mean that courts should put a thumb on the scale in favor of state standing: in professor-speak, that state plaintiffs get extra credit on their standing assessments. We can call this the "extra-credit" understanding. This is the most common, intuitive, and—to critics—consternating account of the concept.[72] The broadest version would give state plaintiffs a boost regardless of which doctrinal area was causing trouble.[73] But narrower versions abound, with some

69. *Id.* at 539 (quoting Massachusetts v. Mellon, 262 U.S. 447, 485–86 (1923)).

70. *See, e.g.*, Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and "The New Process Federalism*,*"* 105 CALIF. L. REV. 1739, 1745 (2017) ("[T]he meaning and durability of [special] solicitude remain unsettled . . . ."); *The Supreme Court, 2020 Term—Leading Cases*, 135 HARV. L. REV. 343, 350 (2021) [hereinafter *2020 Leading Cases*] (discussing several scholarly approaches); *infra* notes 73–74 (collecting theories).

71. *See 2020 Leading Cases*, *supra* note 70, at 350 (concluding that there is neither an "explicit limitation on when states merit 'special solicitude'" in *Massachusetts v. EPA* nor a "theoretical justification for special solicitude clear enough to constitute an express or implied limitation on the doctrine").

72. *See, e.g.*, Massachusetts v. EPA, 549 U.S. at 536 (Roberts, C.J., dissenting) ("Relaxing Article III standing requirements because asserted injuries are pressed by a State . . . has no basis in our jurisprudence, and support for any such 'special solicitude' is conspicuously absent from the Court's opinion.").

73. *See, e.g.*, Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2062–63 (2008) (noting that special solicitude "might mean a generous stance in determining whether the traditional trio of requirements for standing is met"); *2020 Leading Cases*, *supra* note 70, at 350 (noting that "one could argue that *Massachusetts v. EPA* lowered the bar across all three prongs of the standing inquiry").

commentators arguing that special solicitude does or should focus on this or that aspect of the standing analysis in this or that context.[74]

Second, special solicitude could expand the range of injuries that provide standing for states relative to other plaintiffs. We can call this the "injury-expanding" understanding. The point is that private parties are limited to litigating a constrained class of harms (often intrusions on liberty, property, or other tangible interests) while states can vindicate unique interests associated with their status as sovereigns—interests in, say, controlling legal processes or protecting citizens.[75] This understanding stems from various clues in *Massachusetts v. EPA*, most prominently the Court's tying the statement about special solicitude to Massachusetts's "stake in protecting its quasi-sovereign interests" and connecting the notion that "States are not normal litigants" with structural protections for state sovereignty.[76] The United States Solicitor General has recently advocated this understanding.[77]

Finally, conceptions of special solicitude often conjoin the extra-credit and injury-expanding understandings, such that if and only if state plaintiffs assert sovereignty-related injuries, they benefit from bonus points in establishing some or all

74. *See, e.g.*, Grove, *supra* note 12, at 855 (arguing for special solicitude only when states "seek to enforce or defend state law," not when they challenge how "the federal executive enforces *federal* law"); Hessick & Marshall, *supra* note 12, at 107 (stating that in *Massachusetts v. EPA*, special solicitude appeared aimed at "relax[ing] the restriction on speculative injuries"); Aziz Z. Huq, *State Standing's Uncertain Stakes*, 94 NOTRE DAME L. REV. 2127, 2134 (2019) (stating that special solicitude is not "understood to constitute a derogation of the familiar injury-in-fact rule"); Mank, *supra* note 12, at 1704–05 (advocating a version of special solicitude where "courts relax the immediacy and redressability prongs" for quasi-sovereign injuries); Nash, *Sovereign Preemption*, *supra* note 12, at 204 (offering one reading of *Massachusetts v. EPA* as "reduc[ing] the stringency" of the economic-injury test); Young, *supra* note 12, at 1922 (contending that traceability and redressability, not injury, were "the hump that Massachusetts needed special solicitude to get over").

75. *See, e.g.*, Grove, *supra* note 12, at 859 ("[I]n sharp contrast to private parties, governments may invoke federal jurisdiction to enforce or to protect the continued enforceability of their laws, absent any showing of concrete injury." (footnote omitted)).

76. *See* 549 U.S. at 518–20.

77. *See* Transcript of Oral Argument at 12, United States v. Texas, 143 S. Ct. 1964 (2023) (No. 22-58) ("Special solicitude, as we understand it in this Court's precedents, reflects the fact that states have more theories of injury available to them . . . .").

elements of standing.[78] We can call this the "combination" understanding.

With these three interpretations in mind, we can evaluate Justice Gorsuch's claims about special solicitude in the Supreme Court both before and after *Massachusetts v. EPA*.[79] Then we can explore to what extent the Court's more recent cases have shifted the state-standing landscape.[80]

A. BEFORE *MASSACHUSETTS V. EPA*

Justice Gorsuch's concurrence in *United States v. Texas* implied that when *Massachusetts v. EPA* was decided, special solicitude had "no basis" in precedent.[81] Was he right? Yes.

Start with the extra-credit understanding. In *Tennessee Copper*, Justice Holmes wrote that "in its capacity of *quasi*-sovereign," "the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain"—and thus "has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."[82] This language was lofty, and the word "quasi-sovereign" was novel. But the meaning was relatively routine, as the Court had already allowed states to pursue public-nuisance suits for harm to property within their borders whether or not they owned it.[83] Indeed, public-nuisance actions are inherently representational and have long afforded claims to non-owner plaintiffs.[84]

78. *See, e.g.*, Massey, *supra* note 12, at 252 (arguing that special solicitude "permits states, as *parens patriae*, to assert generalized claims of injury suffered in common by all of its [sic] citizens that would not be judicially cognizable if asserted by any individual citizen" and that the doctrine "softens both causation and redressability").

79. *See infra* Parts II.A–II.B.

80. *See infra* Part II.C.

81. United States v. Texas, 143 S. Ct. 1964, 1977 (2023).

82. Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907).

83. *See, e.g.*, Missouri v. Illinois, 180 U.S. 208, 241 (1901) (allowing Missouri to represent its citizens to remedy health and safety concerns); *see also* Crocker, *Sovereign Standing*, *supra* note 13, at 2064–66 (discussing the history of state-plaintiff public-nuisance actions).

84. *See* Thomas W. Merrill, *Is Public Nuisance a Tort?*, J. TORT L., 2011, at 1, 7–8 (stating that "[a]ll accounts of public nuisance agree" that "the action is designed to protect" "the right of the general public" and distinguishing cases regarding "damages for injuries to particular government-owned assets"); F.H. Newark, *The Boundaries of Nuisance*, 65 LAW Q. REV. 480, 483–88 (1949) (discussing the history of public nuisance).

And public authorities have always taken the lead in litigating such cases,[85] so allowing states to shepherd them through federal courts did not authorize special treatment in the general standing inquiry.

Nor did Holmes's invocation of "[s]ome peculiarities" in "a suit of this kind" signify that federal courts should apply lenient standards to what we now call state standing.[86] The point was that "[i]f the State has a case at all, it is somewhat more certainly entitled to specific relief" to enjoin the defendant's conduct "than a private party might be."[87] This comment was about appropriate remedies, not judicial power, just as Chief Justice Roberts argued in *Massachusetts v. EPA*.[88] If anything, the comment suggested that states must meet the same standards as other litigants in establishing whether they have "a case at all." So too, Holmes's remark that "a suit in this court" replaced "the forcible abatement of outside nuisances" related to the Supreme Court's original jurisdiction.[89] It did not mean that federal courts should decide state-plaintiff actions falling beyond their usual adjudicative competence.[90]

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85. *See* Merrill, *supra* note 84, at 12 ("For several centuries after its inception, public nuisance actions apparently were prosecuted exclusively by local public officials or the attorney general on behalf of the Crown. . . . But even after [courts began to permit private parties to bring damages actions for public nuisances in some circumstances], the dominant mode of initiating a public nuisance action continued to be, and remains to this day, an action by public legal officers.").

86. *Tenn. Copper*, 206 U.S. at 237; *see* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169 (1992) (tracing "'standing' as an Article III limitation" to 1944); *see also* Woolhandler & Nelson, *supra* note 16, at 691 (arguing that while "early American courts did not use the term 'standing' much," "eighteenth- and nineteenth-century courts were well aware of the need for proper parties" (footnote omitted)).

87. *Tenn. Copper*, 206 U.S. at 237.

88. *See supra* Part I.B.

89. *Tenn. Copper,* 206 U.S. at 237.

90. *See* Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 63, 65–66 (2007) (noting that *Tennessee Copper* was not invoked in any brief or considered by the courts below in *Massachusetts v. EPA*); *id.* at 65 ("The simplest explanation . . . is that the decision does not support the proposition for which it was cited."). The Supreme Court has also developed discretionary doctrines making it difficult for states to bring original-jurisdiction suits there. *See* Heather Elliott, *Original Discrimination: How the Supreme Court Disadvantages Plaintiff States*, 108 IOWA L. REV. 175, 200–25 (2022)

Precedent also did not support an injury-expanding understanding of special solicitude. Commentators assert that the Court has long allowed states to vindicate more and different kinds of interests than other plaintiffs can.[91] But a closer look at caselaw reveals underappreciated similarities between standing for states and standing for aggregate plaintiffs more generally.

As I have explained in previous work, precedent outlines three kinds of interests that can provide injury for state standing in federal court.[92] Proprietary interests, which are material or financial in nature, include the ability to, say, "own land or participate in a business venture."[93] One early context where states sought to protect proprietary interests involved debt-collection actions. In *Georgia v. Brailsford*,[94] for instance, Georgia "sued individuals claiming that it owned certain debts that a Georgia citizen had incurred to loyalists during the Revolution."[95] Georgia initially tried to intervene in a lower federal-court action where the original creditors had sued the debtor.[96] That court, however, "did not believe it could take jurisdiction of an action in which the state was a party" and ruled for the creditors.[97] Georgia then sought an injunction from the Justices.[98] In seriatim opinions, a majority held that Georgia could pursue a common-law action against the creditors, which "was later tried before a special jury" in the high court itself.[99]

(describing these doctrines and reviewing their history). This too indicates that state plaintiffs were not generally accorded jurisdictional favoritism when *Massachusetts v. EPA* was decided.

91. *See, e.g.*, Robert A. Weinstock, Note, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798, 799–800 (2009) (stating that sovereign and quasi-sovereign interests "are different in kind from proprietary interests that a state possesses like an individual," making it "analytically appropriate to view [them] outside of the traditional standing inquiry").

92. *See* Crocker, *Sovereign Standing*, *supra* note 13, at 2062–64 (introducing proprietary, sovereign, and quasi-sovereign interests).

93. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982); *see* Crocker, *Sovereign Standing*, *supra* note 13, at 2056 (describing proprietary standing).

94. 2 U.S. (2 Dall.) 402 (1792).

95. Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 406 (1995).

96. *Id.* at 406 n.58.

97. *Id.*

98. *Id.*

99. *Id.*

Sovereign interests comprise at least "the maintenance and recognition of borders" and "the power to create and enforce a legal code."[100] These interests are jurisdictional in nature, protecting a state's "core ability to govern."[101] Interstate border disputes, which the 1838 case *Rhode Island v. Massachusetts* held adjudicable, are the classic illustration.[102] By the twentieth century, however, the Supreme Court had sanctioned an array of such actions. In *Maine v. Taylor*, for instance, Maine intervened in a federal criminal case that incidentally questioned the constitutionality of a state statute.[103] Prosecutors charged a Maine bait-shop owner under a federal statute that prohibited various actions in interstate commerce involving fish or wildlife sold in violation of state law.[104] The bait-shop owner argued that Maine's statute forbidding the importation of live baitfish transgressed the Dormant Commerce Clause, and the First Circuit agreed.[105] Maine appealed; the federal government did not; and the bait-shop owner challenged Maine's standing to maintain the suit.[106] The Court concluded that Maine's stakes were "substantial" enough to support standing, for "a State clearly has a legitimate interest in the continued enforceability of its own statutes."[107]

Quasi-sovereign interests include a state's concerns with "the health and well-being—both physical and economic—of its residents," as well as with its "rightful status within the federal system."[108] These interests are indirect in nature, involving the proper distribution of burdens and benefits among citizens and

100. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982).

101. Crocker, *Sovereign Standing*, *supra* note 13, at 2055.

102. *See* 37 U.S. (12 Pet.) 657, 720 (1838) ("Th[e] states . . . adopted the constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more states. . . . By this grant, this Court has acquired jurisdiction over the parties in this cause by their own consent and delegated authority . . . ."); Crocker, *Sovereign Standing*, *supra* note 13, at 2060–61 (discussing the Supreme Court's recognition of interstate border disputes).

103. 477 U.S. 131, 132–33 (1986).

104. *Id.*

105. *Id.* at 133.

106. *Id*.

107. *Id.* at 137.

108. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982).

across boundaries.[109] Public-nuisance actions—like *Tennessee Copper*—offer an early example of quasi-sovereign standing.[110] But this category too expanded over time. The most famous case is *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, decided in 1982.[111] Treating Puerto Rico like a state, the Court allowed the territory to sue apple growers in Virginia who allegedly discriminated against Puerto Rican workers—and thus harmed the Puerto Rican economy—by withholding benefits owed under federal law.[112] Because quasi-sovereign suits vindicate interests held by states as representatives of their citizens, they are often called "*parens patriae*" actions after a Latin term for "parent of the country."[113]

Massachusetts v. EPA conflated sovereign and quasi-sovereign interests, treating them as synonyms.[114] This misstep seems to stem from the observation that states are not fully sovereign in the classical sense, which is uncontroversial so far as it goes.[115] But while state power is only partially—or "quasi"—sovereign in a way, the Court failed to recognize that the term carried a defined and distinct meaning. *Massachusetts v. EPA* was neither the first nor the last case to make this (understandable) mistake. But the distinction is meaningful.

Proprietary injuries are by definition the same kind of "pocketbook" harms that non-state plaintiffs can assert.[116] But as it turns out, and as I have argued in (different) earlier work,

109. *See* Crocker, *Sovereign Standing*, *supra* note 13, at 2064–67 (discussing quasi-sovereign standing).

110. *See id.* at 2064–66.

111. *Alfred L. Snapp & Son*, 458 U.S. 592.

112. *See id.* at 597–98.

113. *See id.* at 600–01.

114. *See, e.g.*, 549 U.S. 497, 519 (2007) ("Just as Georgia's independent interest 'in all the earth and air within its domain' supported federal jurisdiction [in *Tennessee Copper*], so too does Massachusetts' well-founded desire to preserve its sovereign territory today.").

115. *See id.* (stating that states "retain the dignity, though not the full authority, of sovereignty" (quoting Alden v. Maine, 527 U.S. 706, 715 (1999))); *id.* at 519–20 (describing how states "surrender[] certain sovereign prerogatives" to the federal government—and suggesting that "quasi-sovereign interests" remain). On state sovereignty, see generally Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229 (2005).

116. *See Alfred L. Snapp & Son*, 458 U.S. at 601–02; *see also* Davis, *Private Rights*, *supra* note 12, at 2095 (noting "analytical and doctrinal confusion" but arguing that "'proprietary' interests should be understood to refer to any interests that are analogous to those of private parties").

sovereign and quasi-sovereign injuries essentially mirror harms that non-state plaintiffs can assert too.[117] The key is that states are aggregate litigants[118]—and that another class of aggregate litigants, organizations, can claim standing for analogous injuries.

First, precedent permits organizations to sue to protect "economic" interests.[119] Pocketbook injuries for individuals, economic injuries for organizations, and proprietary injuries for states are all the same thing.[120] Second, organizations can assert injuries to their ability to conduct activities consonant with their purpose.[121] Sovereign standing effectively replicates this strand of organizational justiciability, which we can call "missional" standing.[122] For what activities could be more constitutive of a state's purpose than those around which sovereign standing centers—"the maintenance and recognition of borders" and the "creat[ion] and enforce[ment] of a legal code"?[123] Third, organizations can assert injuries to their membership when their members' interests are sufficiently linked with the group's objectives.[124] One can see quasi-sovereign standing as aligned with

117. *See* Crocker, *Organizational Account*, *supra* note 13, at 2069–88.

118. *See* Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 49, 109 (2018) (explaining that states act as aggregate litigants, similar to class-action plaintiffs).

119. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 262 (1977) (granting a nonprofit developer standing to sue a local government for racial discrimination because of "economic injury" where the developer "expended thousands of dollars" on plans and studies).

120. *See* Crocker, *Organizational Account*, *supra* note 13, at 2070–72.

121. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 368, 379 (1982) (granting a nonprofit corporation standing to sue an apartment-complex owner for racial steering where the corporation showed a "concrete and demonstrable injury to [its] activities—with [a] consequent drain on [its] resources" (citing Sierra Club v. Morton, 405 U.S. 727, 739 (1972))).

122. Crocker, *Organizational Account*, *supra* note 13, at 2068.

123. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982).

124. *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977) ("[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."). For a detailed critique of this doctrine, see generally Michael T. Morley & F. Andrew Hessick, *Against Associational Standing*, 91 U. CHI. L. REV. 1539 (2024) (presenting arguments

this representational or "associational" standing.[125] For quasi-sovereign standing protects the interests of citizens (a state's membership) in promoting their welfare and maintaining the federalist system (a state's objectives).[126]

The Court or its members have occasionally recognized the close connection in the standing context between organizations in general and states in particular.[127] But this is the exception rather than the rule, as the two doctrines have developed along separate jurisprudential tracks. Importantly, however, before *Massachusetts v. EPA*, there was no obvious way in which black-letter state-standing law appeared more permissive than black-letter organizational-standing law—and thus no obvious support for special solicitude. And there are still meaningful ways in which state-standing doctrine may be narrower than organizational-standing doctrine—including for litigation against the federal government because of the *Mellon* bar.[128]

Given all this, *Massachusetts v. EPA*'s state-standing exceptionalism was overstated. Yes, states could assert injuries beyond proprietary harms. But so could an array of private parties,[129] and sovereign and quasi-sovereign standing for states looked a lot like—and could even count as subcategories of—missional and representational standing for organizations. If standing doctrine treats states no better than it treats other organizations, that is, there is little reason to view states as benefiting from some "special" status.

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against associational standing sounding in practicality, policy, and precedent and calling for the doctrine's "abandonment, or at least serious modification").

125. *See* Crocker, *Organizational Account*, *supra* note 13, at 2074–88.

126. *Id.*

127. *See, e.g.*, *Alfred L. Snapp & Son*, 458 U.S. at 601 ("[L]ike other associations . . . , a State is bound to have a variety of proprietary interests."); Massachusetts v. EPA, 549 U.S. 497, 538 (2007) (Roberts, C.J., dissenting) ("Just as an association suing on behalf of its members must show . . . that at least one [member] satisfies Article III requirements, so too a State asserting quasi-sovereign interests as *parens patriae* must still show that its citizens satisfy Article III.").

128. *See* Crocker, *Organizational Account*, *supra* note 13, at 2070–71 (discussing an argument that states' indirect costs from federal laws constitute non-justiciable generalized grievances); *id.* at 2083–84 (discussing the *Mellon* bar).

129. For a broader discussion about how standing does not always require tangible injuries (which are often equated with economic harm), see generally Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285 (2018).

One could ask what difference it makes whether the Supreme Court's invocation of special solicitude in *Massachusetts v. EPA* was consistent with precedent. After all, what the Court says is not final for being infallible, but infallible for being final.[130] Except when what the Court says is not final at all, like when it is dicta. Commentators occasionally view special solicitude along such lines. Often, the point is that *Massachusetts v. EPA* tied special solicitude to quasi-sovereign injuries but then evaluated standing based on proprietary harms.[131] Or that the Court never identified what special solicitude meant and applied a seemingly normal standing analysis to the facts at bar, even saying that Massachusetts met "the most demanding standards of the adversarial process."[132]

Indeed, the Justices have long used "special solicitude" in other legal areas[133]—and treat the concept as providing precatory guidance at most. As recently as 2019, for instance, the Court explained that the principle "encourag[ing] special solicitude for the welfare of seamen . . . has never been a commandment that maritime law must favor seamen whenever possible."[134] And in his *McDonald v. City of Chicago* dissent, Justice Stevens wrote that "[e]ven though the Court has long afforded special solicitude for the privacy of the home, we have never understood that principle to 'infring[e] upon' the authority of the

130. *See* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

131. *See, e.g.*, Christie Henke, Note, *Giving States More to Stand On: Why Special Solicitude Should Not Be Necessary*, 35 ECOLOGY L.Q. 385, 394 (2008); Nash, *Sovereign Preemption*, *supra* note 12, at 226.

132. Massachusetts v. EPA, 549 U.S. 497, 521 (2007); *see, e.g.*, Henke, *supra* note 131, at 394; Nash, *Sovereign Preemption*, *supra* note 12, at 226. *But see* Adler, *supra* note 90, at 67 (arguing that the Court "interpret[ed] *Lujan*'s requirements in a most forgiving way, particularly with regard to causation and redressability"); Baude & Bray Comment, *supra* note 1, at 14 (asserting that the state's harm "was exactly the kind of diffuse injury that would ordinarily not suffice to establish standing" for causation and redressability reasons).

133. *See* Stevenson, *supra* note 12, at 20 (noting that the term "is relatively common in American jurisprudence" but that "never before *Massachusetts v. EPA* ha[d] the Court used [it] for state standing").

134. Dutra Grp. v. Batterton, 139 S. Ct. 2275, 2287 (2019).

States to proscribe certain inherently dangerous items."[135] Similar statements in other contexts are easy to find.[136]

The lack of support in precedent and the uncertain import in *Massachusetts v. EPA* itself may help explain the reduced role of special solicitude in subsequent Supreme Court decisions, to which we now turn.

B. AFTER *MASSACHUSETTS V. EPA*

Justice Gorsuch's *United States v. Texas* concurrence asserted that special solicitude had played no "meaningful role" in Supreme Court caselaw since *Massachusetts v. EPA*.[137] Was he right? Again, yes.

Notwithstanding the continued anxiety about special solicitude, a few commentators have depicted its precedential value as "precarious."[138] The analysis here digs into these suggestions by surveying state-standing cases since special solicitude arrived on the scene (but before OT 2022[139])—and by asking to what extent the concept may have influenced such cases. The following table summarizes this discussion.

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135. McDonald v. City of Chicago, 561 U.S. 742, 892 (2010) (Stevens, J., dissenting) (second alteration in original) (quoting Stanley v. Georgia, 394 U.S. 557, 568 n.11 (1969)).

136. *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 106 (1979) (Rehnquist, J., concurring) (recognizing "special solicitude for freedom of speech and of the press" but stating that "we have eschewed absolutes in favor of a more delicate calculus that carefully weighs the conflicting interests . . . under the particular circumstances presented"); Lloyd Corp. v. Tanner, 407 U.S. 551, 568 (1972) (recognizing "special solicitude for the guarantees of the First Amendment" but stating that "this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only").

137. United States v. Texas, 143 S. Ct. 1964, 1977 (2023) (Gorsuch, J., concurring).

138. *2020 Leading Cases*, *supra* note 70, at 343; *see also* Note, *An Abdication Approach to State Standing*, 132 HARV. L. REV. 1301, 1307–08 (2022) [hereinafter *An Abdication Approach*] (discussing special solicitude as "stand[ing] on shaky ground").

139. *See infra* Part II.C (discussing later cases).

TABLE 1: SUPREME COURT CASES POST-*MASSACHUSETTS V. EPA* AND PRE-OT 2022

Case Name	Year	State Standing	Special Solicitude
American Electric Power Co. v. Connecticut[140]	2011	Grant aff'd 4–4	Unclear if applied; not mentioned
United States v. Texas[141]	2016	Grant aff'd 4–4	Unclear if applied; not mentioned
Department of Commerce v. New York[142]	2019	Granted	Not applied; not mentioned
Trump v. New York[143]	2020	Denied	Not applied; not mentioned
California v. Texas[144]	2021	Denied	Not applied; not mentioned

As for explicit mentions of special solicitude, before OT 2022, only one post-*Massachusetts v. EPA* decision referred to the concept, and state standing was not even at issue. In the 2015 case *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the majority, led by Justice Ginsburg, upheld the Arizona legislature's standing to challenge a state ballot initiative that turned over congressional redistricting to an independent commission.[145] The majority then rejected the attack on the merits.[146] In dissent, Justice Scalia, with Justice Thomas, argued that "[d]isputes between governmental branches or departments regarding the allocation of political power" were

140. 564 U.S. 410 (2011).

141. 579 U.S. 547 (2016).

142. 139 S. Ct. 2551 (2019).

143. 141 S. Ct. 530 (2020).

144. 141 S. Ct. 2104 (2021).

145. 576 U.S. 787, 799–804 (2015). The Court treats legislative standing as unique, such that a state legislative plaintiff's standing does not implicate state standing itself. *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 823 (1997) ("[L]egislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.").

146. *See Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 809–24.

nonjusticiable.[147] Responding in a footnote to Scalia's reliance on *Massachusetts v. Mellon*, the majority argued that the matter at bar "b[ore] little resemblance" to that case—and that, in any event, "'[t]he cases on the standing of states to sue the federal government'" were "'hard to reconcile.'"[148] Here, the majority quoted *Massachusetts v. EPA*'s special-solicitude language in a string citation.[149] This discussion did not reinforce special solicitude—and if anything, may have undermined the doctrine by highlighting the inconsistent character of state-standing caselaw.

What about implicit reliance on special solicitude? The state-standing cases the Court has decided since *Massachusetts v. EPA* have been all over the map, but a close analysis reveals two overarching themes: (1) an emphasis on proprietary injuries to the near exclusion of others, contra the expanding-injuries understanding of special solicitude, and (2) business as usual in the other aspects of standing doctrine, contra the extra-credit understanding. To make a difference in any given dispute, special solicitude would have to push standing from suspect to successful. There is little reason to think that happened in most cases—and perhaps in any matter at all. And even where states fell short in seeking standing, they generally do not appear to have faced a lower bar. Together, these themes indicate that as a doctrinal matter, special solicitude has been largely irrelevant at the Supreme Court since 2007—a conclusion the United States Solicitor General's Office endorsed last year.[150]

Illustrative of both themes is *Department of Commerce v. New York*, decided in 2019.[151] Eighteen states (among numerous other public and private plaintiffs) challenged the decision of the Trump administration's Commerce Secretary to include citizenship status on the census questionnaire.[152] Writing for a unanimous Court as to this issue, Chief Justice Roberts recognized standing on the ground that several states had demonstrated

147. *Id.* at 854 (Scalia, J., dissenting).

148. *Id.* at 802 n.10 (majority opinion) (quoting RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 263–66 (6th ed. 2009)).

149. *Id.*

150. *See* Brief for the Petitioners at 24, United States v. Texas, 143 S. Ct. 1964 (2023) (No. 22-58).

151. Dep't of Com. v. New York, 139 S. Ct. 2551 (2019).

152. *Id.* at 2562–63.

that "if noncitizen households are undercounted by as little as 2%"—well below the district court's prediction of 5.8%—"they will lose out on federal funds that are distributed on the basis of state population."[153] The Justices chose to focus on this proprietary injury even though the states also sought and received standing on sovereign grounds below—and even though the states adverted to the same allegation of sovereign injury in their high-court briefing.[154] The Court rejected the federal government's argument that individuals who chose not to respond to the census broke any causal chain between the Commerce Secretary's actions and the states' injury.[155] It held that the states adduced sufficient historical evidence of depressed noncitizen response rates, which the Census Bureau itself had ascribed to the previous presence of a citizenship question.[156]

While the Court granted the states standing on debatable grounds, nothing suggests that it went easy on the analysis, and no Justice even cited *Massachusetts v. EPA*. Plus, the fact that the district court granted private organizations standing as well—which the Justices did not repudiate on cert before judgment[157]—further suggests that special solicitude was not responsible for the outcome. Ultimately, a fractured Court held the stated reason for including the citizenship question—to help

153. *Id.* at 2565.

154. *See* New York v. U.S. Dep't of Com., 351 F. Supp. 3d 502, 604, 610–15 (S.D.N.Y. 2019) (granting standing on one of "at least five" asserted injuries based on "harm to the sovereign interests of state and local governments caused by degradation of the census data upon which they rely"), *aff'd in part, rev'd in part*, 139 S. Ct. 2551 (2019), *remanded to* 2019 WL 3213840 (S.D.N.Y. Jul. 16, 2019); Brief for Government Respondents at 22, Dep't of Com. v. New York, 139 S. Ct. 2551 (No. 18-966) (asserting "harm to accurate population data used to distribute government services"). The lower court also suggested the states suffered injury to their quasi-sovereign "interest in securing observance of the terms under which [they] participate[d] in the federal system." New York v. Dep't of Com., 351 F. Supp. 3d at 614 (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607–08 (1982)); *see Alfred L. Snapp & Son*, 458 U.S. at 607–08 (discussing quasi-sovereign interests).

155. Dep't of Com. v. New York, 139 S. Ct. at 2565–66.

156. *Id.* at 2566.

157. *See id.* at 2563–66 (discussing the case history, "agree[ing] that at least some respondents have Article III standing," and then specifying how "[s]everal state respondents" satisfied the test).

enforce the Voting Rights Act—pretextual, warranting an agency remand.[158]

A related matter came out the opposite way the following year. In *Trump v. New York*, multiple states (again among numerous other public and private plaintiffs) sued federal defendants to block implementation of a presidential directive that the Commerce Secretary exclude noncitizens who were "not in a lawful immigration status" from the population counts for apportioning congressional seats among states.[159] The Court rejected standing in a per curiam opinion.[160] With the census-response period over, the plaintiffs' claim was "premised on the threatened impact of an unlawful apportionment" not only on "federal funding," an injury to proprietary interests, but also on "congressional representation,"[161] which looks like a quasi-sovereign injury. The Court concluded that any such harm was not cognizable because the plaintiffs' theory was "riddled with contingencies and speculation that impede judicial review."[162] Among other things, it was not clear how the Secretary could or would make calculations given that no citizenship question appeared on the census form.[163] Justice Breyer dissented for himself and Justices Kagan and Sotomayor, arguing on largely factual grounds that the asserted injuries were sufficiently likely to occur.[164]

Again, all this seems like doctrinal business as usual, and the fact that the Court rejected state standing means special solicitude could not have been very important anyway. *Massachusetts v. EPA* did not make an appearance here either.

California v. Texas reflects the same themes. Decided in 2021, this was the latest installment in a series of attempts to take down President Obama's signature healthcare-reform

158. *See id.* at 2573–76 ("[T]he decision to reinstate a citizenship question cannot be adequately explained in terms of [the] D[epartment] O[f] J[ustice]'s request for improved citizenship data to better enforce the V[oting] R[ights] A[ct].").

159. Trump v. New York, 141 S. Ct. 530, 534 (2020) (per curiam) (quoting Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44,679, 44,680 (2020)).

160. *Id.* at 536–37.

161. *Id.* at 534–35.

162. *Id.* at 535.

163. *Id.* at 535–36.

164. *Id.* at 537–42 (Breyer, J., dissenting).

law—the Affordable Care Act or "Obamacare."[165] In 2017, Congress zeroed-out the penalty associated with the individual mandate, which required individuals to maintain health-insurance coverage.[166] Texas, multiple other states, and two individuals sued the United States and other federal defendants to assert that this made all of Obamacare illegal.[167] The theory (premised on the 2012 case upholding the individual mandate as an exercise of taxing authority but not as a regulation of commerce[168]) was that without a monetary consequence, Article I did not allow Congress to order Americans to purchase health insurance—and that the rest of Obamacare was inseverable from the offending provision.[169] The Fifth Circuit recognized individual and state standing and declared the individual mandate unconstitutional while remanding for a severability analysis.[170]

The Justices "proceed[ed] no further than standing."[171] In an opinion by Justice Breyer, the Court held that none of the plaintiffs could bring suit.[172] The state plaintiffs asserted that the individual mandate was causing residents to enroll in state-affiliated insurance programs, which were supported by public funds.[173] But any such harm was not traceable to federal enforcement, the Court reasoned, since there *was* no federal enforcement—leading to a lack of causation.[174] Or, the Court explained, because there was no penalty for violating the mandate, the federal government was not doing anything a court could enjoin—leading to a lack of redressability as well.[175] In any event, the states had not shown that the penalty-free individual mandate (as opposed to other factors, like benefits the programs provided) was actually leading to more enrollment in publicly supported

165. *See* California v. Texas, 141 S. Ct. 2104, 2123 (2021) (Alito, J., dissenting) ("Today's decision is the third installment in our epic Affordable Care Act trilogy . . . . In all three episodes, . . . the Affordable Care Act fac[ed] a serious threat . . . .").

166. *Id.* at 2112–13 (majority opinion).

167. *Id.* at 2112.

168. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 574 (2012).

169. California v. Texas, 141 S. Ct. at 2112.

170. *Id.* at 2126 (Alito, J., dissenting).

171. *Id.* at 2113 (majority opinion).

172. *Id.*

173. *Id.* at 2117.

174. *Id.*

175. *Id.* at 2115–16.

insurance plans.[176] The states also pointed to other costs—like keeping participants in state-affiliated insurance programs informed about their benefits and providing information to the Internal Revenue Service.[177] This assertion suffered from causation problems too, the Court said, because these obligations were imposed by provisions that referred to the individual mandate for irrelevant definitional reasons, making their constitutionality separate from the mandate's.[178]

Again, we not only see the Court focusing on allegations of proprietary injury to assess standing in this case; we also see the Court declining to provide state plaintiffs the benefit of the doubt on the other elements.[179] And the Court ignored the states' alternative assertion of sovereign injury from the individual mandate's preemptive effects on health-insurance regulation.[180]

In dissent, Justice Alito, with Justice Gorsuch, accused the Court of being "selectively generous in allowing States to sue."[181] This was the only place where *Massachusetts v. EPA* came up in the decision.[182] The dissent went on to endorse a concept sometimes called "standing-through-inseverability,"[183] which the majority declined to consider because the plaintiffs had not presented it passably below.[184] Under this theory, Alito contended, the states adequately claimed traceability by first attacking the individual mandate as unconstitutional and then arguing that cost-imposing provisions were inseverable from it.[185] This theory was not specific to state plaintiffs—and thus did not support any notion of special solicitude.

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176. *Id.* at 2117–19.

177. *Id.* at 2119.

178. *Id.* at 2119–20.

179. *See 2020 Leading Cases*, *supra* note 70, at 343 ("[N]either the majority, the dissent, the lower courts, nor the parties themselves seemed to believe that the doctrine of special solicitude was controlling, or even relevant . . . .").

180. *See* Brief for Respondent/Cross-Petitioner States at 29–30, California v. Texas, 141 S. Ct. 2104 (No. 19-840) (arguing that the states had standing because the individual mandate prevented them from regulating their own healthcare markets).

181. California v. Texas, 141 S. Ct. at 2124 (Alito, J., dissenting).

182. *See id.* ("Some years ago, Massachusetts was allowed to sue (and force the [EPA] to regulate greenhouse gases) on the theory that failure to do so would cause the ocean to rise and reduce the size of the Commonwealth.").

183. *Id.* at 2122 (Thomas, J., concurring).

184. *Id.* at 2116 (majority opinion).

185. *Id.* at 2131 (Alito, J., dissenting).

Neither of the remaining decisions proves very illuminating. A highly anticipated sequel to *Massachusetts v. EPA* came in the 2011 case *American Electric Power Co. v. Connecticut*.[186] Several states, New York City, and three nonprofit land trusts sued operators of fossil-fuel-fired power plants for public nuisance.[187] The Second Circuit recognized standing on multiple grounds, with the states adequately alleging quasi-sovereign injuries by asserting that carbon-dioxide emissions would "affect virtually their entire populations" and with all plaintiffs adequately alleging proprietary injuries by asserting that rising sea levels would harm their landholdings.[188] The Second Circuit noted the special-solicitude language in *Massachusetts v. EPA* but disclaimed relying on the concept.[189] At the Supreme Court, the Justices deadlocked on standing, with four voting to hold that "at least some plaintiffs" could proceed under *Massachusetts v. EPA* and four either deeming that case distinguishable or adhering to Chief Justice Roberts's dissent there.[190] All eight participating Justices then agreed that the Clean Air Act displaced the federal common-law claims, and they left questions about the congressional preemption of state claims for remand.[191]

Under longstanding practice, a tie produces an affirmance without precedential force.[192] The Court traditionally discloses nothing about the deliberations behind such outcomes.[193] By providing a single paragraph with the bare-bones reasoning recounted above (presumably because Justice Ginsburg was writing to deliver the merits decision anyway), *American Electric Power* offers more insight than usual.[194] Nevertheless, the

186. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011).

187. *Id.* at 418.

188. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 338, 341, 344 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011).

189. *See id.* at 338, 354; *infra* Part III.B.1 (discussing this case).

190. *Am. Elec. Power*, 564 U.S. at 420.

191. *Id.* at 423–25, 429.

192. *See* Neil v. Biggers, 409 U.S. 188, 192 (1972) (citing Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 264 (1960)).

193. *See* Don R. Willett, *Supreme Stalemates: Chalices, Jack-O'-Lanterns, and Other State High Court Tiebreakers*, 169 U. PA. L. REV. 441, 446 (2021) ("When the High Court deadlocks . . . [,] the lower-court judgment is automatically, procedurally, perfunctorily affirmed. With nine bland words, the case is nulled, exactly as if the Court had never granted certiorari in the first place: 'The judgment is affirmed by an equally divided Court.'").

194. *Am. Elec. Power*, 564 U.S. at 420.

Justices said nothing about special solicitude. Even the specific votes went undisclosed: besides knowing that Justice Sotomayor, who was assigned the case on the Second Circuit before joining the Supreme Court, did not participate, readers can only speculate about the standing lineup.[195] On one hand, the fact that four members relied on *Massachusetts v. EPA* suggests that special solicitude could have been important. On the other, the unclear import of the idea in *Massachusetts v. EPA* itself and the fact that the lower court found proprietary standing while disclaiming any role for special solicitude suggest that it did not necessarily influence the outcome.[196]

The next (would-be) major state-standing case also resulted in an equally divided affirmance. In the 2016 case *United States v. Texas* (not to be confused with the 2023 case of the same name),[197] twenty-six states attacked the Obama administration's Deferred Action for Parents of Americans (DAPA) program, which was designed to provide work permits and deportation exemptions to parents of United States citizens and lawful permanent residents.[198] The Fifth Circuit recognized standing primarily on the ground that DAPA would grant a residency status that made participants eligible for publicly subsidized driver's licenses under Texas law, with a "modest" figure putting the state's costs at several million dollars.[199] But the court also said Texas suffered quasi-sovereign injury and was entitled to special solicitude under *Massachusetts v. EPA*.[200] The Fifth Circuit went on to affirm a preliminary injunction against

195. *See id.* at 429; Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 314 n.* (2d Cir. 2009) ("The Honorable Sonia Sotomayor, originally a member of the panel, was elevated to the Supreme Court on August 8, 2009."), *rev'd*, 564 U.S. 410 (2011). Speculating may be relatively straightforward here. The four *Massachusetts v. EPA* dissenters (Chief Justice Roberts and Justices Scalia, Thomas, and Alito) presumably would have rejected standing again, while the three remaining majority members (Justices Kennedy, Ginsburg, and Breyer) plus Justice Kagan likely voted to proceed.

196. For another discussion of the role relaxed standing requirements including special solicitude may have played in this case, see Jonathan H. Adler, *The Supreme Court Disposes of a Nuisance Suit:* American Electric Power v. Connecticut, 2010–2011 CATO S. CT. REV. 295, 311–13 (2011).

197. 579 U.S. 547 (2016) (mem.) (per curiam).

198. Texas v. United States, 809 F.3d 134, 146–49 (5th Cir. 2015), *aff'd by an equally divided Court*, 579 U.S. 547 (2016) (mem.) (per curiam).

199. *Id.* at 155.

200. *Id.* at 151–55.

implementing DAPA.[201] On cert, the entire per curiam opinion said that "[t]he judgment is affirmed by an equally divided Court."[202] Here too, evidence of special solicitude's relevance was equivocal. The Fifth Circuit said quasi-sovereign interests were at stake and purported to apply special solicitude. But its ruling was based largely on proprietary harms, and any effect of the concept there was not at all clear.[203]

Even if special solicitude played some role in these equally divided affirmances, the Court's subsequent and sustained focus on proprietary interests, plus the application of normal standing standards in later state-plaintiff suits, would make these instances exceptional.

C. SINCE OCTOBER TERM 2022

With the four state-standing decisions issued in OT 2022 and OT 2023, the Supreme Court largely adhered to the themes documented above: (1) emphasizing proprietary injuries to the near exclusion of others and (2) conducting business as usual in the other aspects of standing doctrine.[204] As the discussion here documents, however, developments adverse to state plaintiffs also began to unfold, and the Justices continued declining to rely on special solicitude while openly questioning its status for the

201. *Id.* at 188.

202. United States v. Texas, 579 U.S. at 548.

203. *See infra* Part III.B.3 (discussing this case). The Court granted review shortly before Justice Scalia died, and his absence left an even split between Republican and Democratic appointees. Given the ideological valence of the ruling the tie outcome affirmed (that DAPA was probably unlawful), some have speculated that several Justices flipped from *Massachusetts v. EPA*, with Chief Justice Roberts and Justices Kennedy, Thomas, and Alito recognizing standing and Justices Ginsburg, Breyer, Sotomayor, and Kagan possibly rejecting it. *See, e.g.*, Jonathan Adler, *Symposium: Tripped Up by a Tie Vote*, SCOTUSBLOG (June 24, 2016), http://www.scotusblog.com/2016/06/symposium-tripped-up-by-a-tie-vote [https://perma.cc/BU7Y-LCMN] ("The fact that the Court split four–four means, in all likelihood, the Obama administration would have lost the case had Justice Antonin Scalia not passed away earlier this year. It also means, in all likelihood, that the administration would have prevailed had the Senate promptly confirmed Chief Judge Merrick Garland to fill Scalia's seat."); *id.* (noting that "[a]s the Court issued no opinion on any aspect of the Texas case," it "was almost certainly split four–four on [standing]"); *see also* Bradford C. Mank, *State Standing in* United States v. Texas*: Opening the Floodgates to States Challenging the Federal Government, or Proper Federalism?*, 2018 U. ILL. L. REV. 211, 215–16 (mentioning this speculation).

204. *See supra* Part II.B.

first time since *Massachusetts v. EPA*. The following table summarizes these cases' state-standing conclusions and special-solicitude treatment, and the subsequent analysis examines them at length.

TABLE 2: SUPREME COURT CASES SINCE OT 2022

Case Name	Year	State Standing	Special Solicitude
Haaland v. Brackeen[205]	2023	Denied	Not applied; not mentioned
United States v. Texas[206]	2023	Denied	Not applied; mentioned in separate opinions
Biden v. Nebraska[207]	2023	Granted	Not applied; not mentioned
Murthy v. Missouri[208]	2024	Denied	Not applied; mentioned tangentially

Start with *Biden v. Nebraska*, which focused on proprietary injuries despite the state plaintiffs alleging other harms too.[209] This case concerned the President's plan to cancel $430 billion of student-loan debt by forgiving up to $20,000 per person.[210] Two borrowers who did not qualify for the maximum benefit and six states sued to block the program.[211] *Department of Education v. Brown* unanimously held that the borrowers lacked standing.[212] In *Biden v. Nebraska*, by contrast, a divided Court granted Missouri standing.[213] The first step was relatively obvious. The

205. 143 S. Ct. 1609 (2023).

206. 143 S. Ct. 1964 (2023).

207. 143 S. Ct. 2355 (2023).

208. 144 S. Ct. 1972 (2024).

209. *See* Brief for the Respondents at 22, Biden v. Nebraska, 143 S. Ct. 2355 (No. 22-506) (asserting a "quasi-sovereign interest in ensuring that Missouri students and universities have adequate funding for education"); *id.* at 26 (arguing that effectively forcing states to change their laws to avoid tax-revenue losses would inflict sovereign injury).

210. Biden v. Nebraska, 143 S. Ct. at 2362, 2364–65.

211. *See* Dep't of Educ. v. Brown, 143 S. Ct. 2343, 2348 (2023); Biden v. Nebraska, 143 S. Ct. at 2362.

212. *Brown*, 143 S. Ct. at 2352–55.

213. Biden v. Nebraska, 143 S. Ct. at 2365–68.

Missouri Higher Education Loan Authority (MOHELA) stood to lose $44 million per year in servicing fees because of the program, which stated a clear proprietary injury.[214] But to whom? The majority opinion—by Chief Justice Roberts, with Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joining—held that MOHELA was a state instrumentality, meaning that Missouri itself could proceed as plaintiff.[215] The Court went on to invalidate the program as unsupported by statute.[216] In dissent, Justice Kagan—joined by Justices Sotomayor and Jackson—took issue with the state-instrumentality reasoning, arguing that the Court had become "an arbiter of political and policy disputes, rather than of cases and controversies."[217]

Biden v. Nebraska was OT 2022's friendliest case for state standing. But the relatively uncontroversial proposition that a private lender could have sued under the same circumstances undercuts the possibility that special solicitude played a role.[218] Indeed, the decision's logic arguably runs in the opposite direction. For the Court sought to align the government-instrumentality analysis for state standing with the government-instrumentality analyses for the state-action and nondelegation doctrines.[219] So rather than representing an analytical island, state-standing principles merged in a transsubstantive way with related inquiries involving government litigants.[220] Plus, *Massachusetts v. EPA* appeared only in the dissent, where Kagan

214. *See id.* at 2365–66; *id.* at 2386 (Kagan, J., dissenting) (conceding the proprietary-injury point).

215. *Id.* at 2366–68 (majority opinion).

216. *Id.* at 2368–75.

217. *Id.* at 2385 (Kagan, J., dissenting).

218. *See* Transcript of Oral Argument at 33, Biden v. Nebraska, 143 S. Ct. 2355 (No. 22-506) (reflecting the Solicitor General's acknowledgement that "loan servicers . . . would have standing to challenge this plan").

219. Biden v. Nebraska, 143 S. Ct. at 2367.

220. Roberts undercut this feature by agreeing with the dissent that "a public corporation can count as part of the State for some but not 'other purposes.'" *Id.* at 2368 n.3 (quoting *id.* at 2390 n.1 (Kagan, J., dissenting)). The point was to distinguish a Missouri case rejecting state-instrumentality status for a different public corporation "for the purposes of a state ban on 'the lending of the credit of the state.'" *Id.* (quoting Menorah Med. Ctr. v. Health & Educ. Facilities Auth., 584 S.W.2d 73, 78 (Mo. 1979) (plurality opinion)). A better distinction may have been that state law cannot alone answer federal questions about state-instrumentality status.

pointed to Roberts's separate opinion there to criticize his majority turn here.[221]

The remaining cases went beyond the themes gleaned from prior years. Since OT 2022, more than in any other recent period, the Court has restricted state standing in ways that critics have long sought.

Return to *United States v. Texas*.[222] Here too, the Court considered only the asserted proprietary harms (costs flowing from the federal government's failure to enforce immigration laws against more noncitizens), notwithstanding the state plaintiffs' contentions that they suffered other injuries as well.[223] But the Court held that no cognizable injury existed.[224] That was extraordinary, as Justice Gorsuch noted, because the Court did not reject the district court's finding that the federal guidelines "impose[d] 'significant costs' on the States," because no one "dispute[d] that even one dollar's worth of harm is traditionally enough to 'qualify as concrete injur[y] under Article III,'" and because the Court "ha[d] allowed other States to challenge other Executive Branch policies that indirectly caused them monetary harms."[225] Plus, while the underlying principle (that "'a citizen lacks standing to contest'" non-prosecution decisions) can apply to other litigants, the fact that "federal policies frequently generate indirect effects on state revenues or state spending," as the Court noted, makes the holding especially salient in the state-plaintiff context.[226]

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221. *Id.* at 2389, 2391 (Kagan, J., dissenting).

222. *See supra* Part I.A (discussing the Court's rejection of state standing in *United States v. Texas*).

223. *See* United States v. Texas, 143 S. Ct. 1964, 1970–71 (2023) (analyzing the claimed monetary injury); Brief for Respondents at 16–17, United States v. Texas, 143 S. Ct. 1964 (No. 22-58) (asserting a sovereign interest in "admit[ting] or exclud[ing] aliens" (quoting DHS v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020))); *id.* at 23 (asserting a quasi-sovereign interest in "protecting [residents] from criminal aliens").

224. United States v. Texas, 143 S. Ct. at 1970–71.

225. *See id.* at 1977 (Gorsuch, J., concurring) (third alteration in original) (first quoting Texas v. United States, 606 F. Supp. 3d 437, 495 (S.D. Tex.), *rev'd*, 143 S. Ct. 1964 (2023); and then quoting TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021)).

226. *Id.* at 1968, 1972 n.3 (majority opinion) (quoting Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973)); *see, e.g.*, *Linda R.S.*, 410 U.S. at 614–19 (articulating and applying this principle in a private-plaintiff case).

In addition, nothing about the standing denial suggested a preference for state litigants in the doctrinal analysis more generally—which Justices Gorsuch and Alito noted in their separate writings.[227] As Alito put it in his solo dissent: "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 failing to apply our standard test."[228] Indeed, the Court went even further by expressing affirmative skepticism about state standing. The majority emphasized that "federal courts must remain mindful of bedrock Article III constraints in cases brought by States against an executive agency or officer"—and that "when a State asserts . . . that a federal law has produced only . . . indirect [monetary] effects, the State's claim for standing can become more attenuated."[229] These pronouncements effectively endorsed arguments that state-standing skeptics have levied for years.[230]

Haaland v. Brackeen, the final state-standing case from OT 2022, may prove even more impactful. Texas joined a lawsuit filed by individuals to challenge the constitutionality of the Indian Child Welfare Act (ICWA), which "aims to keep Indian children connected to Indian families" by (among other things) establishing foster-care and adoption placement preferences.[231] The Court—in an opinion by Justice Barrett, with Chief Justice Roberts and Justices Kagan, Sotomayor, Gorsuch, Kavanaugh, and Jackson joining—rejected the attack with a mix of standing

227. *See* United States v. Texas, 143 S. Ct. at 1976–77 (Gorsuch, J., concurring); *id.* at 1997 (Alito, J., dissenting).

228. *Id.* at 1997 (Alito, J., dissenting).

229. *Id.* at 1972 n.3 (majority opinion).

230. *See, e.g.*, Amanda Frost, *Symposium: Second Thoughts on Standing*, SCOTUSBLOG (June 24, 2016), https://www.scotusblog.com/2016/06/symposium-second-thoughts-on-standing [https://perma.cc/BZR9-BDNF] ("[T]angential, indirect harm is the kind of generalized grievance that does not create standing."); *id.* ("By keeping the door open to lawsuits [based on this theory], the Court has made itself the focal point of disputes between state attorneys general and the federal government, a result that may end up harming the Court as well as the country."); Stephen I. Vladeck, Opinion, *Just How Hypocritical Are the Supreme Court's Conservative Justices Willing to Be?*, N.Y. TIMES (Mar. 13, 2023), https://www.nytimes.com/2023/03/13/opinion/supreme-court-conservatives-standing.html [https://perma.cc/KM3C-B8XN] (criticizing how some states in *Biden v. Nebraska* "based their standing solely on the indirect economic effects of the program—effects that, even if they were more than just speculative . . . are hardly 'particularized'").

231. Haaland v. Brackeen, 143 S. Ct. 1609, 1622–26 (2023).

and merits reasoning.[232] Relevant here, the Court granted Texas standing to raise a single set of claims: that ICWA unconstitutionally commandeered state-government processes related to the foster-care, adoption, and judicial systems.[233] The majority ruled that Texas lacked standing to contest ICWA's placement preferences.[234] Texas, the Court explained, had "no equal protection rights of its own" and could not "assert equal protection claims on behalf of its citizens because '[a] State does not have standing as *parens patriae* to bring an action against the Federal Government.'"[235] Nor could Texas bypass the *Mellon* bar by relying on third-party standing (which allows claims asserting other parties' rights in some circumstances)—at the very least because that doctrine requires that the plaintiff suffered a cognizable injury and that the third party faces an impediment to filing suit on their own, and neither requirement was met here.[236]

The Court then rejected some "creative arguments" that Texas advanced "despite these settled rules."[237] First, pointing to state law, Texas argued that ICWA injured the state "by requiring it to break its promise to its citizens that it will be color-blind in child-custody proceedings."[238] This allegation failed the injury inquiry on concreteness and particularization grounds (at least), the Court said, for "otherwise, a State would always have standing to bring constitutional challenges when it is complicit in enforcing federal law."[239] Second, the Court rejected Texas's argument that ICWA set a "'fiscal trap'" by "forcing it to discriminate against its citizens or lose federal funds."[240] This argument, the Court explained, turned on a different statute that did not necessarily require observance of ICWA's placement

232. *See id.* at 1627–41 (holding ICWA consistent with Article I, rejecting commandeering arguments, and denying standing on other claims).

233. *Id.* at 1632 n.5.

234. *Id.* at 1640–41.

235. *Id.* at 1640 (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 610 n.16 (1982)).

236. *Id.* at 1640 n.11.

237. *Id.* at 1640.

238. *Id.* (quoting Reply Brief for Petitioner Texas at 15, *Brackeen*, 143 S. Ct. 1609 (No. 21-376)).

239. *Id.* (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

240. *Id.* (quoting Brief for Petitioner Texas at 39–40, *Brackeen*, 143 S. Ct. 1609 (No. 21-376)).

preferences and that Texas had not separately challenged.[241] Third, Texas claimed "a direct pocketbook injury associated with the costs of keeping records, providing notice in involuntary proceedings, and producing expert testimony before moving a child to foster care or terminating parental rights."[242] The Court concluded that any such costs were not traceable to ICWA's placement preferences.[243] Finally, the Court held that because Texas lacked standing to challenge the placement preferences, it likewise lacked standing to launch a nondelegation attack on a provision allowing tribes to reorder them.[244]

These rapid-fire rulings provide a lot to unpack. With respect to the anticommandeering claims, *Brackeen* appears to represent the only post-*Massachusetts v. EPA* instance in which the Court has expressly granted state standing to vindicate an injury to a non-proprietary interest.[245] The assertion that ICWA unconstitutionally required states to implement federal law sounds in the states' sovereign interest in the "power to create and enforce a legal code"[246]—here, a legal code of their own rather than one the federal government forced on them. By approving without explaining Texas's standing to raise such claims (and by doing so in a footnote[247]), the Court suggested that recognizing sovereign standing in this limited context was an easy call. But *Brackeen* gave with one hand and took away with the other. For the Court quickly dismissed the idea that federal preemption of state provisions about race-based government conduct could constitute a cognizable injury—a theory that likewise implicates a state's sovereign interest in the power to create and enforce a legal code. And the Court simply ignored Texas's

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 1641.

245. A plurality may have implicitly recognized standing for Florida to challenge Obamacare's Medicaid expansion in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 575–85 (2012). *See An Abdication Approach*, *supra* note 138, at 1306–07, 1307 n.59 (noting an unaddressed need for state standing in that case).

246. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982).

247. *See Brackeen*, 143 S. Ct. at 1632 n.5.

assertion of a so-called "sovereign interest in regulating domestic relations within the State."[248]

Far from soft-pedaling the standing analysis, *Brackeen* adopted a restrictive view of the doctrine in several other respects relevant to states as well. The Court reaffirmed *California v. Texas*'s approach to causation by requiring precise scrutiny of—and a close connection between—the alleged state injury and the challenged federal policy (as opposed to the broader federal program).[249] And *Brackeen* breathed new life into the *Mellon* bar, which *Massachusetts v. EPA* had left on shaky ground.[250] The best understanding of the *Mellon* bar would block state suits against federal defendants premised on quasi-sovereign (and only quasi-sovereign) injuries.[251] But "*Mellon* seems flatly inconsistent with *Massachusetts v. EPA*," which spoke of such suits in glowing terms.[252] Again, these are meaningful doctrinal

248. Brief for Petitioner Texas at 40, *Brackeen*, 143 S. Ct. 1609 (No. 21-376).

249. *See Brackeen*, 143 S. Ct. at 1640–41 (denying standing on traceability grounds (citing California v. Texas, 141 S. Ct. 2104, 2120 (2021))); *supra* Part II.B (discussing this aspect of *California v. Texas*).

250. *See Brackeen*, 143 S. Ct. at 1640 (applying the *Mellon* bar); *supra* Part I.B (discussing the dissenting argument in *Massachusetts v. EPA* that granting state standing was inconsistent with the *Mellon* bar).

251. *See* Crocker, *Sovereign Standing*, *supra* note 13, at 2079 ("A state . . . sues as *parens patriae* only when it pursues quasi-sovereign claims, not sovereign ones. The *Mellon* bar, which by definition addresses only *parens patriae* suits, is therefore wholly inapplicable to claims premised upon sovereign interests.").

252. Lemos & Young, *supra* note 118, at 121 n.361; *see* Massachusetts v. EPA, 549 U.S. 497, 518–20 (2007). *Massachusetts v. EPA*'s attempt to distinguish *Mellon* was also unpersuasive. The Court professed that "*Mellon* itself disavowed [a] broad reading when it noted that the Court had been 'called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, [and] *not quasi-sovereign rights actually invaded or threatened*.'" 549 U.S. at 520 n.17 (quoting Massachusetts v. Mellon, 262 U.S. 447, 484–85 (1923)). But this misreads *Mellon*, as Massachusetts asserted *both* its own "rights and powers as a sovereign state" *and* "the rights of its citizens," and the Court then addressed these theories in separate discussions. *Mellon*, 262 U.S. at 479, 482–86. The passage *Massachusetts v. EPA* cited came from the independent-injury analysis. *See id.* at 484–85. That theory, which failed under a forerunner to today's political-question doctrine, rested on sovereign interests. *See* Crocker, *Sovereign Standing*, *supra* note 13, at 2080. *Mellon* "then (and only then) asked 'whether the suit may be maintained by the State as the representative of its citizens'"—answering no by pronouncing the famous jurisdictional bar. *Id.* at 2071 (quoting 262 U.S. at 485). That theory rested on quasi-sovereign interests. *See id.* at 2080. After this erroneous statement, *Massachusetts v. EPA*

clarifications that state-standing skeptics have long sought.[253]

The Court's most recent state-standing case, which came down in June 2024, was no friendlier to the state plaintiffs. In *Murthy v. Missouri*, Missouri, Louisiana, and five individuals alleged that the Biden administration placed unlawful pressure on social-media platforms to "censor" disfavored speech regarding, for instance, COVID-19 treatments and Hunter Biden's laptop.[254] The Court rejected the plaintiffs' standing across the board.[255] Most of the attention in the majority opinion—by Justice Barrett for herself, Chief Justice Roberts, and Justices Sotomayor, Kagan, Kavanaugh, and Jackson—went to Jill Hines, the individual plaintiff who offered "the best showing of a connection between her social-media restrictions and communications between [a particular] platform . . . and specific defendant."[256] But the little the Court said about the states' standing claims spoke volumes.

Missouri and Louisiana pressed two theories of injury: that they suffered from content moderation the platforms exercised against (1) state officials and (2) state citizens.[257] The Court devoted a single paragraph to analyzing the first contention, concluding that the one example the states cited flunked the causation element because there was no evidence to support the notion "that Facebook restricted the state representative pursuant to [a] C[enters for] D[isease] C[ontrol]-influenced policy," as alleged—rather than for some independent reason.[258] The Court

said there was also "a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do)." 549 U.S. at 520 n.17 (quoting Georgia v. Penn. R.R. Co., 324 U.S. 439, 447 (1945)).

253. *See, e.g.*, Kevin C. Walsh, *The Ghost That Slayed the Mandate*, 64 STAN. L. REV. 55, 75 (2012) (arguing against states' attempts "to leverage their acknowledged standing to challenge parts of [Obamacare] that do apply to them into standing to challenge a part that does not"); Ann Woolhandler & Michael G. Collins, *Reining In State Standing*, 94 NOTRE DAME L. REV. 2015, 2020–21 (2019) (arguing that the *Mellon* bar helped "reinforce the tradition that conflicts between the state and federal governments as to the scope of federal power should ordinarily be litigated as between private parties and government" and critiquing *Massachusetts v. EPA*'s incursions on this principle).

254. 144 S. Ct. 1972, 1983–84, 1990 (2024).

255. *Id.* at 1981.

256. *Id.* at 1990.

257. *Id*. at 1984.

258. *Id.* at 1989.

allocated two short paragraphs to analyzing the second contention.[259] In response to the states' "assert[ing] a sovereign interest in hearing from their citizens on social media," the majority concluded that Missouri and Louisiana had "not identified any specific speakers or topics that they have been unable to hear or follow."[260] And in response to the states' attempting to parlay "this supposed sovereign injury" into "a basis for asserting third-party standing on behalf of" their allegedly suppressed citizens, the majority quoted *Brackeen* to conclude that "[t]his argument" represented "a thinly veiled attempt to circumvent" the *Mellon* bar.[261]

That the Court did not accord the states special solicitude (at least under the extra-credit understanding) should be beyond dispute. But the Court did mention the doctrine—marking only the second time a majority has done so since *Massachusetts v. EPA*.[262] In dissent, Justice Alito—joined by Justices Thomas and Gorsuch—cited that case for the proposition that the redressability element requires only that judicial action "reduce [the plaintiff's] 'risk of . . . harm . . . *to some extent*.'"[263] "[B]y invoking *Massachusetts v. EPA*," Barrett argued, Alito employed "a new and loosened standard for redressability."[264] For *Massachusetts v. EPA* "explained that *state* plaintiffs are 'entitled to special solicitude' when it comes to standing" and "conducted [its] analysis accordingly."[265] But "Hines, an individual," could not benefit from that doctrine, the Court declared.[266] Though interesting, in context, this reference to special solicitude appears consistent with the broader shift away from that idea. The Court suggested that *Massachusetts v. EPA* means "*state* plaintiffs *are* 'entitled to special solicitude'" and appeared to employ an extra-credit

259. *Id.* 1996–97.

260. *Id.* at 1996.

261. *Id.* at 1996–97 (alteration in original) (quoting Haaland v. Brackeen, 143 S. Ct. 1609, 1640 n.11 (2023)).

262. *See supra* Part II.B (discussing Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787 (2015)).

263. *Murthy*, 144 S. Ct. at 2009 (Alito, J., dissenting) (third alteration in original) (quoting Massachusetts v. EPA, 549 U.S. 497, 526 (2007)).

264. *Id.* at 1996 n.11 (majority opinion).

265. *Id.* (quoting Massachusetts v. EPA, 549 U.S. at 520).

266. *Id.*

framing for the doctrine.[267] But, critically, *Murthy* declined to put any such lessons into practice by refusing to lower the bar in the actual state-standing analysis.

In sum, Supreme Court decisions addressing state standing since *Massachusetts v. EPA* have emphasized proprietary injuries to the near exclusion of others, contra the expanding-injuries understanding of special solicitude, and have generally conducted business as usual for the other aspects of standing doctrine, contra the extra-credit understanding. Changes to how standing applies, moreover, have only tightened the reins on states. But while the Court has disregarded special solicitude, it has not disavowed it despite many opportunities.

A quick clarification: the analysis here has aimed to address all cases where the Court expressly decided state-standing issues during the relevant period. There are additional cases where the Court sidelined possible state-standing questions either by proceeding straight to the merits (like in *Biden v. Texas*, which upheld the rescission of the Trump administration's "Remain in Mexico" policy under one theory while remanding for consideration of another[268]) or by recognizing non-state plaintiffs' standing instead (like in *Trump v. Hawaii*, which allowed individuals to challenge the former president's infamous travel ban[269]). Such cases are not precedential on state standing.[270] And in any event, the Court's handling suggests, respectively, that state standing was not difficult or dispositive, such that special solicitude would not have made a meaningful difference.

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267. *Id.* (second emphasis added) (quoting Massachusetts v. EPA, 549 U.S. at 520).

268. 142 S. Ct. 2528, 2534–35, 2548 (2022) (holding that the rescission did not violate the Immigration and Nationality Act but remanding to the district court for proceedings regarding whether it violated the Administrative Procedure Act (APA)). This policy was formally called the Migrant Protection Protocols (MPP) and required people seeking asylum to wait in Mexico while their applications were processed. *See id.* at 2535.

269. 138 S. Ct. 2392, 2415–17 (2018) (holding that these plaintiffs suffered injury in the form of separation from family members wishing to enter the United States).

270. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2100 (2019) (Gorsuch, J., concurring) (stating that the Court's "failure to consider standing cannot be mistaken as an endorsement of it").

III. SPECIAL SOLICITUDE IN THE CIRCUIT COURTS

Although the Supreme Court has more or less ignored special solicitude since initially formulating it, the concept remains live in lower courts. The federal courts of appeals have discussed the doctrine in dozens of decisions, and unless and until the Justices actually abrogate it, lower courts will continue expending time and effort determining whether and how it applies. Stepping away from the "obsessive academic focus on the Supreme Court,"[271] it proves worthwhile to map how the federal circuit courts—which set law for federal trial courts across the country—have looked to special solicitude.

As the following analysis demonstrates, since *Massachusetts v. EPA*, the federal courts of appeals have wrestled with what special solicitude means. Different circuits, different panels, and different judges have offered different formulations without reaching any meaningful consensus. Some opinions have openly struggled with how much weight the concept carries and where it goes on the doctrinal scale, arriving at various answers. Others have limited special solicitude to contexts involving particular kinds of rights or interests based on a relatively literal reading of the idea's original articulation. Still others have insisted that the concept does not apply to the injury element (the most prominent piece of the analytical puzzle)—or does not relieve states of their baseline standing burdens at all. Some have ignored the concept altogether.

The ensuing discussion documents the ways in which lower courts have engaged (or failed to engage) with special solicitude, presenting what appears to be the most comprehensive scholarly analysis of such cases to date. This catalogue includes each and every instance in the Westlaw database where a circuit-court opinion mentioned "special solicitude" in the state-standing context between when *Massachusetts v. EPA* was decided in 2007 and the end of June 2023, when all the OT 2022 state-standing cases had come down. There are sixty-two decisions that meet these parameters (with some cases spawning multiple qualifying decisions). Three include two opinions (for example, a majority and a dissent) mentioning special solicitude, resulting in sixty-

271. Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 459 (2012); *see also* Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 831–34 (2022) (urging scholars to focus on lower-court developments).

five opinion citations total. In fifteen of these citations, judges discussed special solicitude in relation to state standing while deciding other questions (like issue preclusion).[272] Subtracting those, there are fifty citations where state standing was actually at issue.[273] The collection also includes a brief sampling of state-standing cases from the same timeframe that said nothing about special solicitude.[274]

The bottom line is that special solicitude, like state standing more generally, is a mess—but on a doctrinal level, a mess that does not matter as much as many have assumed. For while some previous scholarship has suggested that "expansive constructions of state standing may be waning,"[275] this analysis supports the further hypothesis that special solicitude may have rarely if ever made a dispositive difference in providing state standing.

This compilation contains three overarching categories. The first covers opinions that discuss special solicitude while denying (or arguing to deny) standing to states—or to tribal governments, to which courts sometimes apply the doctrine.[276] For all opinions in this category, special solicitude was necessarily non-dispositive because the concept weighs in favor of standing, which they reject. Within this category are two subcategories: one for opinions that declare special solicitude generally inadequate to provide standing and another for opinions that treat the concept as specifically irrelevant to the injury analysis.[277]

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272. *See infra* Part III.C (discussing opinions where state standing was not directly at issue).

273. *See infra* Parts III.A–III.B (discussing opinions where state standing was directly at issue).

274. *See infra* notes 421–423 and accompanying text (discussing opinions where special solicitude was not mentioned).

275. *An Abdication Approach*, *supra* note 138, at 1308; *see also id.* ("[T]he lower courts' applications of special solicitude vary dramatically: many have adopted restrictive interpretations . . . that import additional requirements . . . ." (footnote omitted)).

276. *See infra* Part III.A. On the standing of tribal governments, compare, for example, *Center for Biological Diversity v. United States Department of Interior*, 563 F.3d 466, 477 (D.C. Cir. 2009) (assuming that special solicitude could apply to a tribal government), with *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 882 (N.D. Cal. 2009) (refusing to apply special solicitude to a tribal government), *aff'd*, 696 F.3d 849, 858 (9th Cir. 2012) (declining to address standing).

277. *See infra* Parts III.A.1–A.2.

The second overarching category covers opinions that discuss special solicitude in the course of granting (or arguing to grant) state—or tribal—standing.[278] Here there are three subcategories: first, where special solicitude was explicitly extraneous, meaning that the opinions specifically say that standing would or should have existed even without special solicitude; second, where special solicitude was implicitly extraneous, meaning that other aspects of justiciability doctrine (like the one-plaintiff rule) make clear that special solicitude was not necessary to grant standing; and third, where special solicitude was conceptually extraneous, meaning that contextual clues about the independent strength of the plaintiffs' assertions suggest that the courts could have granted standing even without special solicitude.[279]

The final overarching category covers miscellaneous cases, meaning opinions that discuss special solicitude in relation to state standing while deciding other questions (like issue preclusion).[280]

A. CASES DENYING STATE STANDING

The first and simplest category contains opinions that discuss special solicitude but deny (or argue to deny) state standing. These opinions account for twenty-one of the fifty citations where state standing was at issue—or forty-two percent, as the following table shows.

TABLE 3: CIRCUIT COURT CASES OVERVIEW

Category	Opinions	Percentage
Denying State Standing	21	42%
Granting State Standing	29	58%
Total	50	100%

In such cases, special solicitude was necessarily nondispositive (because the concept weighs in favor of the opposite outcome,

278. *See infra* Part III.B.
279. *See infra* Parts III.B.1–B.3.
280. *See infra* Part III.C.

granting state standing). Within this category, courts engage with special solicitude in two main ways: first, by declaring the idea generally inadequate to get plaintiffs over the applicable doctrinal hurdles and, second, by treating the idea as specifically irrelevant to the injury inquiry.[281]

1. Special Solicitude as Generally Inadequate

A substantial proportion of opinions appearing to endorse the extra-credit or combination understandings of special solicitude end up denying (or arguing to deny) state standing because they conclude that the concept does not lighten the usual doctrinal load enough to make a difference (or, interestingly, at all). Some opinions even treat the idea like dicta by asserting that, after gesturing at special solicitude, *Massachusetts v. EPA* applied a garden-variety standing analysis.[282]

Start with the D.C. Circuit, which plays an outsized role on the state-standing stage because of its jurisdiction over cases challenging federal agency action. In *North Carolina v. EPA*, for example, North Carolina challenged EPA's decision to release Georgia from certain ozone-related obligations.[283] "[N]otwithstanding any 'special solicitude,'" the court explained, North Carolina "must demonstrate Article III standing."[284] And it failed to do so with respect to redressability.[285] Because states could use credits to excuse excess emissions, reimposing Georgia's obligations would not have reduced its ozone-related emissions and would not have remedied any injury they caused.[286]

Environmental Integrity Project v. Pruitt was similar. Would-be intervenors including North Dakota opposed an attempt to make EPA review and potentially revise oil and gas

281. *See infra* Parts III.A.1–A.2.

282. *See, e.g.*, Missouri v. Yellen, 39 F.4th 1063, 1070 n.7 (8th Cir. 2022) (stating that *Massachusetts v. EPA* did "not eliminate[] the basic requirements for standing just because a state is the plaintiff" and characterizing that decision as "assessing injury, causation, and redressability and concluding that Massachusetts, which owns a substantial portion of its coastline, had alleged a concrete and particularized injury from sea level rise along its coast"), *cert. denied*, 143 S. Ct. 734 (2023).

283. 587 F.3d 422, 423 (D.C. Cir. 2009).

284. *Id.*

285. *Id.* at 426–29.

286. *Id.*

waste-management regulations.[287] The D.C. Circuit explained that "a putative intervenor has no standing—specifically, has no injury-in-fact"—when the asserted harm is "the establishment of a deadline for a federal agency to decide *whether* to promulgate a rule."[288] The court stated that North Dakota was entitled to special solicitude but reasoned that it made no difference because the asserted injury still "amount[ed] to nothing more than 'the possibility of potentially adverse regulation.'"[289]

Four other opinions from the D.C. Circuit—three majorities and one dissent—likewise treated special solicitude as generally inadequate to establish standing.[290]

A prominent Sixth Circuit decision also presents this pattern. *Arizona v. Biden* initially seemed to adopt the injury-expanding understanding of special solicitude.[291] In assessing whether Arizona, Montana, and Ohio could challenge the Biden administration's immigration-enforcement guidelines, the court said special solicitude makes "more theories of injury available" but "does not allow [states] to bypass proof of injury in particular

287. Env't Integrity Project v. McCarthy, 319 F.R.D. 8, 10 (D.D.C. 2016), *aff'd sub nom.* Env't Integrity Project v. Pruitt, 709 F. App'x 12 (D.C. Cir. 2017) (mem.).

288. *Env't Integrity Project*, 709 F. App'x at 12.

289. *Id.* at 12–13 (quoting Defs. of Wildlife v. Perciasepe, 714 F.3d 1317, 1325 (D.C. Cir. 2013)).

290. *See* Ctr. for Biological Diversity v. U.S. Dep't of Interior, 563 F.3d 466, 477 (D.C. Cir. 2009) (assuming that the tribal-government plaintiff was eligible for special solicitude but declaring it "clear" that *Massachusetts v. EPA* "d[id] not govern" because the tribal government "d[id] not allege anywhere that it ha[d] suffered its own individual harm apart from the general harm caused by climate change" and derivative consequences for citizens); Government of Manitoba v. Bernhardt, 923 F.3d 173, 176, 182 (D.C. Cir. 2019) (reasoning, in a case attacking a federal project to "send clean water from the Missouri River Basin to parched communities in northern North Dakota," that special solicitude could not get Missouri around the *Mellon* bar because the state alleged injury to its citizens rather than itself); Alaska v. U.S. Dep't of Agric., 17 F.4th 1224, 1230 (D.C. Cir. 2021) (stating that where the record was "almost completely silent" on Alaska's claimed injury, "'[s]pecial solicitude' . . . for matters involving [states'] 'quasi-sovereign interests'" could not support standing (quoting Massachusetts v. EPA, 549 U.S. 497, 520 (2007))); New Jersey v. EPA, 989 F.3d 1038, 1052–53 (D.C. Cir. 2021) (Walker, J., dissenting) ("Even though courts owe states 'special solicitude' in EPA emissions cases, this solicitude doesn't cover unknown injuries inflicted by unknown [entities] at some unknown time in the possibly distant future." (footnote omitted) (quoting Massachusetts v. EPA, 549 U.S. at 520)).

291. 40 F.4th 375, 385–87 (6th Cir. 2022).

or Article III in general" because the "foundational standing requirements remain for private and public litigants alike."[292] Ultimately, the court endorsed a combination understanding by suggesting that special solicitude could "relax[] the causation and redressability inquiries" after all.[293] But it concluded that the federal government, not the states, was "[t]he key sovereign with authority and 'solicitude'" on immigration.[294] So "[w]ith or without *Massachusetts v. EPA*," state standing failed.[295] The Sixth Circuit used almost identical language to discuss special solicitude at an earlier stage of this matter too.[296]

Two cases from the Eighth Circuit also offer excellent examples of panels treating special solicitude as generally inadequate to support state standing. In *Missouri v. Yellen*, Missouri challenged implementation of the American Rescue Plan Act of 2021 (ARPA), which provided states funds to address the COVID-19 pandemic.[297] Officials worried that the Treasury Secretary would take an overly stringent approach to the so-called Offset Restriction, which prohibited states from using ARPA money to make up for tax-revenue losses caused by amending their own laws.[298] The panel rejected state standing, explaining that Missouri "asks us to enjoin a hypothetical interpretation of the Offset Restriction that the Secretary has explicitly disclaimed, without alleging any concrete, imminent injury from the Secretary's actual interpretation."[299] Confining special solicitude to a footnote, the Eighth Circuit stated that "[a]lthough the Supreme Court has suggested that 'States are not normal litigants for the purposes of invoking federal jurisdiction,' it has not eliminated the basic requirements for standing."[300] Accordingly, the court

292. *Id.* at 385–86.

293. *Id.* at 387.

294. *Id.* at 386–87.

295. *Id.* at 387.

296. Arizona v. Biden, 31 F.4th 469, 476–77 (6th Cir. 2022) (granting stay pending appeal).

297. 39 F.4th 1063, 1066, 1070 n.7 (8th Cir. 2022).

298. *Id.* at 1066. ("A State or territory shall not use the funds provided under this section . . . to either directly or indirectly offset a reduction in the net tax revenue of such State or territory resulting from a change in law . . . ." (emphasis omitted) (quoting 42 U.S.C. § 802 (c)(2)(A))).

299. *Id.* at 1070.

300. *Id.* at 1070 n.7 (quoting Massachusetts v. EPA, 549 U.S. 497, 518 (2007)).

concluded that even with special solicitude, Missouri lacked standing.[301]

The Eighth Circuit took the same approach in *Missouri v. Biden*, where numerous states challenged an executive order requiring federal agencies to consider the social costs of greenhouse gas emissions in certain decisions.[302] "Whether and when alleged sovereign injuries can constitute the concrete and particularized injury in fact required for Article III standing is a controversial, unsettled question," the court said.[303] But "even if the States as sovereigns are entitled to some undefined 'special solicitude' in the standing analysis, they still must satisfy the basic requirements of Article III standing"—and a desire for agencies to ignore information did not count as "concrete harm."[304]

This tendency extends well beyond the D.C., Sixth, and Eighth Circuits, with additional instances of opinions treating special solicitude as generally inadequate to establish standing arising from the Fifth, Seventh, and Ninth Circuits (the latter in a dissent).[305]

2. Special Solicitude as Excluding Injury

In treating special solicitude as insufficient to support state standing, many opinions specifically exclude some or all of the oft-litigated injury element from any extra credit the concept affords. Some of these opinions also imply that the pertinent part

301. *Id.*

302. *See* 52 F.4th 362, 365, 369–70 (8th Cir. 2022).

303. *Id.* at 369.

304. *Id.* at 369–70.

305. *See* Louisiana *ex rel.* Landry v. Biden, 64 F.4th 674, 677, 683–85 (5th Cir. 2023) (declaring that regardless of whether special solicitude applies, states "must still satisfy the basic requirements of standing" and holding nonjusticiable a multistate attack on the executive order requiring agency consideration of greenhouse gas emissions' social costs); Michigan v. EPA, 581 F.3d 524, 529 (7th Cir. 2009) (deeming special solicitude insufficient to allow Michigan standing to challenge EPA regulations based on a quasi-sovereign interest in clean air because unlike where "Massachusetts's coastal lands were threatened by rising sea levels, Michigan's air c[ould] only benefit" from the contested rules); Washington v. Trump, 858 F.3d 1168, 1187 & n.5 (9th Cir. 2017) (Bea, J., dissenting) (arguing, in a challenge to former President Trump's travel ban, that a panel decision in the case should not have granted Washington and Minnesota third-party standing to assert their residents' constitutional rights because of the *Mellon* bar, notwithstanding the use of special solicitude in *Massachusetts v. EPA*).

of *Massachusetts v. EPA* was not directed at the injury inquiry because of the strength of the harms asserted there.[306]

These carve-outs are relatively common in the D.C. Circuit. *Delaware Department of Natural Resources & Environmental Control v. Federal Energy Regulatory Commission* declared that the state agency's claimed harm—that the federal government incorporated the state's input too late in a permitting process and thus exposed it to pressure to allow a project to proceed—was nothing more than a "conjectural political dynamic" that could not constitute "any sort of legally-cognizable injury."[307] In a footnote at the end of the analysis, the court noted that "Delaware heavily relie[d] on" special solicitude.[308] But that doctrine, the court said, "does *not* eliminate the state petitioner's obligation to establish a concrete injury."[309]

In two cases challenging the greenhouse gas-related regulations that flowed from *Massachusetts v. EPA*, the D.C. Circuit likewise stated that special solicitude does not "remotely suggest[] that states are somehow exempt from the burden of establishing a concrete and particularized injury in fact."[310]

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306. *See, e.g.*, Del. Dep't of Nat. Res. & Env't Control v. Fed. Energy Regul. Comm'n, 558 F.3d 575, 579 n.6 (D.C. Cir. 2009) ("[S]pecial solicitude does *not* eliminate the state petitioner's obligation to establish a concrete injury, as [*Massachusetts v. EPA*] amply indicates. Indeed, the [majority] opinion devotes a full section to the 'harms associated with climate change,' on its way to holding in the state's favor." (quoting Massachusetts v. EPA, 549 U.S. 479, 521 (2007))).

307. *Id.* at 578.

308. *Id.* at 579 n.6.

309. *Id.*

310. Coal. for Responsible Regul. v. EPA, 684 F.3d 102, 148 (D.C. Cir. 2012) (per curiam), *aff'd in part, rev'd in part sub nom.* Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014), *and amended by* 606 F. App'x 6 (D.C. Cir. 2015); Texas v. EPA, 726 F.3d 180, 199 (D.C. Cir. 2013) (quoting *Coal. for Responsible Regul.*, 684 F.3d at 148); *see also Coal. for Responsible Regul.*, 684 F.3d at 146–48 (holding there was no state standing where the plaintiffs sought to attack requirements that would have mitigated their alleged injuries, to demand "more regulation, not less"—a tactic apparently meant to create administrative chaos—by parroting Massachusetts's previous claims of environmental harm, and to invoke climate-change-related harm without citing any record evidence); Texas v. EPA, 726 F.3d at 197–99 (denying standing by holding that the harms the state petitioners asserted came from self-executing provisions of the Clean Air Act—a problem described in terms of injury, causation, *and* redressability—and with respect to special solicitude, stating that the petitioners failed to show how a benefit "due to States in addressing their standing to ensure enforcement of the Act applies when they attempt to block operation of the Act" (citation omitted)).

Again, the D.C. Circuit is not alone in treating special solicitude as excluding some or all of the injury element when denying state standing. The Second Circuit, for example, characterized the doctrine as excluding injury in *Lacewell v. Office of the Comptroller of the Currency*, which concerned a New York agency's attack on a federal policy allowing financial-technology companies to seek special-purpose national-bank charters.[311] After rejecting standing, in response to a counterargument, the court insisted that it did "not cast doubt on" special solicitude, for the doctrine "does not absolve a state or state-agency plaintiff from the constitutional requirement that it establish a sufficiently 'concrete, particularized, and . . . imminent' injury in fact."[312]

The Fifth Circuit endorsed this logic in *Louisiana ex rel. Louisiana Department of Wildlife & Fisheries v. National Oceanic & Atmospheric Administration*, which challenged a federal rule requiring shrimping boats to use turtle-excluder devices.[313] Special solicitude could not get Louisiana across the starting line, the court said, because the doctrine "merely changes 'the normal standards for redressability and immediacy.'"[314] It does not, the court emphasized, provide "a standing shortcut when standing is otherwise lacking"—and in particular "does not absolve States from substantiating a cognizable injury" that is both "concrete and particularized."[315]

The Tenth Circuit likewise minimized any effect of special solicitude on the injury element in *Wyoming v. U.S. Department of Interior*. This case contested federal rules regulating snowmobile use in national parks.[316] At the end of the standing analysis, the court declared that despite a "lack of guidance on how lower courts are to apply the special solicitude doctrine," it was "clear" that the concept "'does *not* eliminate the state petitioner's

311. *See* 999 F.3d 130, 134 (2d Cir. 2021).

312. *Id.* at 145 (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013)).

313. *See* 70 F.4th 872, 875 (5th Cir. 2023).

314. *Id.* at 882 (quoting Texas v. United States, 50 F.4th 498, 514 (5th Cir. 2022)).

315. *Id.*

316. *See* Wyoming v. U.S. Dep't of Interior, 674 F.3d 1220, 1223 (10th Cir. 2012).

obligation to establish a concrete injury,'" which Wyoming had failed to do.[317]

Other instances of cases treating special solicitude as excluding at least some of the injury analysis while denying state standing come from the First and Ninth Circuits.[318]

In sum, opinions from federal courts of appeals often recognize special solicitude but nevertheless deny (or argue to deny) state standing on the ground that any doctrinal boost is not strong enough to power plaintiffs over the usual causation, redressability, and—especially—injury hurdles. This renders special solicitude essentially irrelevant in a broad swath of cases.

B. CASES GRANTING STATE STANDING

On the flipside of opinions addressing special solicitude in the course of denying (or arguing to deny) state standing are those that discuss the doctrine in the course of granting (or arguing to grant) it. These opinions make up twenty-nine of the fifty citations where state standing was at issue—or fifty-eight percent. They too display a range of approaches and can be divided into several groups. First are cases where special solicitude was explicitly extraneous, meaning the opinions actually say the doctrine was unnecessary to establish standing.[319] Next are cases where special solicitude was implicitly extraneous, meaning other aspects of standing law, like the one-plaintiff rule, show that justiciability would have obtained even without special solicitude.[320] Last are cases where special solicitude was conceptually extraneous, meaning that the overall standing

317. *Id.* at 1238 (quoting Del. Dep't of Nat. Res. & Env't Control v. Fed. Energy Regul. Comm'n, 558 F.3d 575, 579 n.6 (D.C. Cir. 2009)).

318. *See* Penobscot Nation v. Frey, 3 F.4th 484, 487–88, 508–09 (1st Cir. 2021) (en banc) (declaring cases providing for special solicitude "inapposite" because they involved "actual harm to tribal members or people operating in tribal territory that threatened the tribes' sovereignty"—whereas in this dispute between the Penobscot Nation and Maine about ownership and fishing rights along the Penobscot River, the plaintiff showed no "actual or imminent" injury); Sturgeon v. Masica, 768 F.3d 1066 1069 (9th Cir. 2014) (rejecting state standing where Alaska challenged the National Park Service's authority to regulate state scientific research on state-owned lands), *vacated and remanded sub nom.* Sturgeon v. Frost, 577 U.S. 424 (2016); *id.* at 1074 (declaring that with special solicitude, "evidence of actual injury is still required").

319. *See infra* Part III.B.1.

320. *See infra* Part III.B.2.

claims may well have been strong enough to render special solicitude unimportant.[321]

The following table summarizes these findings and shows the number of opinions from each category, as well as the percentage comprised by each group within the universe of circuit-court cases discussing special solicitude while deciding state standing.

TABLE 4: CIRCUIT COURT CASES IN DETAIL

Category	Opinions	Percentage
State Standing Denied	**21**	**42%**
➢ Special solicitude as necessarily nondispositive *(doctrine could not have made a difference)*	21	42%
State Standing Granted	**29**	**58%**
➢ Special solicitude as explicitly extraneous *(opinions say doctrine made no difference)*	9	18%
➢ Special solicitude as implicitly extraneous *(other justiciability issues show doctrine made no difference)*	16	32%
➢ Special solicitude as conceptually extraneous *(contextual clues suggest doctrine may have made no difference)*	4	8%
Total	**50**	**100%**

At bottom, special solicitude appears insignificant—and generally irrelevant—not only in opinions pooh-poohing state standing, but also in those approving it.

1. Special Solicitude as Explicitly Extraneous

Many opinions acknowledge special solicitude but explicitly declare it extraneous because the plaintiffs' cases for standing were strong enough without it. These opinions account for nine of the fifty citations where state standing was at issue—or eighteen percent.

321. *See infra* Part III.B.3.

As an initial example, recall *American Electric Power*, where several states and other plaintiffs alleged public nuisance against operators of fossil-fuel-fired power plants, prompting the Supreme Court to divide equally on standing.[322] The Second Circuit noted the special-solicitude language from *Massachusetts v. EPA* but disclaimed relying on it.[323] "The question," the court said, was whether the Supreme Court's discussion there should affect "the analysis of *parens patriae* standing" here.[324] "[W]e need not answer," the court said, for "all of the plaintiffs have met the *Lujan* test."[325]

The First Circuit followed suit in *Massachusetts v. U.S. Department of Health & Human Services*. Massachusetts challenged the federal government's religious and moral exemptions from Obamacare rules requiring employers to provide women contraceptive coverage in health-insurance plans.[326] The First Circuit granted standing because of the prospect that some women who would lose coverage under the exemptions would "obtain state-funded contraceptive services or prenatal and postnatal care for unintended pregnancies."[327] The court announced that it did "not afford the Commonwealth 'special solicitude in [the] standing analysis' in light of its demonstration of fiscal injury."[328] Massachusetts thus "established standing under a traditional Article III analysis."[329]

The Third Circuit took the same approach in a challenge to the same exemptions in *Pennsylvania v. President*, which explained that "we need not decide whether [Pennsylvania and New Jersey] also have standing under the special solicitude . . . doctrine[]."[330]

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322. *See supra* Part II.B.

323. *See* Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 338 (2d Cir. 2009), *rev'd*, 564 U.S. 410 (2011).

324. *Id.*

325. *Id.*

326. *See* Massachusetts v. U.S. Dep't of Health & Hum. Servs., 923 F.3d 209, 212–13 (1st Cir. 2019).

327. *Id.* at 223; *see also id.* at 221–28 (broader discussion).

328. *Id.* at 222 (alteration in original) (quoting Massachusetts v. EPA, 549 U.S. 497, 520 (2007)).

329. *Id.*

330. 930 F.3d 543, 553, 562, 565 n.17 (3d Cir. 2019), *rev'd and remanded sub nom.* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020). In *Little Sisters of the Poor Saints Peter & Paul Home v.*

The Fifth Circuit has treated special solicitude as explicitly extraneous several times. Consider the case about the zeroed-out Obamacare individual-mandate penalty that became *California v. Texas* on cert.[331] Because the state plaintiffs "suffered fiscal injuries as employers," the Fifth Circuit declared, "we need not address special solicitude or the alleged sovereign injuries" to their ability to regulate healthcare markets.[332] The court also granted the individual plaintiffs standing and declared that the case could thus proceed whether or not the states were involved, rendering special solicitude doubly irrelevant under the one-plaintiff rule.[333]

Two additional opinions from the Fifth Circuit have likewise treated special solicitude as irrelevant when granting or arguing to grant state standing[334]—as have two opinions from the Seventh Circuit (one majority and one dissent) and a decision from the Tenth.[335]

Pennsylvania, the Supreme Court reversed the Third Circuit's merits ruling blocking the exemptions. *See* 140 S. Ct. at 2379–86. But no Justice said anything about state standing, suggesting it was not in doubt.

331. *See supra* Part II.B.

332. Texas v. United States, 945 F.3d 355, 384 (5th Cir. 2019), *rev'd and remanded sub nom.* California v. Texas, 141 S. Ct. 2104 (2021).

333. *Id.* at 384 n.26.

334. *See* Texas v. Biden, 10 F.4th 538, 543–49 (5th Cir. 2021) (per curiam) (emphasizing, in a case where Texas and Missouri challenged the rescission of the MPP, that Texas would have been "able to establish redressability," which was probably the shakiest element, even "without . . . special solicitude"); Gen. Land Off. v. Biden, 71 F.4th 264, 271–72, 274–75 (5th Cir. 2023) (stating, in a case where Texas and Missouri sued to force the Biden administration to spend $2.75 billion allocated by Congress for former President Trump's border "wall," that special solicitude made "'imminence and redressability . . . easier to establish'"—but specifying that injury (which includes imminence) was "not at issue" and emphasizing that Texas would have been "'able to establish redressability without . . . special solicitude'" (first quoting Texas v. Biden, 20 F.4th 928, 970 (5th Cir. 2021); then quoting Texas v. Biden, 10 F.4th at 549)).

335. *See* Indiana v. EPA, 796 F.3d 803, 809–10, 810 n.5 (7th Cir. 2015) (waffling over whether special solicitude applied to Indiana's challenge to EPA's approval of Illinois's plan for complying with ozone-related regulations but concluding that Indiana had standing "on other grounds" because Illinois's plan would have had the effect of subjecting Indiana to greater regulatory burdens); 1000 Friends of Wis. Inc. v. U.S. Dep't of Transp., 860 F.3d 480, 488 (7th Cir. 2017) (Feinerman, J., dissenting) (arguing, in a case addressing whether a Wisconsin agency had standing to appeal a judgment against its federal co-defendant, that "even if the conventional redressability analysis were close—*which it is not*"—special solicitude would have established standing because reversing

2. Special Solicitude as Implicitly Extraneous

Other opinions that discuss special solicitude while approving state standing implicitly show—but do not explicitly state—that the concept was extraneous to the analysis. This occurs where other aspects of justiciability doctrine leave little doubt that the opinions would have supported standing whether or not special solicitude came into play. For example, as we have already seen,[336] special solicitude is implicitly extraneous by virtue of the one-plaintiff rule where a court grants a state plaintiff standing with special solicitude but also grants a non-state plaintiff standing without it. Opinions where special solicitude was implicitly extraneous account for sixteen of the fifty citations in which state standing was actually at issue—or thirty-two percent.

Several patterns recur among these cases. One arises where courts make clear that the standing analysis rests on a distinct principle or precedent that predates *Massachusetts v. EPA*. Consider the D.C. Circuit case *National Ass'n of Clean Air Agencies v. EPA* (*NACAA*), in which a trade-association plaintiff with state-agency members challenged aircraft emissions standards.[337] The court specified that only injury was at issue and that it had "little difficulty" finding this element satisfied because "by allegedly raising (or failing to lower) the emissions allocated to one source," the rule at issue "require[d] states to impose stricter controls on emissions from other individual sources"—a determination the court deemed "controlled by our rationale and judgment in *West Virginia* [*v. EPA*]."[338] That case was decided three years before *Massachusetts v. EPA* and said nothing about giving

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the judgment would have made Wisconsin eligible for federal highway funds and thus remedied its asserted injury (emphasis added)); New Mexico v. Dep't of Interior, 854 F.3d 1207, 1211, 1215 (10th Cir. 2017) (stating, in a case challenging federal authority to regulate negotiations between states and tribes about gaming on Indian lands, that special solicitude simply "bolstered" the court's "confidence" that New Mexico "demonstrated an injury in fact on two independent bases"—one from losing certain procedural protections provided by federal statute and one from being subjected "to a harmful forced choice regarding whether to participate in [an] allegedly unlawful [regulatory] process").

336. *See supra* note 333 and accompanying text (discussing Texas v. United States, 945 F.3d 355, 384 n.26 (5th Cir. 2019), *rev'd and remanded sub nom.* California v. Texas, 141 S. Ct. 2104 (2021)).

337. 489 F.3d 1221, 1223–24, 1226–27 (D.C. Cir. 2007).

338. *Id.* at 1227–28.

states a break on standing.[339] It is little surprise, therefore, that the lone, brief mention of special solicitude in *NACAA*—which appears at the end of the standing analysis in a "[*s*]*ee also*" citation—seems like an afterthought.[340] Indeed, the case was briefed and argued before *Massachusetts v. EPA* came down.[341]

A prominent version of this pattern involves courts granting standing on the ground that state plaintiffs are themselves objects of federal regulation—which provides a basis to bring suit regardless of whether special solicitude applies. In *Texas v. Equal Employment Opportunity Commission*, for instance, Texas attacked guidance from the Equal Employment Opportunity Commission on the applicability of employment discrimination law to bars on hiring people convicted of felonies.[342] The Fifth Circuit initially stated that because Texas was "bringing this action in its capacity as a sovereign state being pressured to reevaluate state law or incur substantial costs," it was "'entitled to special solicitude.'"[343] The court proceeded to hold, however, that since Texas, as an employer, was "an object of the [federal policy] at issue," there was "no reason to deviate from the presumption that Texas has constitutional standing to challenge it."[344]

339. *See* West Virginia v. EPA, 362 F.3d 861, 865–66, 868 (D.C. Cir. 2004).

340. 489 F.3d at 1228.

341. *See* Docket, *NACAA*, 489 F.3d 1221 (No. 06-1023). There was no supplemental briefing on *Massachusetts v. EPA*. *See id.*

342. 827 F.3d 372, 375–77 (5th Cir.), *withdrawn on reh'g*, 838 F.3d 511 (5th Cir. 2016).

343. *Id.* at 378 (quoting Massachusetts v. EPA, 549 U.S. 497, 520 (2007)).

344. *Id.* The court ended up withdrawing this opinion on rehearing for unrelated reasons—and then ignored special solicitude when granting state standing again. Texas v. Equal Emp. Opportunity Comm'n, 838 F.3d 511, 511 (5th Cir. 2016) (per curiam) (remanding for reconsideration in light of an intervening Supreme Court decision about a different issue); Texas v. Equal Emp. Opportunity Comm'n, 933 F.3d 433, 446–50 (5th Cir. 2019).

New Jersey v. EPA from the D.C. Circuit also invoked object-of-regulation reasoning.[345] And additional cases resting on separate pre-*Massachusetts v. EPA* principles or precedent—including from the D.C. Circuit (again),[346] the Second Circuit,[347] the Fifth Circuit (in one panel opinion and one separate writing),[348] the Ninth Circuit,[349] and the Tenth Circuit (in two panel opinions)[350]—are easy to find.

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345. *See* 989 F.3d 1038, 1042–43, 1045 (D.C. Cir. 2021) (stating, in a case challenging a rule imposing recordkeeping requirements on large polluters only if they determined there was a "reasonable possibility" they would exceed emissions thresholds, that "[s]tanding is usually self-evident when the petitioner is an object of the challenged government action"); *id.* at 1045 (noting that while the rule at issue did "not formally regulate" New Jersey, it "directly implicate[d]" the state's "ability to comply with its statutory obligations"); *see also id.* (granting New Jersey special solicitude).

346. *See* Se. Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316, 1318, 1322 (D.C. Cir. 2008) (granting Florida and Alabama standing in a case challenging a settlement reallocating water from a reservoir in Georgia because the settlement "directly impacted" them and stating that their quasi-sovereign interests entitled them to special solicitude—but also relying on an older case allowing Florida to intervene in a suit about the same reservoir for the same water-flow reasons (citing Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1252 (11th Cir. 2002))); *see also* Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d at 1252 ("Whenever 'the action of one State reaches, through the agency of natural laws, into the territory of another State, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them.'" (quoting Kansas v. Colorado, 206 U.S. 46, 97–98 (1907))).

347. *See* Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457, 459, 463–64 (2d Cir. 2013) (stating that "actual infringements on a tribe's sovereignty constitute a concrete injury sufficient to confer standing" because tribes are entitled to special solicitude and granting standing because the challenged tax diminished the tribe's ability to govern affairs on its reservation—but centering the analysis on a 2000 sister-circuit decision holding that tribes have cognizable interests in resisting state assertions of authority over on-reservation activities (citing Miccosukee Tribe of Indians of Fla. v. Fla. State Athletic Comm'n, 226 F.3d 1226, 1230 (11th Cir. 2000))); *id.* at 463 (noting that *Miccosukee Tribe* relied on *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 845 (1982)).

348. In a separate writing in the en banc case that became *Haaland v. Brackeen* on cert, Judge Dennis purported to apply special solicitude in arguing to grant the state plaintiffs standing to sue under the APA. Brackeen v. Haaland, 994 F.3d 249, 296 (5th Cir. 2021) (opinion of Dennis, J.), *aff'd in part, rev'd in part, vacated in part*, 143 S. Ct. 1609 (2023). But the opinion treated incursions on the purported "sovereign interest in controlling child custody proceedings in state courts" as tantamount to "federal preemption of state law" and relied on a case discussion citing authority going back to 1985. *Id.* (citing Texas v. United

A second pattern where special solicitude is implicitly extraneous because other aspects of standing doctrine control involves

States, 809 F.3d 134, 153 (5th Cir. 2015)); *see* Texas v. United States, 809 F.3d at 153, 153 n.38 (collecting cases published as early as 1985 to support the idea that "[p]ursuant to [their sovereign] interest [in creating and enforcing a legal code], states may have standing based on . . . federal preemption of state law"). And because of the conclusion that they had "standing on other grounds," Dennis declined to analyze the district court's holding that the states suffered an independent injury based on "the Social Security Act's conditioning of funding on states' compliance with ICWA." *Brackeen*, 994 F.3d at 296 n.17 (opinion of Dennis, J.). Dennis also discussed special solicitude along essentially identical lines in the vacated panel decision. *See* Brackeen v. Bernhardt, 937 F.3d 406, 424 (5th Cir. 2019), *on reh'g en banc sub nom. Brackeen*, 994 F.3d 249, *aff'd in part, rev'd in part, vacated in part* 143 S. Ct. 1609.

349. *See* Natural Resources Defense Council v. EPA, 542 F.3d 1235, 1237–38, 1248 n.8 (9th Cir. 2008) (responding to an argument asserting the *Mellon* bar, in a case where states tried to compel EPA to regulate construction-related storm-water discharge, by reasoning that *Massachusetts v. EPA* reaffirmed the preexisting principle that states have an "interest in protecting in-state waterways from pollution originating outside their borders"—and mentioning special solicitude incidentally in summarizing *Massachusetts v. EPA*).

350. First is *Utah ex rel. Division of Forestry, Fire & State Lands v. United States*, where Utah filed a quiet-title action against the United States and hundreds of other parties to determine who owned land abutting Utah Lake. 528 F.3d 712, 716 (10th Cir. 2008). The court stated that "[i]mportantly, '[s]tates are not normal litigants for the purposes of federal jurisdiction' and are 'entitled to special solicitude in our standing analysis.'" *Id.* at 721 (second alteration in original) (quoting Massachusetts v. EPA, 549 U.S. 497, 518, 520 (2007)). But it is basically impossible to see how special solicitude could have made a difference, for Utah claimed ownership of the land in question—an archetypal proprietary injury that private parties could likewise assert. Second is *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236 (10th Cir. 2008). Federal law prohibits people convicted of misdemeanor domestic-violence crimes from owning firearms but excepts convictions that have been "expunged or set aside." *Id.* at 1238–39, 1239 n.1. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), a federal agency, determined that convictions subject to a Wyoming statute would not qualify as "expunged or set aside" because the records, though sealed, would remain available for some purposes. *Id.* at 1238–40, 1245–46. The Tenth Circuit said that in part because of special solicitude, Wyoming had standing to challenge this interpretation. *Id.* at 1241–42. But there was "little doubt" that Wyoming "satisfie[d] the traceability and redressability requirements," the court said, so only injury was at issue. *Id.* at 1242. Citing *Alfred L. Snapp & Son*, the court said states "have a legally protected sovereign interest" in enforcing their legal codes—and citing sister-circuit cases from the 1980s, concluded that "[f]ederal regulatory action that preempts state law creates a sufficient injury-in-fact." *Id.* (first citing Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982); then citing Alaska v. U.S. Dep't of Transp., 868 F.2d 441, 443 (D.C. Cir. 1989); and then citing Ohio *ex rel.* Celebrezze v. U.S. Dep't of Transp., 766 F.2d 228, 232–33 (6th Cir. 1985)).

the one-plaintiff-rule scenario mentioned before: where courts grant standing to state plaintiffs with special solicitude *and* to non-state plaintiffs without it. Two related Ninth Circuit decisions about the fiscal machinations behind former President Donald Trump's border wall provide excellent examples. In a first set of proceedings, numerous states and two private organizations in companion cases challenged the transfer of funds appropriated for other purposes to constructing the wall.[351] In a second set of proceedings, the same states and organizations in a consolidated case challenged border-wall funding on a different theory involving Trump's declaration of a national emergency.[352] One decision from each set of proceedings referred to special solicitude.

In *California v. Trump*, California and New Mexico became the focus of standing inquiries because portions of the wall were slated for their southern borders.[353] The court declared that "[s]tates are 'entitled to special solicitude in our standing analysis'" and then premised standing on apparently quasi-sovereign interests in the states' "environment and wildlife" and on "sovereign interests in enforcing their environmental laws."[354] In *Sierra Club v. Trump*, much of the analysis proceeded along similar lines. The Ninth Circuit again briefly noted that states receive special solicitude and then granted California and New Mexico standing to prevent the same sort of environmental and enforcement-related harms implicated in the prior proceeding.[355] Here, however, the court also granted standing to seven states without territory on the Mexican border (as well as New Mexico) on the basis of "direct injuries in the form of lost tax revenues resulting from the cancellation of specific military construction projects."[356]

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351. *See* Petition for a Writ of Certiorari at 8–16, Biden v. Sierra Club, 142 S. Ct. 46 (2021) (mem.) (No. 20-138); Petitioners' Motion to Vacate and Remand in Light of Changed Circumstances at 4–7, *Sierra Club*, 142 S. Ct. 46 (No. 20-138).

352. *See* Petition for a Writ of Certiorari at 2–3, Biden v. Sierra Club, 142 S. Ct. 56 (2021) (mem.) (No. 20-685).

353. 963 F.3d 926, 935 (9th Cir. 2020).

354. *Id.* at 936 (quoting Massachusetts v. EPA, 549 U.S. 497, 520 (2007)).

355. Sierra Club v. Trump, 977 F.3d 853, 866–70 (9th Cir. 2020).

356. *Id.* at 871.

Notwithstanding all this focus on state standing, the court approved the organizational plaintiffs' standing too.[357] Indeed, in both sets of proceedings, the district court granted the organizational plaintiffs full injunctive relief and then denied the states' petitions as duplicative—which the states appealed and lost.[358] It is easy to see, therefore, how the one-plaintiff rule made special solicitude implicitly extraneous.[359] Cases from other courts, including the Tenth Circuit,[360] exhibit this phenomenon as well.

A third pattern of cases where special solicitude is implicitly extraneous occurs where state plaintiffs succeed on multiple standing theories but do not receive special solicitude for them all. In the just-discussed *Sierra Club* case from the Ninth Circuit, for instance, the reference to special solicitude appears in a passage that does not pertain to the tax-related injuries—which the court treated as dictated by pre-*Massachusetts v. EPA* precedent.[361] Another illustration from the Ninth Circuit comes from *Arizona v. Yellen*, where Arizona challenged implementation of

357. *Id.* at 872–76.

358. *See* California v. Trump, 963 F.3d at 949; *Sierra Club*, 977 F.3d at 889–90. On the merits, the court held the Trump administration's conduct unlawful in both sets of proceedings. *See* California v. Trump, 963 F.3d at 944–49; *Sierra Club*, 977 F.3d at 879–88. The Supreme Court granted a consolidated cert petition from the first set of proceedings but ultimately vacated the judgments from both after the Biden administration stopped work on the wall. *See* Biden v. Sierra Club, 142 S. Ct. 46 (2021) (mem.); Biden v. Sierra Club, 142 S. Ct. 56 (2021) (mem.); Petitioners' Motion to Vacate and Remand in Light of Changed Circumstances at 4–7, *Sierra Club*, 142 S. Ct. 46 (No. 20-138).

359. The federal government did not even attack state standing on appeal: the Ninth Circuit considered it sua sponte in both decisions. *See* California v. Trump, 963 F.3d at 935 n.10; *Sierra Club*, 977 F.3d at 865. The United States Solicitor General likewise stayed silent on the issue when challenging both rulings before the Supreme Court, and the Justices did not raise it themselves. *See* Petition for a Writ of Certiorari, *Sierra Club*, 142 S. Ct. 46 (No. 20-138); Petition for a Writ of Certiorari, *Sierra Club*, 142 S. Ct. 56 (No. 20-685); Trump v. Sierra Club, 141 S. Ct. 618 (2020) (mem.).

360. *See* New Mexico *ex rel.* Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 696 n.13 (10th Cir. 2009) (granting state standing in a case challenging a federal decision to open public lands to oil and gas development after "consider[ing] that states have special solicitude to raise injuries to their quasi-sovereign interest in lands within their borders" but holding four private organizations' claims justiciable as well).

361. 977 F.3d at 866–72 (treating the tax-related injuries as controlled by Wyoming v. Oklahoma, 502 U.S. 437, 442–51 (1992)).

the ARPA Offset Restriction.[362] The court recognized standing on two grounds: first, that Arizona faced a sufficient likelihood of enforcement proceedings and, second, that Arizona faced coercion to accept federal funds at the expense of controlling its own tax laws.[363] The court mentioned special solicitude only once, only briefly, and only with respect to the second injury by stating that special solicitude "has relevance" where a defendant's conduct allegedly infringes a state's "sovereign rights."[364] The "alternative[]" nature of Arizona's successful standing theories renders nondispositive any effect that special solicitude may have had on the second one.[365] The same Tenth Circuit case mentioned in the previous paragraph presents a similar situation.[366]

A final pattern where special solicitude is implicitly extraneous occurs in opinions that say the doctrine affects specific components of the standing analysis but that also make clear those components are not in doubt. The Fifth Circuit decision the Supreme Court reviewed in OT 2022's *United States v. Texas*, on the challenge to the Biden administration's immigration-enforcement guidelines,[367] demonstrates this tendency. The Fifth Circuit said Texas was "entitled to 'special solicitude,' which means imminence and redressability are easier to establish here than usual."[368] But to the court, there was no credible argument against imminence: "Texas's injuries" were "difficult to deny"; the district court found that the state suffered multimillion-dollar costs from "incarcerating or paroling certain criminal aliens," which the federal government did "not contest"; and the "conclusory" argument that the agency guidance did "not compel a decrease in enforcement" did not "come close" to succeeding.[369] The

362. 34 F.4th 841, 845–47 (9th Cir. 2022).

363. Arizona v. Yellen, 34 F.4th at 848–53.

364. *Id.* at 851.

365. *Id.* at 853.

366. *See* New Mexico *ex rel.* Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 696 n.13 (10th Cir. 2009) (mentioning that "states have special solicitude to raise injuries to their quasi-sovereign interest in lands within their borders" but making clear that while "New Mexico allege[d] harm to its lands," it also asserted "a financial burden through the costs of lost resources such as water" from an untapped aquifer—and appearing to hold both injuries cognizable); *supra* note 360 and accompanying text.

367. *See supra* Part I.A.

368. Texas v. United States, 40 F.4th 205, 216 (5th Cir. 2022) (per curiam) (footnote omitted).

369. *Id.* at 216–17.

Fifth Circuit also navigated redressability without any trouble. The federal government contended that resource constraints would make it impossible to detain everyone Texas wanted detained.[370] But "[a] court order need only alleviate some of the state's asserted harms," the panel said, and vacating the guidelines would "naturally" have that effect.[371] The court looked to just one source—a private-party-dispute—for this standard.[372] Another opinion from the Fifth Circuit is similar.[373]

3. Special Solicitude as Conceptually Extraneous

For a few decisions granting state standing, a relatively mechanical application of doctrine does not show that special solicitude was necessarily irrelevant to the outcomes, but the overarching analyses suggest it may have been. In some ways, these are the most difficult cases for this project's hypothesis that special solicitude makes little if any difference as a doctrinal matter. But the ensuing discussion aims to show that the idea can be considered conceptually extraneous because contextual clues concerning the strength of the plaintiff's assertions allow one to see the standing grants as separable from special solicitude. These opinions account for four of the fifty citations where state standing was actually at issue—or eight percent. And as a matter of legal realism, it is worth noting that all but one come from the state-plaintiff-friendly Fifth Circuit, which may further support the possibility that the results would have been the same even without special solicitude.

Two Fifth Circuit cases—both captioned *Texas v. United States* and both about immigration—provide paradigmatic

370. *Id.* at 219.

371. *Id.*

372. *Id.* (citing Sanchez v. R.G.L., 761 F.3d 495, 506 (5th Cir. 2014)).

373. *See* Texas v. Biden, 20 F.4th 928, 970–71, 973–74 (5th Cir. 2021) (stating in the appeal of the vacatur of the MPP rescission that "[i]f nothing else," special solicitude "means imminence and redressability are easier to establish here than usual"—but then reasoning, for instance, that "it's impossible to imagine how the Government could terminate MPP *without* costing Texas any money"; that this harm was "'certainly impending'"; and that "[t]he Government offers no basis to conclude that a renewed MPP, by restoring [immigration officers'] discretion, would do *anything but* increase the number of aliens returned to Mexico," thus "redressing Texas's injuries"), *rev'd and remanded*, 142 S. Ct. 2528 (2022).

examples.[374] We are already familiar with one: the DAPA matter where the Supreme Court affirmed in a tie vote.[375] Two circuit-court decisions in that case held special solicitude applicable. The first denied the federal government's motion to stay a preliminary injunction pending appeal;[376] the second affirmed the preliminary injunction.[377] In both, the court recognized standing for Texas on the ground that DAPA would render participants eligible for state-subsidized driver's licenses.[378]

The first decision discussed special solicitude only in the section on causation.[379] In response to the argument that the causal link between DAPA's implementation and the driver's-license injury was too attenuated, the court said that Texas was entitled to special solicitude because it asserted a procedural right under the APA and sought to protect its purportedly "quasi-sovereign interest in not being forced to choose between incurring costs and changing its driver's license regime."[380] The court proceeded to hold the causal link close enough, in part through a comparison to the traceability analysis in *Massachusetts v. EPA*.[381] The second decision started the standing section with special solicitude.[382] The court held the concept applicable largely for the same reasons as before but discussed the doctrine at greater length and with more emphasis on its importance.[383] The court proceeded to reason through injury, causation, and

374. Two decisions are relevant in the first case: *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015), and *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015). One decision is relevant in the second: *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022).

375. *See supra* Part II.B (discussing United States v. Texas, 579 U.S. 547 (2016)).

376. Texas v. United States, 787 F.3d at 743.

377. Texas v. United States, 809 F.3d at 146.

378. Texas v. United States, 787 F.3d at 747; Texas v. United States, 809 F.3d at 150.

379. Texas v. United States, 787 F.3d at 751–52.

380. *Id.*

381. *Id.* at 752–53.

382. Texas v. United States, 809 F.3d at 151.

383. *See id.* at 151–55. The majority responded to the argument that special solicitude comes from "a single, isolated phrase in *Massachusetts v. EPA*," *id.* at 193 (King, J., dissenting), by saying the language was of "considerable significance" and that "being a state greatly matters" for standing. *Id.* at 151 n.26 (majority opinion).

redressability along similar lines as in the previous opinion.[384] The next express reference to special solicitude came in the causation section, which declared the idea applicable but concluded that "the causal link" was "even closer" than in *Massachusetts v. EPA*.[385]

Special solicitude did not clearly control the outcome in either decision. Relying on *Massachusetts v. EPA*'s causation analysis does not necessarily entail relying on special solicitude, for the Supreme Court did not expressly apply the doctrine there.[386] In addition, the Fifth Circuit opinions distinguished in considerable detail their acceptance of causation from a swath of Supreme Court cases coming out the opposite way.[387] Those cases did not involve states, which suggests that the Fifth Circuit viewed its decisions as fitting comfortably within private-plaintiff precedent.[388] And at least in the second decision, the court considered the private-plaintiff cases not only distinguishable, but "far removed."[389] Indeed, the Fifth Circuit may have made special solicitude more prominent in the second decision not as a sword, but as a shield to deflect concerns that "Texas's theory of standing" had "no principled limit."[390] Among other things, the panel contended that while standing was "based in part on" special solicitude, the factors triggering this doctrine (a procedural right and a quasi-sovereign interest) would "seldom exist" in other cases.[391] And while the doctrine applied exclusively or especially to causation in these decisions, the Fifth Circuit would later declare that it "merely changes 'the normal standards for

384. *See id.* at 155–61.

385. *Id.* at 159.

386. See *supra* Part I.B (discussing Massachusetts v. EPA, 549 U.S. 497 (2007)).

387. *See* Texas v. United States, 787 F.3d 733, 752–53 (5th Cir. 2015); Texas v. United States, 809 F.3d at 160 & nn.68–69.

388. *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401 (2013); Already, LLC v. Nike, Inc., 568 U.S. 85, 88 (2013); Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 129 (2011); McConnell v. FEC, 540 U.S. 93, 228 (2003); Whitmore v. Arkansas, 495 U.S. 149, 151 (1990); Allen v. Wright, 468 U.S. 737, 739 (1984).

389. Texas v. United States, 809 F.3d at 160.

390. *Id.* at 161 (discussing an argument made by the United States); *see also id.* at 195 (King, J., dissenting) ("It is hard for me to see the bounds of the majority's broad ruling.").

391. *Id.* at 162 (majority opinion).

redressability and immediacy,'" and "is not a standing shortcut when standing is otherwise lacking."[392]

The next *Texas v. United States* case concerned not DAPA, but DACA. Short for Deferred Action for Childhood Arrivals, DACA allowed noncitizens who came to the United States as children to seek deferred removal and become eligible for work authorization, among other things.[393] Ten states or governors challenged the program, with standing assertions centered on Texas.[394] Addressing special solicitude up front, the court again determined that Texas qualified because it asserted a procedural right under the APA and injury to an ostensible quasi-sovereign interest in "alien classification."[395] The court specified that the doctrine relaxes "the normal standards for redressability and immediacy."[396] It then held injury satisfied because of "pocketbook" harms "in the form of healthcare, education, and social services costs"—the same sort of harms the court deemed "no doubt" sufficient in a later case[397]—without any indication that special solicitude contributed to that conclusion.[398]

Things got tricky with redressability, though, for rescinding DACA would not itself prompt the removal of any noncitizens.[399] Usually, the court explained, this element required a "show[ing] that 'it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'"[400] But "[w]ith special solicitude," a plaintiff only needed to demonstrate "'some possibility that the requested relief' w[ould] reduce the harm."[401] Texas cleared that bar because of "evidence that if DACA were no longer in effect, at least some recipients would leave," thereby reducing the state's costs.[402] So Texas established redressability, the court concluded, "[e]specially with the benefit of special

392. Louisiana *ex rel.* La. Dep't of Wildlife & Fisheries v. Nat'l Oceanic & Atmospheric Admin., 70 F.4th 872, 882 (5th Cir. 2023).

393. Texas v. United States, 50 F.4th 498, 508–09 (5th Cir. 2022).

394. *Id.* at 508, 514.

395. *Id.* at 517.

396. *Id.* at 514 (quoting Massachusetts v. EPA, 549 U.S. 497, 517–18 (2007)).

397. Gen. Land Off. v. Biden, 71 F.4th 264, 271 (5th Cir. 2023).

398. *See* Texas v. United States, 50 F.4th at 517–19.

399. *Id.* at 519–20.

400. *Id.* (quoting Inclusive Cmtys. Project, Inc. v. Dep't of Treasury, 946 F.3d 649, 655 (5th Cir. 2019)).

401. *Id.* at 520 (quoting Massachusetts v. EPA, 549 U.S. at 518).

402. *Id.*

solicitude."[403] This is a close call, but the court did not say that Texas would have failed the normal redressability test. And if expecting a statement along those lines to demonstrate special solicitude's impact asks too much of courts, it bears noting that the Fifth Circuit had derived a far more lenient redressability standard from private-party precedent just months before.[404] Both considerations open up the possibility that special solicitude was not (or should not have been) dispositive here.

One can view special solicitude as conceptually extraneous for somewhat similar reasons in a separate writing from the Sixth Circuit.[405]

In sum, courts of appeals frequently grant state standing after purporting to apply special solicitude. At first glance, the doctrine would seem to matter in such circumstances. But a closer look shows it may well have been extraneous in all or almost all these decisions. To be sure, whether special solicitude made a difference in some cases surveyed here can be argued either way. But any disagreement about marginal classifications should not detract from the broader conclusion that at least as a doctrinal matter, special solicitude appears to matter much less than conventional wisdom assumes.

C. MISCELLANEOUS CASES

Accounting for fifteen of the sixty-five total citations, miscellaneous mentions of special solicitude—where state standing was not directly at issue—complete this collection.

First, courts have sometimes concluded that plaintiffs were not entitled to special solicitude because they were, say, private parties or foreign governments rather than states, and some

403. *Id.*

404. *See supra* Part III.B.2 (discussing Texas v. United States, 40 F.4th 205, 219 (5th Cir. 2022) (per curiam)).

405. *See* Kentucky v. Yellen, 54 F.4th 325, 359–64 (6th Cir. 2022) (Nalbandian, J., concurring in part and dissenting in part) (applying special solicitude to argue that the court should have granted Kentucky standing to challenge the ARPA Offset Restriction's implementation based on a "slightly different analysis" as to imminence, which would have relaxed the importance of the state plaintiffs' intending to engage in conduct that would arguably violate federal law—but making clear he believed the states *did* intend to engage in such conduct anyway).

separate opinions have discussed the doctrine along similar lines.[406] Judges have also occasionally mentioned special solicitude for states when assessing standing for others. Granting standing for private individuals in *Comer v. Murphy Oil USA*, for example, the Fifth Circuit stated that "the chain of causation" there was "one step shorter than the one recognized in *Massachusetts* [*v. EPA*]," such that the plaintiffs "need[ed] no special solicitude."[407]

Second, special solicitude has come up incidentally in mandamus actions. *In re Trump* involved a suit by Maryland and Washington, D.C., alleging that former President Trump violated the Constitution's Emoluments Clauses.[408] The district court denied Trump's motion to dismiss in part and then refused to certify an interlocutory appeal.[409] Trump sought mandamus relief from the Fourth Circuit, and the panel ordered dismissal for lack of state standing.[410] It was not until rehearing en banc that the court mentioned special solicitude. Denying Trump's petition, the majority opinion stated that one reason Trump could not clear the high bar for mandamus relief was because whether Maryland and D.C. had cognizable injuries "present[ed] a

406. *See* Marino v. Nat'l Oceanic & Atmospheric Admin., 33 F.4th 593, 598 (D.C. Cir. 2022) (private parties); Juliana v. United States, 947 F.3d 1159, 1171 n.7 (9th Cir. 2020) (private parties); Arpaio v. Obama, 797 F.3d 11, 27 (D.C. Cir. 2015) (Brown, J., concurring) (county sheriff); Wash. Env't Council v. Bellon, 741 F.3d 1075, 1077 (9th Cir. 2014) (M. Smith, J., concurring) (private parties); Wash. Env't Council v. Bellon, 732 F.3d 1131, 1145 (9th Cir. 2013) (private parties); Amnesty Int'l USA v. Clapper, 667 F.3d 163, 197 n.2 (2d Cir. 2011) (Livingston, J., dissenting) (not states), *aff'd*, 568 U.S. 398 (2013); Canadian Lumber Trade All. v. United States, 517 F.3d 1319, 1337–38 (Fed. Cir. 2008) (foreign government); Public Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279, 1284, 1294 n.2 (D.C. Cir. 2007) (private parties).

407. 585 F.3d 855, 865 n.5 (5th Cir. 2009); *see also Juliana*, 947 F.3d at 1183 n.9 (Staton, J., dissenting) (stating that the plaintiffs did not need to "rely on the 'special solicitude' of a state to be heard" (quoting Massachusetts v. EPA, 549 U.S. at 520)); Saginaw Cnty. v. STAT Emergency Med. Servs., 946 F.3d 951, 957 (6th Cir. 2020) (denying a county standing and stating that *Massachusetts v. EPA*'s invocation of special solicitude "did not abandon the constitutional baseline"); *Wash. Env't Council*, 741 F.3d at 1079–80 (Gould, J., dissenting) (arguing that despite the "special solicitude" language, "*Massachusetts v. EPA*, in my view, does not mean that only states have standing for environmental challenges relating to global warming").

408. 958 F.3d 274, 280 (4th Cir. 2020), *cert. granted, judgment vacated sub nom.* Trump v. District of Columbia, 141 S. Ct. 1262 (2021).

409. *See id.*

410. *Id.* at 281.

debatable question."[411] For their standing claims "rest[ed] on legal principles that the Supreme Court has expressly endorsed"—including special solicitude.[412] After Trump left office, the Supreme Court vacated the judgment and instructed the Fourth Circuit to dismiss the case as moot.[413]

The Fifth Circuit case *In re Gee* was also a mandamus matter. Abortion providers challenged Louisiana laws regulating the procedure.[414] The district court did not conduct a provision-by-provision standing analysis for all the laws subject to a "cumulative-effects challenge" because of the claim's collective character.[415] The defendant officials, whom the Fifth Circuit treated as Louisiana itself, sought mandamus relief, asking for the dismissal of certain counts.[416] The panel concluded that Louisiana made out a prima facie case in part because states have "special rights to seek relief in federal court," including special solicitude.[417] Nevertheless, the court withheld the writ, remanding the case for a reassessment of the defense's jurisdictional arguments.[418]

Finally, the dissent in a Tenth Circuit case about issue preclusion mentioned special solicitude. *Sierra Club v. Two Elk Generation, LP* held that a private party was bound by administrative proceedings because the state was acting as *parens patriae* in those proceedings.[419] Disagreeing, Judge Lucero argued that *parens patriae* was not a broad preclusion principle but was instead meant "to extend 'special solicitude' to states litigating in federal courts."[420]

The preceding analysis displays the wide variety of ways courts have defined special solicitude and provides evidence that, contrary to conventional wisdom, the concept may rarely if

411. *Id.* at 285–86.

412. *Id.* at 286.

413. Trump v. District of Columbia, 141 S. Ct. at 1262.

414. *See In re* Gee, 941 F.3d 153, 156 (5th Cir. 2019).

415. *Id.* at 156–57.

416. *Id.* at 157 & n.1.

417. *Id.* at 166–67; *see also id.* at 157–70 (broader discussion).

418. *Id.* at 170–71.

419. 646 F.3d 1258, 1267–70 (10th Cir. 2011) (evaluating the argument that a state agency had been in privity with citizens of the state under *parens patriae* doctrine).

420. *Id.* at 1274–75 (Lucero, J., dissenting); *see also id.* at 1275–76 (mentioning special solicitude twice more as a tangent to the preclusion issue).

ever control whether states have standing as a doctrinal matter. But many decisions both denying and granting state standing fail to consider special solicitude at all. The Fifth Circuit, for instance, ignored the concept in its ultimate disposition of *Texas v. Equal Employment Opportunity Commission*—despite a previous opinion in the same case having held it applicable.[421] Likewise, some prominent state-standing cases—including *Virginia ex rel. Cuccinelli v. Sebelius*, an Obamacare challenge from the Fourth Circuit[422]—said nothing about special solicitude. Research quickly reveals similar cases across the country.[423]

IV. REASSESSING SPECIAL SOLICITUDE

What does this deep dive into appellate cases mean for reassessing special solicitude's place in state-standing law? That as a doctrinal matter, the idea does not appear as directly responsible for the current state-litigation situation as many have assumed—but not that there is an appropriate number of state-plaintiff suits in federal courts, that they are brought for appropriate reasons, or that they seek appropriate remedies. And while this investigation has been insistently doctrinal, the point is not that doctrine is the sum of the law. Much the opposite. To borrow from Professor Doug Laycock's classic study debunking the irreparable-injury rule (under which courts say they will not grant equitable relief if an adequate remedy at law exists), "I cite [these] cases more for what they do than for what they say; indeed, I cite them principally to show that they almost never do what they say."[424] Like Laycock's, this project is both insistently doctrinal and "relentlessly realist," for a central motivation "is to conform doctrine"—and conversations about doctrine—"to

421. *See* 933 F.3d 433, 446–49 (5th Cir. 2019) (demonstrating an absence of the concept of special solicitude in the court's analysis); *supra* Part III.B.2 (discussing the previous opinion).

422. *See generally* 656 F.3d 253 (4th Cir. 2011).

423. *See, e.g.*, New York v. Yellen, 15 F.4th 569, 572, 575–77 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 1669 (2022) (granting state standing without mentioning special solicitude); Del. Dep't of Nat. Res. & Env't Control v. EPA, 785 F.3d 1, 4, 8–10 (D.C. Cir. 2015) (granting state standing in part and denying state standing in part without mentioning special solicitude); South Dakota v. U.S. Dep't of Interior, 665 F.3d 986, 987, 989–91 (8th Cir. 2012) (granting state standing without mentioning special solicitude). This list is definitely not exhaustive.

424. DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE, at viii (1991).

reality."[425] The point here is not only that the Supreme Court should renounce special solicitude, but that until then, scholars and other stakeholders concerned about state standing should shift greater attention toward other, potentially more impactful issues and interventions.

The ensuing discussion crystallizes this project's contributions and signposts paths for future research into the complex inputs and implications of state standing.[426] It then leverages this examination of appellate caselaw to posit some alternative areas of potential improvement.[427]

A. CONTRIBUTIONS AND COMPLEXITIES

This study makes multiple important contributions to the conversation surrounding state standing. It documents how different courts, different panels, and different judges have taken a dizzying array of doctrinal approaches to special solicitude since *Massachusetts v. EPA* articulated the concept in 2007. Some pay lip service to giving states extra credit in assessing standing by mentioning special solicitude but reverting to the usual standards. Others view special solicitude as inapposite to the injury element (or at least the concreteness and particularization parts). Still others say the idea assists states in establishing immediacy and redressability but nothing else. Some imply that special solicitude governs suits asserting all manner of harm; others apply the idea only where state plaintiffs allege injury to quasi-sovereign (or sometimes sovereign) interests. Some require the assertion of a procedural right too. And there are still other approaches.

This study also shows that as a doctrinal matter, special solicitude appears significantly less important than previous commentary has assumed. For every or almost every case mentioning the doctrine would or could have come out the same way without it—because courts denied standing anyway, disclaimed the idea, granted standing to other parties seeking the same relief, or suggested that the plaintiffs could have passed the typical

425. *Id.* at viii–ix.
426. *See infra* Part IV.A.
427. *See infra* Part IV.B.

test.[428] Along the way, this study also provides evidence for affirmative doctrinal trends and tendencies—like the Supreme Court's laser-like focus on proprietary injuries, tightening of the causation inquiry in statutory challenges, and resurrection of the *Mellon* bar from its post-*Massachusetts v. EPA* purgatory; or like circuit courts' relative receptivity to sovereignty-related suits and simultaneous skepticism about attempts to recast citizen injuries as state harms.

One of this study's contributions toward advancing the conversation over what special solicitude actually entails should come from inspiring new questions for further exploration. For instance, are there ways in which special solicitude could have influenced outcomes that are difficult to detect from the reasoning in case reporters alone? Perhaps some judges view special solicitude less as a technical instruction and more as a nebulous signal that federal courts should welcome state suits—less as doctrine and more as "vibes." Or perhaps some judges embrace the concept but hesitate to acknowledge (or actively disclaim) its importance because of concerns about its doctrinal place, precedential force, or ideological implications.[429] Perhaps still, in an example of what Professor Richard Re has dubbed "precedent as permission," some judges who would otherwise deny standing grant it without specifying special solicitude's role to provide conservative states the same boon they believe *Massachusetts v. EPA* gave their liberal counterparts.[430]

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428. One could counter that special solicitude should apply only in extraordinary circumstances—like where uncertain harm would be "catastrophic and irreversible," Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494, 511, 513–14 (2008); *see also* Jonathan Remy Nash, *Standing's Expected Value*, 111 MICH. L. REV. 1283, 1306–08 (2013) (similar), or where no private plaintiff has standing to seek a nationwide injunction against unlawful federal conduct, Jonathan Remy Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 NOTRE DAME L. REV. 1985, 2011 (2019). Under that view, the concept's thin record of significance could make good sense. State standing is indeed especially attractive in particular situations, but courts have not limited special solicitude in these ways. So the doctrine's unimportance seems to stem from irrelevance more than rarity.

429. Indeed, because this study proceeds from the hypothesis that special solicitude is doctrinally unimportant even when courts purport to rely on it, the analysis here takes courts at their word when they purport *not* to do so.

430. *See* Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 912 (2021) (explaining that "[i]n its *permissive aspect*, precedent supports the lawfulness of . . . adhering to past decisions"); *id.* at 930 (discussing how "the

Scholars could also pursue additional research techniques. One could attack the issue from a more quantitative than qualitative angle—say, by comparing the rates or volumes of state-standing grants before and after *Massachusetts v. EPA*. State favoritism, furthermore, could have influenced cases that did not use the term "special solicitude," so a wider review of state-standing matters could yield additional information. It is easy to imagine other possible approaches stemming from and supporting this project's takeaway that state-standing problems are more complex than much criticism of special solicitude suggests.

Finally, this study helps align our understanding of doctrinal developments with the litigation landscape. Professors Bray and Baude assert that "[i]n the years since *Massachusetts v. EPA*, the number of lawsuits brought by state attorneys general challenging actions by the federal government has skyrocketed," with "a dramatic rise in such lawsuits during the Obama and Trump administrations."[431] This description is right so far as it goes, but given that *Massachusetts v. EPA* came down toward the end of the George W. Bush administration, it implies that special solicitude produced a massive change.[432] This project complicates that depiction—and makes more sense of empirical political-science work. Exploring such research can help us disaggregate two distinct (but not necessarily independent) sets of phenomena: why courts grant or deny state standing and why state litigators file or withhold suits. This project focuses on the former question—and suggests that the latter likely has (at least somewhat) separate answers.

Professor Paul Nolette has created a database of multistate suits against federal defendants, which, per the graphic below, shows that the total number of actions against federal defendants held roughly steady between the George W. Bush and Obama administrations (at seventy-six and eighty,

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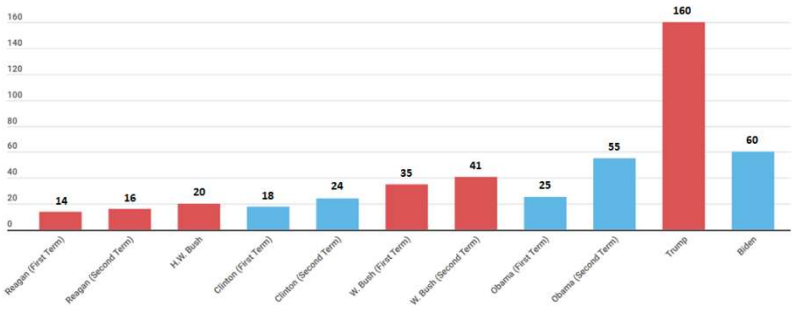
permission model would seem to exacerbate" the concern that "judges can opportunistically use precedent-rhetoric to advance a covert and illicit agenda").

431. Bray & Baude Brief, *supra* note 2, at 10 (citing Paul Nolette & Colin Provost, *Change and Continuity in the Role of State Attorneys General in the Obama and Trump Administrations*, 48 PUBLIUS 469, 473–74 (2018)).

432. *See also* Baude & Bray Comment, *supra* note 1, at 165 (making a similar suggestion).

respectively).[433] Indeed, the number of suits the Obama administration faced during its first four years (twenty-five) was substantially lower than the number the George W. Bush administration faced during its own initial term (thirty-five)—and on par with the number the Clinton administration faced in its second go-round (twenty-four).[434] The real change came after President Obama's reelection, when multistate suits not only grew in number (to fifty-five) but became "increasingly broad in policy scope," challenging several of the administration's "signature policy achievements."[435] Multistate suits then ballooned during the Trump administration's single term (to 160).[436]

FIGURE 1: MULTISTATE LAWSUITS AGAINST THE FEDERAL GOVERNMENT



Professor Nolette has specified that the "surge" in "[p]artisan lawsuits by states challenging federal actions" began "after 2014,"[437] which was seven-plus years after *Massachusetts v. EPA* mentioned special solicitude. Maybe the doctrine's effects were not felt until then—say, because state attorneys general needed

433. Paul Nolette, *Statistics and Visualizations*, STATE LITIG. & AG ACTIVITY DATABASE, https://attorneysgeneral.org/multistate-lawsuits-vs-the-federal-government/statistics-and-visualizations-multistate-litigation-vs-the-federal-government [https://perma.cc/KC9Q-WES8]. I added the numbers atop each bar and removed tabs for the political parties of plaintiffs. The source suggests that the underlying data was last updated on September 2, 2023. Paul Nolette, *State Lawsuits Database*, STATE LITIG. & AG ACTIVITY DATABASE, https://attorneysgeneral.org/multistate-lawsuits-vs-the-federal-government/list-of-lawsuits-1980-present [https://perma.cc/R9XU-VGGS].

434. Nolette, *Statistics and Visualizations*, *supra* note 433.

435. *Id.*; Nolette & Provost, *supra* note 431, at 474.

436. Nolette, *Statistics and Visualizations*, *supra* note 433.

437. Liptak, *supra* note 4.

years to staff up before flexing their new litigation muscles. But that seems implausible as a complete answer, and many other hypotheses are conceivable. What matters for now, though, is that special solicitude as a matter of standing doctrine was likely less pathbreaking than previous commentary has assumed.

B. ALTERNATIVE REFORM AREAS

Like most social phenomena, one cannot reduce federal judicial or state litigation decisions to any single cause. Indeed, careful observers do not chalk up *all* the increase in state-plaintiff suits to special solicitude.[438] In a recent *Harvard Law Review* comment, for instance, Professors Baude and Bray acknowledge that *Massachusetts v. EPA* may not have been "the most important" contributor to present circumstances—with other possible causes including "the rising sophistication and resources of state solicitors general, ideological polarization in Congress, changes in the preliminary injunction, the rise of the national injunction, and a trend toward major executive actions being taken with only an attenuated claim of legislative authorization."[439]

Often, however, special solicitude still takes top billing over less alliterative factors,[440] which deflects focus from alternative areas of reform to the litigation landscape. These may include leveraging political pressure against aggressive plaintiff practices. When Texas Governor Greg Abbott was the state's attorney general, he would famously quip, "I go into the office in the morning. I sue Barack Obama, and then I go home."[441] That strategy brought media attention and electoral success. It is little surprise, therefore, that Abbott's successor, Ken Paxton, has kept up the practice.[442] But with even the majority-conservative

438. For an extended analysis, see generally PAUL NOLETTE, FEDERALISM ON TRIAL (2015).

439. Baude & Bray Comment, *supra* note 1, at 165.

440. *See, e.g.*, Liptak, *supra* note 4 (ascribing special solicitude a central role, including in the subheadline).

441. Catalina Camia, *Texas Gov Hopeful Likes to Sue President Obama*, USA TODAY (July 15, 2013), https://www.usatoday.com/story/onpolitics/2013/07/15/greg-abbott-texas-governor-barack-obama-lawsuits/2517847 [https://perma.cc/FJN3-GNLD].

442. *See* Neena Satija et al., *Texas vs. the Feds—A Look at the Lawsuits*, TEX. TRIB. (Jan. 17, 2017), https://www.texastribune.org/2017/01/17/texas-federal-government-lawsuits [https://perma.cc/7Y6V-KV2P].

Supreme Court souring on the Lone Star State's tactics in *California v. Texas*, *Haaland v. Brackeen*, and *United States v. Texas*, Texans may want to reevaluate such efforts.[443] Stakeholders in other states should take heed too.

Several additional areas bear considering. A few have gained academic and media attention already—including remedial issues like an upswing in preliminary and national injunctions and uncritical reliance on vacatur in APA cases.[444] The possibility of ideological inflections in some recent justiciability rulings has also made headlines.[445] But other potential pivot points remain obscure, buried in the details of lower-court decisions. While a full exposition lies beyond the present project's scope, shining a light on issues that this research indicates recur across the caselaw should prove useful.

Three aspects of state standing and the surrounding legal terrain stand out. First is the extraordinary scope that some cases accord sovereign and quasi-sovereign interests.[446] While the Fifth Circuit often uses such injuries as special-solicitude triggers, they can also provide state standing all on their own. And courts can seize on the fact that these concepts, especially quasi-sovereign interests, "do[] not lend [themselves] to a simple or exact definition" to elevate policy disagreements between states and the federal government to cognizable legal claims.[447]

Multiple opinions, for instance, have suggested that feeling implicit pressure to change state laws because they interact with

443. *See supra* Parts II.B–II.C (discussing these cases).

444. *See* Baude & Bray Comment, *supra* note 1, at 169–71, 180–83.

445. *See* Pamela King, *Why the Latest Abortion Pill Ruling Has Enviros Rolling Their Eyes*, POLITICO (Aug. 19, 2023), https://www.politico.com/news/2023/08/19/abortion-pill-ruling-environment-00111843 [https://perma.cc/Z46G-M626] (discussing a controversial standing theory proposed by a Fifth Circuit judge in an abortion-related case); Adam Liptak, *What to Know About a Seemingly Fake Document in a Gay Rights Case*, N.Y. TIMES (July 3, 2023), https://www.nytimes.com/2023/07/03/us/politics/same-sex-marriage-document-supreme-court.html [https://perma.cc/SY8Z-5HMD] (discussing controversy surrounding standing in a Supreme Court case related to the freedom of speech and same-sex marriage).

446. *See* Ann Woolhandler & Julia D. Mahoney, *State Standing After* Biden v. Nebraska, 2023 S. CT. REV. 303, 322–23, 322 n.107 (noting and criticizing this trend).

447. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982).

federal regulation in undesirable ways can inflict injury.[448] And some cases ground injury not only in the actual preemption of actual state laws, but in the hypothetical preemption of hypothetical state laws.[449] States, of course, can harbor a potential desire to regulate in any given space at any given time, making such injury always available. Most immediately, courts should reject assertions of standing premised on mere amendatory pressure and purely hypothetical preemption. Further into the future, stakeholders should work to discipline sovereign and quasi-sovereign standing more broadly.

Courts and scholars should also seek to delineate to a greater degree what makes indirect injuries litigable or not. In *Lujan*, the Supreme Court echoed previous statements that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing . . . is ordinarily 'substantially more difficult' to establish" on causation and redressability grounds.[450] The Justices have offered little guidance

448. *See, e.g.*, Kentucky v. Yellen, 54 F.4th 325, 364 (6th Cir. 2022) (Nalbandian, J., concurring in part and dissenting in part) ("[I]f the States wish to comply with the Rules, they must do *something*—either raise other taxes or lower expenditures elsewhere in the budget to offset a revenue reduction. That *something* creates an ongoing injury."); Texas v. United States, 809 F.3d 134, 153 (5th Cir. 2015) ("DAPA affects the states' 'quasi-sovereign' interests by imposing substantial pressure on them to change their laws . . . ."); New Mexico v. McAleenan, 450 F. Supp. 3d 1130, 1185–86 (D.N.M. 2020) (granting New Mexico standing to challenge federal immigration policy because, among other things, "the Defendants' actions prompted New Mexico to avoid potential humanitarian, public safety, and public health crises that would result from inaction" (internal quotation marks omitted)); Pennsylvania v. Trump, 351 F. Supp. 3d 791, 806 (E.D. Pa.) ("[T]he Final Rules—like DAPA—'affect[ ] the [S]tates' "quasi-sovereign" interest by imposing substantial pressure on them to change their laws.'" (second and third alterations in original) (quoting Texas v. United States, 809 F.3d at 153)), *aff'd*, 930 F.3d 543 (3d Cir. 2019), *rev'd and remanded sub nom.* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020).

449. *See, e.g.*, Texas v. United States, 50 F.4th 498, 516 (2022) ("DACA implicates preemption concerns. . . . An attempt by Texas to establish an alternative classification system or work authorizations would be preempted, despite the State's likely interest in doing so. . . . [This] create[s] a quasi-sovereign interest."); Kentucky v. Biden, 23 F.4th 585, 598–99 (6th Cir. 2022) ("States have a sovereign interest to sue the United States when a federal regulation purports to preempt state law. . . . States also have sovereign interests to sue when they believe that the federal government has intruded upon areas traditionally within states' control.").

450. 504 U.S. 555, 562 (1992) (quoting Allen v. Wright, 468 U.S. 737, 757–58 (1984)).

since, and decisions turning on indirect injuries are often hard to reconcile.[451] To the extent that states are increasingly likely to experience indirect injuries by virtue of federal power expanding over time, they should not suffer disadvantages relative to other plaintiffs.[452] But clarifying how to assess indirect injuries consistently across plaintiff categories (something that *Department of Commerce v. New York* and *Murthy v. Missouri* have recently begun to do in the state-litigation context[453]) could bring considerable order to this chaotic corner of doctrine.

The broad APA review system provides a last area of potential reform. The APA provides that persons "affected or aggrieved by agency action within the meaning of a relevant statute" may seek judicial review, and the Supreme Court has interpreted this provision leniently to further "Congress' evident intent to make agency action presumptively reviewable."[454] This "test is not meant to be especially demanding,"[455] the Court has declared, and "the benefit of any doubt goes to the plaintiff."[456]

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451. *Compare, e.g.*, Texas v. United States, 809 F.3d at 161–62 (defending as not without "principled limit" a grant of state standing to challenge federal immigration policy based on the indirect injury of providing services to noncitizens), *with* Arizona v. Biden, 40 F.4th 375, 386 (6th Cir. 2022) ("Are we really going to say that any federal regulation of individuals through a policy statement that imposes peripheral costs on a State creates a cognizable Article III injury for the State to vindicate in federal court? If so, what limits on state standing remain?").

452. *See* Crocker, *Organizational Account*, *supra* note 13, at 2071–72 (arguing that "the fact that states' proprietary interests are so diffuse that a host of federal-government actions could cause them injuries does not make those injuries generalized grievances" and that "[a]s a doctrinal matter, at least, states should be able to vindicate their proprietary interests through litigation in federal court to the same extent that other litigants can").

453. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2565–66 (2019) (explaining how the plaintiffs' standing theory did "not rest on mere speculation about the decisions of third parties" but rested "instead on the predictable effect of Government action on the decisions of third parties"); Murthy v. Missouri, 144 S. Ct. 1972, 1986, 1994–95 (2024) (explaining how a particular plaintiff could "[]not rely on 'the predictable effect of Government action on the decisions of third parties'" but could "only 'speculat[e] about the decisions of third parties'" (second alteration in original) (quoting Dep't of Com. v. New York, 139 S. Ct. at 2566)). For a recent non-state case grappling with assertions of indirect injury, see generally *Food & Drug Administration v. Alliance for Hippocratic Medicine*, 144 S. Ct. 1540 (2024).

454. 5 U.S.C. § 702; Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987).

455. *Sec. Indus. Ass'n*, 479 U.S. at 399.

456. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 225 (2012).

Under this "generous" scheme, courts regularly allow states to levy technical attacks on federal policies that affect them only incidentally.[457] Indeed, displaying constitutional-avoidance logic, courts often prefer such claims to substantive legal challenges—such that, for instance, DAPA went down for being promulgated without notice-and-comment rulemaking rather than (as the plaintiff states also argued) for violating the Constitution's Take Care Clause.[458] Congress could (though I take no position on whether it should) narrow the opening this gatekeeping regime provides with respect to states, perhaps by setting some population- or monetary-effect threshold, or even by limiting such suits to states directly affected by federal action.

Two closing points bear considering. First, many of the problems with state-standing law may actually be problems with standing law more broadly. As Chief Justice Roberts said in his *Massachusetts v. EPA* dissent, "[w]hen dealing with legal doctrine phrased in terms of what is 'fairly' traceable or 'likely' to be redressed, it is perhaps not surprising that the matter is subject to some debate."[459] Indeed, both state-standing doctrine and standing law more broadly may be so malleable that in many cases, judges can effectively do whatever they want. The present study is consistent with but does not compel this conclusion. The key here is that sidelining myopic criticisms of special solicitude should produce more constructive conversations by providing a more accurate assessment of how (state) standing actually works.

Second, there are good reasons for the Supreme Court to discard special solicitude expressly—or at least to limit *Massachusetts v. EPA*'s reference to restating the preexisting preference for procedural rights applicable to all plaintiffs.[460] To channel Professor Laycock again, "[b]ad doctrine matters because it

457. *Sec. Indus. Ass'n*, 479 U.S. at 395 (quoting Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 156 (1970)); *see, e.g.*, Texas v. United States, 787 F.3d 733, 754–62 (5th Cir. 2015) (allowing states to attack DAPA under the APA); Wyoming *ex rel.* Crank v. United States, 539 F.3d 1236, 1242 (10th Cir. 2008) (allowing a state to attack ATF's interpretation of a federal firearms law under the APA).

458. *See* Texas v. United States, 86 F. Supp. 3d 591, 677 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 579 U.S. 547 (2016).

459. 549 U.S. 497, 547 (2007) (Roberts, C.J., dissenting).

460. *See id.* at 517 (majority opinion) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992)); *supra* Part I.B.

confuses us—scholars, judges, and practitioners alike."[461] When it comes to special solicitude, government lawyers waste public resources briefing and arguing an issue that usually proves irrelevant as a doctrinal matter. Legal rules that favor some parties over others without clear justification erode judicial legitimacy.[462] And courts could imbue special solicitude with additional meaning—and mischief—in the future.[463]

The point is not that state standing (even in controversial contexts) is necessarily problematic. Vindicating sovereign interests can be important for federalism reasons, for example, and vindicating quasi-sovereign interests can be important for democracy reasons—among others.[464] The point is instead that by appearing to do nearly nothing, special solicitude seems, paradoxically, to do more harm than good.[465]

CONCLUSION

This Article has taken a deep dive into federal appellate caselaw to reassess the role of special solicitude in state standing. Among other contributions, the study has returned with what may be a surprising result: that special solicitude is not so special after all. Contrary to conventional wisdom, the Supreme Court's declaration in *Massachusetts v. EPA* that states are "entitled to special solicitude in our standing analysis" appears to have made little if any difference to the outcomes of actual cases.[466]

To be sure, the Justices should jettison the doctrine. But in the meantime, as federal courts and concerned commentators continue to hash out the status of states in public-law litigation,

461. LAYCOCK, *supra* note 424, at ix.

462. *See* Katherine Mims Crocker, *Constitutional Rights and Remedial Consistency*, 110 VA. L. REV. 521, 581–82 (2024).

463. *Cf.* Allison Orr Larsen, *Becoming a Doctrine*, 76 FLA. L. REV. 1, 9–14 (2024) (tracing the evolving meaning and mischief of the major-questions doctrine).

464. *See* Crocker, *Organizational Account*, *supra* note 13, at 2084–88; Crocker, *Sovereign Standing*, *supra* note 13, at 2082–88. For multiple arguments in favor of quasi-sovereign standing, see generally F. Andrew Hessick, *Quasi-Sovereign Standing*, 94 NOTRE DAME L. Rev. 1927 (2019).

465. *Cf.* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE. L.J. 2, 10–11 (2017) (arguing that qualified immunity influences case outcomes less often than assumed and contending that this inefficacy impairs the litigation process by prompting complex motions practice and wasteful public spending).

466. 549 U.S. 497, 520 (2007).

the conversation should focus less on special solicitude and more on other areas of potential reform.

CASE APPENDIX

Organized alphanumerically by court, then alphanumerically by case name

D.C. Circuit				
Case Name	**Citation**	**State Standing**	**Special Solicitude**	**Part**
Alaska v. U.S. Dep't of Agric.	17 F.4th 1224 (D.C. Cir. 2021)	Denied	Generally inadequate	III.A.1
Arpaio v. Obama	797 F.3d 11 (D.C. Cir. 2015) (Brown, J., concurring)	Not at issue	Miscellaneous	III.C
Ctr. for Biological Diversity v. U.S. Dep't of Interior	563 F.3d 466 (D.C. Cir. 2009)	Denied	Generally inadequate	III.A.1
Coal. for Responsible Regul. v. EPA	684 F.3d 102 (D.C. Cir. 2012)	Denied	Excluding injury	III.A.2
Del. Dep't of Nat. Res. & Env't Control v. Fed. Energy Regul. Comm'n	558 F.3d 575 (D.C. Cir. 2009)	Denied	Excluding injury	III.A.2
Env't Integrity Project v. Pruitt	709 F. App'x 12 (D.C. Cir. 2017)	Denied	Generally inadequate	III.A.1

Manitoba v. Bernhardt	923 F.3d 173 (D.C. Cir. 2019)	Denied	Generally inadequate	III.A.1
Marino v. Nat'l Oceanic & Atmospheric Admin.	33 F.4th 593 (D.C. Cir. 2022)	Not at issue	Miscellaneous	III.C
Nat'l Ass'n of Clean Air Agencies v. EPA	489 F.3d 1221 (D.C. Cir. 2007)	Granted	Implicitly extraneous	III.B.2
New Jersey v. EPA	989 F.3d 1038 (D.C. Cir. 2021); *id.* at 1052 (Walker, J., dissenting)	Granted; argued for denying	Implicitly extraneous; argued generally inadequate	III.B.; III.A.1
North Carolina v. EPA	587 F.3d 422 (D.C. Cir. 2009)	Denied	Generally inadequate	III.A.1
Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.	489 F.3d 1279 (D.C. Cir. 2007)	Not at issue	Miscellaneous	III.C
Se. Fed. Power Customers, Inc. v. Geren	514 F.3d 1316 (D.C. Cir. 2008)	Granted	Implicitly extraneous	III.B.2
Texas v. EPA	726 F.3d 180 (D.C. Cir. 2013)	Denied	Excluding injury	III.A.2

Federal Circuit				
Case Name	**Citation**	**State Standing**	**Special Solicitude**	**Part**
Canadian Lumber Trade All. v. United States	517 F.3d 1319 (Fed. Cir. 2008)	Not at issue	Miscellaneous	III.C
First Circuit				
Case Name	**Citation**	**State Standing**	**Special Solicitude**	**Part**
Massachusetts v. U.S. Dep't of Health & Hum. Servs.	923 F.3d 209 (1st Cir. 2019)	Granted	Explicitly extraneous	III.B.1
Penobscot Nation v. Frey	3 F.4th 484 (1st Cir. 2021) (en banc)	Denied	Excluding injury	III.A.2
Second Circuit				
Case Name	**Citation**	**State Standing**	**Special Solicitude**	**Part**
Amnesty Int'l USA v. Clapper	667 F.3d 163 (2d Cir. 2011) (Livingston, J., dissenting)	Not at issue	Miscellaneous	III.C
Connecticut v. Am. Elec. Power Co.	582 F.3d 309 (2d Cir. 2009)	Granted	Explicitly extraneous	III.B.1
Lacewell v. Off. of the Comptroller	999 F.3d 130 (2d Cir. 2021)	Denied	Excluding injury	III.A.2

of the Currency				
Mashantucket Pequot Tribe v. Town of Ledyard	722 F.3d 457 (2d Cir. 2013)	Granted	Implicitly extraneous	III.B.2
Third Circuit				
Case Name	**Citation**	**State Standing**	**Special Solicitude**	**Part**
Pennsylvania v. President	930 F.3d 543 (3d Cir. 2019)	Granted	Explicitly extraneous	III.B.1
Fourth Circuit				
Case Name	**Citation**	**State Standing**	**Special Solicitude**	**Part**
In re Trump	958 F.3d 274 (4th Cir. 2020)	Not at issue	Miscellaneous	III.C
Fifth Circuit				
Case Name	**Citation**	**State Standing**	**Special Solicitude**	**Part**
Brackeen v. Bernhardt	937 F.3d 406 (5th Cir. 2019)	Granted	Implicitly extraneous	III.B.2
Brackeen v. Haaland	994 F.3d 249 (5th Cir. 2021) (separate opinion of Dennis, J.)	Argued for granting	Implicitly extraneous	III.B.2
Comer v. Murphy Oil USA	585 F.3d 855	Not at issue	Miscellaneous	III.C

	(5th Cir. 2009)			
Gen. Land Off. v. Biden	71 F.4th 264 (5th Cir. 2023)	Granted	Explicitly extraneous	III.B.1
In re Gee	941 F.3d 153 (5th Cir. 2019)	Not at issue	Miscellaneous	III.C
Louisiana ex rel. Landry v. Biden	64 F.4th 674 (5th Cir. 2023)	Denied	Generally inadequate	III.A.1
Louisiana ex rel. La. Dep't of Wildlife & Fisheries v. Nat'l Oceanic & Atmospheric Admin.	70 F.4th 872 (5th Cir. 2023)	Denied	Excluding injury	III.A.2
Texas v. Biden	10 F.4th 538 (5th Cir. 2021)	Granted	Explicitly extraneous	III.B.1
Texas v. Biden	20 F.4th 928 (5th Cir. 2021)	Granted	Implicitly extraneous	III.B.2
Texas v. Equal Emp. Opportunity Comm'n	827 F.3d 372 (5th Cir. 2016)	Granted	Implicitly extraneous	III.B.2
Texas v. United States	787 F.3d 733 (5th Cir. 2015)	Granted	Conceptually extraneous	III.B.3

Texas v. United States	809 F.3d 134 (5th Cir. 2015)	Granted	Conceptually extraneous	III.B.3
Texas v. United States	945 F.3d 355 (5th Cir. 2019)	Granted	Explicitly extraneous	III.B.1
Texas v. United States	40 F.4th 205 (5th Cir. 2022)	Granted	Implicitly extraneous	III.B.2
Texas v. United States	50 F.4th 498 (5th Cir. 2022)	Granted	Conceptually extraneous	III.B.3
Sixth Circuit				
Case Name	**Citation**	**State Standing**	**Special Solicitude**	**Part**
Arizona v. Biden	31 F.4th 469 (6th Cir. 2022)	Denied	Generally inadequate	III.A.1
Arizona v. Biden	40 F.4th 375 (6th Cir. 2022)	Denied	Generally inadequate	III.A.1
Kentucky v. Yellen	54 F.4th 325 (6th Cir. 2022) (Nalbandian, J., concurring in part, dissenting in part)	Argued for granting	Conceptually extraneous	III.B.3
Saginaw Cnty. v.	946 F.3d 951	Not at issue	Miscellaneous	III.C

STAT Emergency Med. Servs.	(6th Cir. 2020)			
Seventh Circuit				
Case Name	**Citation**	**State Standing**	**Special Solicitude**	**Part**
Indiana v. EPA	796 F.3d 803 (7th Cir. 2015)	Granted	Explicitly extraneous	III.B.1
Michigan v. EPA	581 F.3d 524 (7th Cir. 2009)	Denied	Generally inadequate	III.A.1
1000 Friends of Wisc. Inc. v. U.S. Dep't of Transp.	860 F.3d 480 (7th Cir. 2017) (Feinerman, J., dissenting)	Argued for granting	Explicitly extraneous	III.B.1
Eighth Circuit				
Case Name	**Citation**	**State Standing**	**Special Solicitude**	**Part**
Missouri v. Biden	52 F.4th 362 (8th Cir. 2022)	Denied	Generally inadequate	III.A.1
Missouri v. Yellen	39 F.4th 1063 (8th Cir. 2022)	Denied	Generally inadequate	III.A.1
Ninth Circuit				
Case Name	**Citation**	**State Standing**	**Special Solicitude**	**Part**
Arizona v. Yellen	34 F.4th 841 (9th Cir. 2022)	Granted	Implicitly extraneous	III.B.2

California v. Trump	963 F.3d 926 (9th Cir. 2020)	Granted	Implicitly extraneous	III.B.2
Juliana v. United States	947 F.3d 1159 (9th Cir. 2020); *id.* at 1175 (Staton, J., dissenting)	Not at issue; not at issue	Miscellaneous; miscellaneous	III.C; III.C
Nat. Res. Def. Council v. EPA	542 F.3d 1235 (9th Cir. 2008)	Granted	Implicitly extraneous	III.B.2
Sierra Club v. Trump	977 F.3d 853 (9th Cir. 2020)	Granted	Implicitly extraneous	III.B.2
Sturgeon v. Masica	768 F.3d 1066 (9th Cir. 2014)	Denied	Excluding injury	III.A.2
Washington v. Trump	858 F.3d 1168 (9th Cir. 2017) (Bea, J., dissenting)	Argued for denying	Generally inadequate	III.A.1
Wash. Env't Council v. Bellon	732 F.3d 1131 (9th Cir. 2013)	Not at issue	Miscellaneous	III.C
Wash. Env't Council v. Bellon	741 F.3d 1075 (9th Cir. 2014) (M. Smith, J.,	Not at issue; not at issue	Miscellaneous; miscellaneous	III.C; III.C

	concurring); *id.* at 1079 (Gould, J., dissenting)			
Tenth Circuit				
Case Name	**Citation**	**State Standing**	**Special Solicitude**	**Part**
New Mexico v. Dep't of Interior	854 F.3d 1207 (10th Cir. 2017)	Granted	Explicitly extraneous	III.B.1
New Mexico ex rel. Richardson v. Bureau of Land Mgmt.	565 F.3d 683 (10th Cir. 2009)	Granted	Implicitly extraneous	III.B.2
Sierra Club v. Two Elk Generation, LP	646 F.3d 1258 (10th Cir. 2011)	Not at issue	Miscellaneous	III.C
Utah ex rel. Div. of Forestry, Fire & State Lands v. United States	528 F.3d 712 (10th Cir. 2008)	Granted	Implicitly extraneous	III.B.2
Wyoming v. U.S. Dep't of Interior	674 F.3d 1220 (10th Cir. 2012)	Denied	Excluding injury	III.A.2
Wyoming ex rel. Crank v. United States	539 F.3d 1236 (10th Cir. 2008)	Granted	Implicitly extraneous	III.B.2