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A TAKE ON "SPECIAL SOLICITUDE" IN STATE STANDING: RECONCILING THE UNRECONCILABLE

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I. INTRODUCTION

Climate change. Immigration. Student loan debt. Discrimination. Economic crises. These are all topics over which states have attempted to sue the federal government. At first glance, states seem to have a special power to vindicate wrongdoings against their citizens. But do states *really* have greater power to bring suit than private individuals? The answer to this question is often no; the same standing doctrine applies to both individuals and states. Therefore, all claimants must demonstrate they satisfy the three prongs of Article III standing: injury, causation, and redressability. This principle would be all well and good if not for *Massachusetts v. Environmental Protection Agency*, where the Supreme Court famously quipped, without much elaboration, that when states bring a suit, they are entitled to "special solicitude."[1] Following this, the Court held that the state of Massachusetts established standing to sue the federal government over damage to the State's coastline property resulting from a complete lack of emission regulation.[2]

These two words—"special solicitude"—have been largely hollow in the standing doctrine. During the summer of 2023, in *U.S. v. Texas*, the Court held that Texas and Louisiana did not have standing to sue the federal government when they demanded the Executive amend its immigration policy to arrest more criminal noncitizens.[3] Unsurprisingly, the majority opinion did not invoke special solicitude. However, the dissent *did*. Justice Alito relied on special solicitude to argue that Texas did in fact have a judicially cognizable injury.[4] *U.S. v. Texas*'s conflicting opinions have left the legal community perplexed as to whether Texas effectively established standing based on *Massachusetts v. EPA*'s holding. The arguments presented in *U.S. v. Texas* therefore renewed the debate on how lenient courts should be in assessing state standing.

This Comment investigates the gap between the holdings in *Massachusetts v. EPA* and *U.S. v. Texas* and attempts to reconcile their

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1. Mass. v. EPA, 549 U.S. 497, 520 (2007).
2. *Id.* at 521-22.
3. *See* U.S. v. Tex., 143 S. Ct. 1964 (2023).
4. *Id.*

seemingly contrary conclusions. Then, in an attempt to preserve each case, this Comment offers a proposal outlining which case should be the controlling precedent when future cases on state standing arise. Section II first explains the standing doctrine and elaborates on a special form of state standing invoked in *parens patriae* suits. Section II then explores the Court's opinions in *Massachusetts v. EPA*, relevant literary analyses of *Massachusetts v. EPA*, and the impact of *Massachusetts v. EPA* on the standing doctrine. Lastly, Section II discusses the four opinions in *U.S. v. Texas*.

Subsequently, Section III of this Comment argues the Court correctly held that Texas lacked standing and that both *Massachusetts v. EPA* and *U.S. v. Texas* should hold precedential weight in future cases, limited only to their traditional Article III standing analyses. First, Section III argues that the Court was wrong to rely on special solicitude in *Massachusetts v. EPA*, but the three-part standing analysis in that case should remain good law. Second, Section III agrees that Texas, following the Court's reasoning in *Massachusetts v. EPA* and *Linda R.S. v. Richard D.*, lacked a legally cognizable interest and, therefore, did not have standing to sue the federal government. Third, Section III proposes that the Court should invoke the traditional three-part standing analyses in either *Massachusetts v. EPA* or *U.S. v. Texas* for future state standing cases, depending on whether the claimant is challenging existing government actions or alleging a complete absence of necessary government action.

II. BACKGROUND

Since the *Massachusetts v. EPA* decision in 2007, states have flooded federal courts with suits against the Executive. One of the many suits was *U.S. v. Texas*. Facing the vague language in *Massachusetts v. EPA*, the Court has often erred on the side of not invoking this case to support decisions on state standing.[5] However, the use of *Massachusetts v. EPA* in the *U.S. v. Texas* dissent raised questions of the former's merit. This Section introduces the standing doctrine and further discusses *Massachusetts v. EPA* and *U.S. v. Texas*. Part A first explores the doctrine of standing generally and as applied to the states. Then, Part B delves into *Massachusetts v. EPA*, analyzing both the majority and dissenting opinions. Part C introduces various scholarship concerning the special solicitude standard of *Massachusetts v. EPA*. Subsequently, Part D briefly explores how *Massachusetts v. EPA* has shaped state standing since 2007. Finally, Part E dissects how the majority, concurrences, and dissent applied the standing doctrine in the recent *U.S. v. Texas* decision.

5. *See infra* Section II.D.

A. The Standing Doctrine

Article III of the Constitution grants the Federal Judiciary jurisdiction over "all Cases . . . arising under this Constitution, [and] the Laws of the United States . . . [and all] Controversies."[6] This provision is commonly interpreted to extend Article III jurisdiction to the lower federal courts, albeit limiting their reach to hear only those cases and controversies that arise under the Constitution.[7] In practice, the words "cases" and "controversies" limit federal jurisdiction to disputes that have historically been viewed as "capable of resolution through the judicial process," reinforcing a separation between the branches of government.[8] That is, some controversies are better left to the Executive, and others to the Legislature. By screening out which issues qualify for judicial review, Article III plays a vital role in maintaining the separation of powers.[9]

Further, a claim is justiciable, or able to be properly resolved in the courts,[10] only if the party bringing the suit has standing, the issue is ripe and not moot, and the issue presented is not a political question.[11] The language of Article III by itself does not provide precise guidelines for the courts, but there is a large body of case law that establishes these justiciability principles. Therefore, many cases have defined what is known as the standing doctrine.

1. The Three Standing Requirements

To have standing, at least one party bringing suit must have a concrete and particularized injury.[12] If the injury is not yet concrete, at least one party bringing suit must have an actual or imminent, not hypothetical, threat of an injury.[13] Moreover, the injury must be "fairly traceable to the defendant's allegedly unlawful conduct"—establishing causation.[14] And lastly, the relief requested must be likely to redress the injury.[15] Overall, the injury must always be cognizable in a federal court, reflecting

6. U.S. CONST. art. III, § 2, cl. 1.

7. Flast v. Cohen, 392 U.S. 83, 94-95 (1968).

8. *Id.* at 95.

9. *Id.* at 94-95.

10. *Justiciable*, BLACK'S LAW DICTIONARY (2nd ed.).

11. *Flast*, 392 U.S. at 95.

12. Mass. v. EPA, 549 U.S. 497, 505 (2007) (specifying that only one party bringing suit needs to satisfy Article III standing requirements); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (requiring a concrete and particularized injury).

13. L.A. v. Lyons, 461 U.S. 95, 102 (1983).

14. Allen v. Wright, 468 U.S. 737, 751 (1984).

15. *Id.*

traditionally recognized cases and controversies.[16] Although a seemingly straightforward list, these three elements have caused much confusion in complex litigation.

Starting with the latter two elements, causation and redressability are often intertwined in their analyses and heavily rely upon how the claimant characterized the injury.[17] For example, the Court in *Linda R.S.* held that the plaintiff lacked causation and redressability because her alleged injury was not judicially cognizable.[18] The plaintiff sought the prosecution of her illegitimate child's father under a statute criminalizing the neglect of legitimate children, which she alleged was discriminatory.[19] However, the plaintiff's interest in compelling the father's prosecution was not an interest traditionally heard in federal courts.[20] And, without a cognizable interest in the prosecution of the father, the plaintiff could not establish a causal link between the statute's nonenforcement and the father's refusal to pay child support.[21] The Court also noted there was no way to prove that the prosecution of the father would have redressed the plaintiff's injury: child-related expenses.[22] Therefore, the plaintiff's claim lacked both causation and redressability because of the nature of the injury.

As *Linda R.S.* shows, injuries take many forms. Because of this, the case law regarding what constitutes a valid injury under Article III is extremely expansive. This Comment focuses on the Court's analysis of when a state brings a particularized injury claim and when, alternatively, a state brings a *parens patriae* claim as sovereign of its citizens.

2. Injury and State Standing

A state may satisfy the standing requirements the same way private parties would—through a direct injury to its own property—or, alternatively, states may claim a quasi-sovereign interest in the litigation as a *parens patriae*.[23] For the first method, states must generally satisfy the three constitutional standing elements as any individual would.[24] *Massachusetts v. EPA*, however, suggests that courts may apply relaxed standing analyses to states, which this Comment discusses further in Section II.B.[25]

16. Alfred L. Snapp & Son v. P.R., 458 U.S. 592, 611 (1982) (Brennan, J., concurring).
17. *See* Linda R.S. v. Richard D., 410 U.S. 614 (1973).
18. *Id.* at 619.
19. *Id.* at 614-15.
20. *Id.* at 619.
21. *Id.* at 618.
22. *Id.* at 619.
23. *See* Alfred L. Snapp & Son v. P.R., 458 U.S. 592 (1982).
24. *See* Biden v. Neb., 143 S. Ct. 2355, 2365 (2023).
25. Mass. v. EPA, 549 U.S. 497, 520 (2007) (discussed in depth in Section II.B).

A state may also sue as a *parens patriae*. Literally translated, *parens patriae* means the "parent of the country or homeland."[26] Thus, a state may bring a suit as the parent of its "country" when the alleged injury affects the citizens of the state at large.[27] To do this, the state must show that it has a quasi-sovereign interest in the outcome of the case.[28] The Court has deemed this extra requirement a "hurdle" because of the undefined nature of what actually constitutes a quasi-sovereign interest.[29] To qualify as quasi-sovereign, the state's interest must be "sufficiently concrete to create an actual controversy between the state and the defendant."[30] In other words, the state cannot be a merely nominal party—a party in name only, lacking a personal stake in the litigation.[31] Additionally, in *Massachusetts v. Mellon*, the Court held that a state cannot bring a *parens patriae* suit against the federal government because the federal government has the same quasi-sovereign interests in the citizens' well-being as the states do.[32] Despite this precedent, the Court found standing in *Massachusetts v. EPA*, which the Court confusingly deemed a *parens patriae* suit.[33]

What constitutes a quasi-sovereign interest is best understood through case law. For example, quasi-sovereign interests include protecting a state's citizens from discrimination and, also, ensuring there are fair employment opportunities available to those citizens outside the state's borders.[34] The Court in *Alfred L. Snapp & Son v. P.R.* found that Puerto Rico, an unincorporated territory analyzed as a state, had standing as a *parens patriae*. In this case, Alfred L. Snapp & Son, Inc., a Virginia company, failed to employ qualified Puerto Rican migrants and forced other Puerto Rican employees to work in poor conditions. Further, the company wrongfully terminated Puerto Rican employees in violation of the Wagner-Peyser Act and the Immigration and Nationality Act of 1952.[35] Therefore, Puerto Rico had quasi-sovereign interests in preventing both the employment discrimination towards and the denial of federal benefits to its citizens by a party from another state.[36]

In other cases, the Court has found quasi-sovereign interests when there

26. *Parens Patriae*, LEGAL INFO. INST. (May 2022) https://www.law.cornell.edu/wex/parens_patriae.

27. *Alfred*, 458 U.S. at 602-03 (quoting La. v. Tex., 176 U.S. 1 (1900)).

28. *Id.*

29. *Mass. v. EPA*, 549 U.S. at 537 (Roberts, C.J., dissenting).

30. *Alfred*, 458 U.S. at 602.

31. *Id.* at 607.

32. Mass. v. Mellon, 262 U.S. 447, 485-86 (1923).

33. *See Mass. v. EPA*, 549 U.S. at 497; *see also infra* Section III.A (analyzing the Court's dicta).

34. *Alfred*, 458 U.S. at 608.

35. *Id.* at 598.

36. *Id.* at 608.

was physical damage to property mostly owned by state citizens;[37] when the defendant state threatened to cut off gas supply to the plaintiff state and all its citizen consumers;[38] and when the defendant state imposed a tax on the plaintiff state and its citizens for certain uses of natural gas.[39] Despite guidance from the case law, many aspects of what constitutes a quasi-sovereign interest remain delphic, including what proportion of the state must be affected to count as the population "at large."[40]

B. Massachusetts v. EPA

Until 2007, the Court largely followed its ruling in *Mellon*, forbidding *parens patriae* suits against the federal government. This all fell into question after the Court's decision in *Massachusetts v. EPA*. The majority held that Massachusetts had standing to sue the Environmental Protection Agency (EPA) in what the Court called a *parens patriae* suit.[41]

1. Facts

Multiple private organizations filed a rulemaking petition asking the EPA to regulate the emissions of four different greenhouse gases according to § 202(a)(1) of the Clean Air Act. The provision required the EPA Administrator (Administrator) to create regulation standards for any class of new motor vehicles that created emissions "reasonably . . . anticipated to endanger public health or welfare."[42] The petitioners challenged the Administrator's decision, in light of § 202(a)(1), not to regulate new motor vehicles. The petitioners argued that, without any regulations, the four greenhouse gas emissions produced by the vehicles would add to the "serious adverse effects on human health and the environment" caused by climate change.[43] The EPA denied the petition, claiming that the Clean Air Act did not authorize the Administrator to set emission standards, and, even if it did, the Administrator would choose not to regulate the emissions.[44]

Multiple states, including Massachusetts, and local governments intervened in the suit. The parties sought review of the EPA's response in the U.S. Court of Appeals for the District of Columbia Circuit, where the

37. Ga. v. Tenn. Copper Co., 206 U.S. 230 (1907).
38. Pa. v. W. Va., 262 U.S. 553 (1923).
39. Md. v. La., 451 U.S. 725 (1981).
40. *Alfred*, 458 U.S. at 603 (quoting La. v. Tex., 176 U.S. 1 (1900)) (internal quotes omitted).
41. Mass. v. EPA, 549 U.S. 497 (2007).
42. 42 U.S.C.S. § 7521 (2023).
43. *Mass. v. EPA*, 549 U.S. at 510.
44. Mass. v. EPA, 415 F.3d 50, 53 (D.C. Cir. 2005).

court held that the Administrator used proper discretion in denying the petition.[45] Further, the D.C. Circuit did not address standing, instead noting concerns about the clarity and accuracy of the research presented regarding the effects of greenhouse gases on climate change.[46] Following an appeal, the Supreme Court granted certiorari.[47]

2. The Majority

By a bare 5–4 majority, the Court held that Massachusetts satisfied the Article III standing requirements, establishing an injury to its coastline property caused by the EPA's contribution to climate change.[48] Justice Stevens, joined by Justices Kennedy, Souter, Ginsburg, and Breyer, wrote the opinion.

Beginning the discussion on standing, Justice Stevens referenced *Georgia v. Tennessee Copper Co.*, where the Court held that Georgia had standing via *parens patriae*. In *Georgia*, the Court found that the State had a quasi-sovereign interest "behind the [land] titles of its citizens, in all the earth and air within its domain. [Georgia] has the last word as to whether . . . its inhabitants shall breathe pure air."[49] Justice Stevens then likened Georgia's claim to Massachusetts's, writing that "Massachusetts's well-founded desire to preserve its sovereign territory today" supports federal jurisdiction just as Georgia's interest in its earth and air did.[50] Additionally, Justice Stevens recognized that Massachusetts owned a more significant portion of damaged land than Georgia did, making Massachusetts's interest in the claim even stronger.[51]

The majority reasoned that Massachusetts, as a member of the Union, did not have an ability to force other states to reduce emissions, nor did it have the power to negotiate with international superpowers to form a plan for reducing emissions.[52] Therefore, the majority focused on Massachusetts's inability to independently reduce the foreign emissions damaging its property. Justice Stevens went on to famously write, "[g]iven . . . Massachusetts's stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to *special solicitude* in our standing analysis"[53]—suggesting that courts might relax the standing

45. *Id.* at 58.

46. *Id.* at 56.

47. *Mass. v. EPA*, 549 U.S. at 497.

48. *Id.*

49. *Id.* at 518-19 (internal quotations omitted) (quoting Ga. v. Tenn. Copper Co., 206 U.S. 230, 237 (1907)).

50. *Id.* at 519.

51. *Id.*

52. *Id.*

53. *Id.* at 520 (emphasis added).

requirements for states. While Justice Stevens did not directly cite case law supporting special solicitude in state standing, the majority likely used the preceding *parens patriae* cases from the opinion, including *Georgia* and *Alfred*,[54] to support the notion of special solicitude when a state is otherwise powerless to address the harm.[55] The majority went on without discussing the justification or scope of special solicitude. Leaving the world of *parens patriae*, Justice Stevens analyzed Massachusetts's particularized injury under Article III standing.[56]

i. Injury

Massachusetts and its fellow petitioners provided evidence that as emissions rose, glaciers retreated, snow caps melted, and frozen rivers and lakes melted earlier in the year. Massachusetts further provided evidence that, as a result of these adverse environmental impacts, sea levels rose between ten and twenty centimeters over the course of the twentieth century—an increase that had already "begun to swallow" the State's coastal property.[57] The petitioners also claimed that if the EPA did not take steps to reduce emissions, climate change would worsen and lead to various other adverse outcomes.[58] These outcomes included damaging ecosystems; reducing water storage and affecting water supplies; and increasing the severity of natural storms, like hurricanes.[59]

The majority accepted these arguments, clarifying that, though a widespread phenomenon, the scale of the climate change concerns did not preclude Massachusetts—which properly alleged a concrete and particularized injury—from having an interest in the outcome of the litigation.[60] The majority also emphasized Massachusetts's future risk of permanently losing a significant amount of its coastal property.[61] Additionally, the majority considered the hundreds of millions of dollars in current and future repair costs Massachusetts would need to expend without the implementation of additional emission regulations.[62]

54. *See id.* at 518-19.

55. *See id.* at 519-20.

56. *See id.* at 520. The opinion did not provide any context for why it began with a *parens patriae* analysis only to turn to a traditional Article III analysis predicated upon Massachusetts's own personal injury.

57. *Id.* at 522.

58. *Id.* at 520.

59. *Id.*

60. *Id.* at 522 (citing FEC v. Akins, 524 U.S. 11, 24 (1998)).

61. *Id.* at 523.

62. *Id.*

ii. Causation and Redressability

The EPA did not dispute the causal link between greenhouse gas emissions and adverse environmental impacts. However, the EPA did contest causation with respect to its lack of regulation and Massachusetts's specific injuries.[63] Greenhouse gas emissions are produced globally, and so, the EPA reasoned that its lack of emission regulations were not fairly traceable to the damage of Massachusetts's coastal property.[64] Further, the EPA argued that because the incremental step of reducing emissions from new motor vehicles would not mitigate the damage to Massachusetts's land, the requested relief was not likely to redress the State's injury.[65]

The majority rejected this argument. Justice Stevens wrote that "reducing domestic automobile emissions [was] hardly a tentative step" and further discussed how the U.S. was responsible for a large portion of the world's emissions, making any effort to reduce emissions an impactful one.[66] Thus, the majority found that a lack of regulation was fairly traceable to climate-change-related injuries, and, therefore, any level of regulation reducing the effects of climate change would redress Massachusetts's injuries.[67]

3. The Dissent

Chief Justice Roberts authored the dissent, which Justices Scalia, Thomas, and Alito joined.[68] The dissent criticized the majority's use of special solicitude, noting that there is "no basis in [the Court's] jurisprudence" and no real support presented by the majority in the opinion.[69] Additionally, the dissent pointed out that the statutory provision at issue did not specify a relaxed standing requirement for states, nor did it treat public litigants any differently than private litigants.[70] The dissent also discounted the majority's special solicitude argument, explaining that a State's ability to bring suit under *parens patriae* does not lessen the fundamental Article III requirements of injury, causation, and redressability—which the dissent claimed Massachusetts did not meet.[71]

63. *Id.*
64. *Id.* at 523-24.
65. *Id.* at 524.
66. *Id.* at 524-26.
67. *Id.*
68. *Id.* at 535
69. *Id.*
70. *Id.* at 536-57.
71. *Id.* at 538.

Chief Justice Roberts went on to note, importantly, that the majority's reasoning seemed to contradict itself.[72] That is, he took issue with the fact that, after invoking *Georgia* and discussing special solicitude for states in *parens patriae* suits, the majority then applied the traditional three-part Article III test to Massachusetts's *own* injury, not to its citizens' injuries. In other words, the majority found an injury in Massachusetts's "capacity as a landowner,"[73] not as a *parens patriae*.[74] So, the dissent argued not only that special solicitude in *parens patriae* suits had no jurisprudential support, but also that the majority's analysis caused confusion by subsequently invoking a traditional Article III analysis of Massachusetts's *own* injury—not of a quasi-sovereign interest.[75]

Further, the dissent pointed out that the majority ignored relevant precedent prohibiting *parens patriae* suits against the federal government.[76] Interestingly, Chief Justice Roberts also noted how neither the petitioners' briefs, nor any supporting amicus briefs, invoked a *parens patriae* argument.[77] Therefore, the dissent revealed logical gaps in the majority's opinion that have since been scrutinized in academia and subsequent court decisions.[78]

C. Critiques of Massachusetts v. EPA

Even among those who support the holding in *Massachusetts v. EPA*, there is a consensus that the Court failed to fully explain the scope of special solicitude and to articulate its justification in the jurisprudence.[79] Various scholars have contributed gap-filling theories and other explanations to justify the Court's use of special solicitude.

In his article, Professor Bradford Mank argues that *parens patriae* standing already provides special solicitude for states—the only addition the Court made was its use of the phrase "special solicitude."[80] He suggests that courts have interpreted *Mellon*'s limitation on state *parens patriae* suits against the federal government as merely a prudential

72. *Id.* at 539.

73. *Id.* at 522.

74. *Id.* at 539.

75. *Id.* at 539-40. *See supra* Section II.A for a discussion on how states assert the same quasi-sovereign interests that the federal government does over its citizens.

76. *Id.* at 539.

77. *Id.*

78. *See infra* Sections II.C, II.D.

79. *See* 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 (2008); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L. J. 2023 (2008); Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201 (2017).

80. Mank, *supra* note 79, at 1767-68.

limitation on standing. Therefore, the Court in *Massachusetts v. EPA* had the freedom to reject *Mellon*'s prudential limitation.[81] Further, Professor Mank reasons that prohibiting states from suing the federal government over its inaction under the Clean Air Act would go against the Act's premise of shared responsibilities between state and federal governments.[82]

Professor Ernest A. Young presents an alternative stance, arguing that Massachusetts had a traditional interest—that of a landowner with damaged property—that justified its injury-in-fact.[83] So, Professor Young suggests, the Court awarded Massachusetts's causation and redressability analyses special solicitude, not its injury analysis. Professor Young discusses how global emissions contribute to climate change, not just motor vehicle emissions in the U.S., and so the causation and redressability prongs necessarily required a relaxed approach to support Massachusetts's standing.[84] The *Massachusetts v. EPA* dissenters made these same arguments pertaining to a lack of causation and redressability.[85]

Other scholars invoke a third explanation, called sovereign preemption state standing, that justifies giving special solicitude to states. Professor Gillian E. Metzger deems special solicitude a "federalism-inspired deviation from standard administrative law."[86] Further, Professor Metzger recognizes that the majority in *Massachusetts v. EPA* fell short by not justifying this landmark suit with Massachusetts's personal interests as a land owner.[87] Professor Jonathon Remy Nash, inspired by Professor Metzger's piece, coins the term "sovereign preemption state standing."[88] In his article, Professor Nash explains that sovereign preemption state standing arises when a state alleges that an executive agency's lack of enforcement is inconsistent with the relevant statute, and the statute preempts state law.[89] Professor Nash thus argues that Massachusetts had standing because the lack of new motor vehicle emission regulation was inconsistent with the Clean Air Act, which in turn preempted state regulation of new motor vehicle emissions.[90]

However, Professor Tara Leigh Grove criticizes the theory of

81. *Id.*

82. *Id.* at 1769-71.

83. Ernest A. Young, *Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1922 (2019).

84. *Id.*

85. Mass. v. EPA, 549 U.S. 510, 541-42 (2007).

86. Metzger, *supra* note 79, at 2063.

87. *Id.*

88. Nash, *supra* note 79, at 206.

89. *Id.*

90. *Id.* at 207.

sovereign preemption state standing.[91] If Massachusetts's injury was its inability to regulate emissions that the EPA refused to, the proper redress, Professor Grove contends, would have been to "lift the preemption" and allow states to regulate motor vehicle emissions. Therefore, Massachusetts would not have had standing under this preemption theory, considering the State requested that the EPA regulate emissions, not that it be allowed to regulate emissions within its borders.[92] Overall, Professor Grove argues that the *Massachusetts v. EPA* majority lacked sound reasoning for abandoning the precedent that a state cannot sue a federal agency as a *parens patriae*.[93]

Lastly, many scholars have recognized the influx of state suits against the federal government that followed the *Massachusetts v. EPA* decision.[94] Professor Albert C. Lin discusses how, since *Massachusetts v. EPA* during the Bush administration, many liberal *and* conservative states have brought suit against the federal government seeking either stricter or looser environmental regulations, respectively.[95] This trend has also led to numerous suits against the federal government concerning matters beyond environmental regulations and far outside the scope of *Massachusetts v. EPA*.[96]

D. The Impact of Massachusetts v. EPA *on State Standing*

Despite *Massachusetts v. EPA*'s effect of opening the door to more suits against the federal government, courts have nevertheless resisted awarding the decision's use of special solicitude any precedential authority. Since 2007, courts have mainly cited *Massachusetts v. EPA* to support general assertions, including that a widespread harm can constitute a concrete injury when at least one party has suffered a personalized harm.[97] The Court has also invoked *Massachusetts v. EPA* in a few environmental cases over the years, including *American Electric Power Co. v. Connecticut* in 2011 and *Utility Air Regulatory Group v. EPA* in 2014, citing mainly to the decision's impact on the EPA's duty to

91. Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 888 (2016).

92. *Id.*

93. *Id.* at 887.

94. *See* Albert C. Lin, *Uncooperative Environmental Federalism: State Suits Against the Federal Government in an Age of Political Polarization*, 88 GEO. WASH. L. REV. 890 (2020); *see also* Note, *An Abdication Approach to State Standing*, 132 HARV. L. REV. 1301 (2019).

95. Lin, *supra* note 94, at 893.

96. *See* Biden v. Neb., 143 S. Ct. 2355 (2023) (concerning the Biden administration's debt relief plan); *see also* U.S. v. Tex., 143 S. Ct. 1964 (2023) (concerning the number of criminal noncitizen arrests the Department of Homeland Security made near the border after prioritization guidelines were enforced).

97. *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 340 (2016).

regulate emissions under the Clean Air Act.[98]

Beyond these general uses, *Massachusetts v. EPA*'s impact on state standing has been extremely limited. Many courts have refused to cite to *Massachusetts v. EPA* in a strong precedential capacity. *Massachusetts v. EPA* left the legal community with questions about whether a state is truly able to bring a *parens patriae* suit against the federal government. The Court recently reaffirmed, in *Haaland v. Brackeen*, that states generally cannot bring *parens patriae* suits against the federal government.[99] However, the Court did not discuss *Massachusetts v. EPA*.[100] Further, the Court has not adopted its special solicitude argument in a majority opinion since *Massachusetts v. EPA*, exhibiting the low precedential impact of the decision.[101] Therefore, *Massachusetts v. EPA* has had the practical effect of opening the door for suits against the federal government while also having little legal authority to actually support special solicitude in state standing or the allowance of *parens patriae* suits against the federal government.

E. U.S. v. Texas

In 2023, yet another state suit against the federal government came before the Court. However, the majority in *U.S. v. Texas* seemingly parted from the *Massachusetts v. EPA* precedent in deciding that Texas and Louisiana lacked standing for claims contesting the Executive's issuance of the Guidelines for the Enforcement of Civil Immigration Law (the Guidelines).[102]

1. Facts

Under the Biden administration, the Department of Homeland Security (DHS) released the Guidelines, which prioritized the arrest of noncitizens "who are suspected terrorists or dangerous criminals, or who have unlawfully entered the country only recently."[103] The DHS communicated the Guidelines in a memorandum published in January 2021 and provided a temporary update to the Guidelines in a second memorandum

98. Am. Elec. Power Co. v. Conn., 564 U.S. 410, 416 (2011); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 310 (2014).

99. Haaland v. Brackeen, 143 S. Ct. 1609, 1640 (2023).

100. *See generally id.*

101. *See U.S. v. Tex.*, 143 S. Ct. at 1977 (Gorsuch, J., concurring).

102. *Id.* at 1964; *see Guidelines for the Enforcement of Civil Immigration Law*, DEP'T OF HOMELAND SEC., (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [hereinafter *the Guidelines*].

103. *U.S. v. Tex.*, 143 S. Ct. at 1964.

distributed in February 2021.[104] The first memorandum communicated the new arrest priorities and clearly stated that arrests not qualifying as priorities are not prohibited under the Guidelines.[105] Further, the first memorandum articulated that it did not alone create any right enforceable by law.[106] Subsequently, the DHS released its second memorandum with a temporary update, also emphasizing the interim nature of the first memorandum.[107] Significantly, the second memorandum stated that preapproval for enforcement actions against non-prioritized noncitizens would generally be required, but that an officer may act when preapproval is not practical and instead seek approval within twenty-four hours of the action.[108]

In response to the Guidelines, Texas and Louisiana sued the DHS and its Secretary, as well as the U.S. and other federal agencies and executives. The States argued that the Executive violated § 1226(c) and § 1231(a)(2) of Title 8, which require the DHS to arrest a wider range of criminal noncitizens than those prioritized in the Guidelines.[109] The States asked the U.S. District Court for the Southern District of Texas to find the Guidelines unlawful and vacate them, issue a permanent injunction, and award declaratory relief.[110] Subsequently, the district court found that the extra costs the States incurred by detaining criminal noncitizens constituted a concrete harm.[111] Further, the court found a causal link between the Guidelines' instructions and DHS officers' decisions not to arrest or detain certain criminal noncitizens.[112] Therefore, the district court ruled that the Guidelines were unlawful and vacated them, declining to grant injunctive relief.[113] The U.S. Court of Appeals for the Fifth Circuit then declined the DHS's request to reconsider the district court's judgment. The Supreme Court granted certiorari.[114]

2. The Majority

Justice Kavanaugh, joined by Chief Justice Roberts and Justices Sotomayor, Kagan, and Jackson, delivered the majority opinion in *U.S. v.*

104. Tex. v. U.S., 606 F. Supp. 3d 437, 454-55 (Tex. S.D. 2022).

105. *Id.* at 454-55.

106. *Id.* Although not discussed in depth for the purposes of this Comment, the Guidelines' lack of creating a cause of action adds to the interesting discussion on Texas and Louisiana's standing.

107. *Id.*

108. *Id.* at 456.

109. U.S. v. Tex., 143 S. Ct. 1964, 1968-69 (2023).

110. *Tex. v. U.S.*, 606 F. Supp. 3d at 497-98.

111. *U.S. v. Tex.*, 143 S. Ct. at 1969.

112. *Tex. v. U.S.*, 606 F. Supp. 3d at 467.

113. *Id.* at 501.

114. *U.S. v. Tex.*, 143 S. Ct. at 1969.

Texas.[115] The majority held that Texas and Louisiana's alleged injuries—monetary costs resulting from making more noncitizen arrests—were not judicially cognizable.[116] Previously, the Court established that an injury must be both legally and judicially cognizable.[117] Justice Kavanaugh explained that the Court has also previously held, namely in *Linda R.S.*, that a plaintiff lacks a judicially cognizable interest in a suit ordering the prosecution of another.[118] Therefore, because Texas and Louisiana were not the ones prosecuted, they did not have a judicially cognizable interest in challenging the Executive's prosecuting policy.[119]

Additionally, Justice Kavanaugh explained that an injury-in-fact is difficult to establish when there is an "absence of coercive power over the plaintiff" personally.[120] Justice Kavanaugh also noted that accusing the Executive of making an insufficient number of arrests encroaches onto the Executive's Article II authority to faithfully execute the law.[121] With this, the majority noted that, traditionally, the Executive has had the power to prioritize certain noncitizen arrests when there are resource constraints.[122]

Further, Justice Kavanaugh clarified that this holding does not mean the Court would never hear cases involving Executive arrest and prosecution decisions.[123] If the Executive "wholly abandoned its statutory responsibilities to make arrests or bring prosecutions," a plaintiff could obtain agency review under the Administrative Procedure Act and, further, could potentially establish Article III standing in an "extreme case of non-enforcement."[124] However, the States here did not advance an abdication-of-duties argument, and so the majority did not analyze standing further pertaining to this hypothetical.[125]

Finally, the majority emphasized the unique nature of this case, raising the question of whether the Judiciary has the power to order the Executive to take further enforcement actions against federal law violators.[126] Therefore, Justice Kavanaugh described this decision as "narrow" and as "maintain[ing] the longstanding jurisprudential status quo."[127]

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115. *Id.* at 1967.
116. *Id.* at 1969-70.
117. *Id.* at 1969; *see* Raines v. Byrd, 521 U.S. 811, 819 (1997).
118. *Id.* at 1970; *see* Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973).
119. *U.S. v. Tex.*, 143 S. Ct. at 1969-70.
120. *Id.* at 1971 (citing to Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992).
121. *Id.*
122. *Id.* at 1972.
123. *Id.* at 1973.
124. *Id.* at 1974.
125. *Id.*
126. *Id.* at 1975.
127. *Id.* (citing Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973)).

3. The Concurrences

The concurring opinions in *U.S. v. Texas* agreed that the States lacked Article III standing.[128] However, the concurrences differed significantly from the majority, holding that Texas and Louisiana *did* suffer a judicially cognizable harm, but nevertheless lacked redressability.[129] Justice Gorsuch authored the first concurrence, joined by Justices Thomas and Barrett, and Justice Barrett wrote the second concurrence, joined only by Justice Gorsuch.[130]

Justice Gorsuch attacked the majority's statement that the States' lack of standing had to do with the fact that "when the [E]xecutive [B]ranch elects *not* to arrest or prosecute, it does not exercise coercive power over an individual's liberty or property."[131] Justice Gorsuch expressed what is, in his opinion, a contradiction with the jurisprudence. He asked how a lack of exercising coercive power impacted Louisiana and Texas's standing, considering Massachusetts had standing when the EPA was also *not* regulating something allegedly within its power. Notwithstanding this point, Justice Gorsuch criticized *Massachusetts v. EPA*'s special solicitude, suggesting that lower courts should not enforce the case's standing theory in future cases.[132]

Though rejecting the majority's injury analysis, Justice Gorsuch ultimately found that 8 U.S.C. § 1252(f)(1)—which says that only the Supreme Court may grant an injunction in this type of case[133]—prohibited the district court from granting an injunction against the Executive's actions under the Title 8 immigration laws.[134] Additionally, Justice Gorsuch argued that vacating the Guidelines was insufficient because it would not actually dictate how the Executive would exercise its prosecutorial discretion moving forward.[135] Therefore, Justices Gorsuch, Thomas, and Barrett agreed that Texas and Louisiana lacked redressability.[136]

Justice Barrett then wrote separately to contest the majority's argument that the States did not have judicially cognizable injuries.[137] She explained that the Court denied the plaintiff standing in *Linda R.S.* because of a lack

128. *Id.* at 1976 (Gorsuch, J., concurring); *id.* at 1986 (Barrett, J., concurring).

129. *Id.* at 1978.

130. *Id.* at 1976 (Gorsuch, J., concurring); *id.* at 1986 (Barrett, J., concurring).

131. *Id.* at 1977 (quoting U.S. v. Tex., 143 S. Ct. 1964, 1971 (2023)) (internal quotes omitted).

132. *Id.* at 1977.

133. 8 U.S.C. § 1252(f)(1) (2023).

134. *U.S. v. Tex.*, 143 S. Ct. at 1978 (Gorsuch, J., concurring).

135. *Id.* at 1978-79.

136. *Id.*

137. *Id.* at 1986 (Barrett, J., concurring).

of redressability, not because of a lack of a concrete injury.[138] Justice Barrett then argued that *Linda R.S.* discussed issues with both causation and redressability that might arise when the plaintiff is not the individual prosecuted. Thus, she concluded that *Linda R.S.* alone did not preclude finding a cognizable injury in the States' claims. Further, Justice Barrett distinguished the States' interests from the plaintiff's in *Linda R.S.* because the States were not seeking the prosecution of a specific individual—just the "temporary detention of certain noncitizens during elective removal proceedings of uncertain duration" and the vacation of the Guidelines.[139]

4. The Dissent

Justice Alito dissented alone.[140] Finding that only Texas had Article III standing,[141] Justice Alito accused the majority of "brush[ing] aside a major precedent that directly controls the standing question"—*Massachusetts v. EPA*.[142]

The dissent first argued that the Executive was guilty of choosing not to enforce the existing immigration laws by implementing and following the Guidelines' prioritizations.[143] Justice Alito then analyzed the three-part standing test with respect to Texas's alleged injuries. Briefly, the dissent stated that the "cost of criminal supervision of aliens" and "other burdens that Texas had borne" constituted concrete, specific harms.[144] Following the district court's findings, the dissent held that Texas bore costs that were both direct and indirect effects of the second memorandum, which announced the general requirement of preapproval for enforcement actions.[145]

Justice Alito then refuted Justice Gorsuch's arguments against redressability. First, the dissent pointed out that injunctive relief is available for the immigration laws in question by the Court, although it is barred for lower courts.[146] Justice Alito further noted that the district court did not issue an injunction in this case, making this debate irrelevant.[147]

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138. *Id.* at 1987.

139. *Id.*

140. *Id.* at 1989 (Alito, J., dissenting).

141. *Id.* at n.1 (Alito, J., dissenting) (explaining that Texas satisfied Article III standing requirements, so the dissent does not need to consider whether Louisiana also satisfied Article III standing requirements). Accordingly, this Comment focuses solely on Texas' claim throughout Section III.

142. *Id.* at 1989 (Alito, J., dissenting).

143. *Id.* at 1990.

144. *Id.* at 1994.

145. *Id.*

146. *Id.* at 1995.

147. *Id.*

Second, the dissent argued that vacating the second memorandum, based on the district court's findings of causation, would result in the DHS keeping detainers in place that they had otherwise vacated because of the Guidelines.[148] Overall, Texas's superfluous use of state resources would cease, redressing the injuries.[149]

Finally, Justice Alito attacked the majority's main argument that Texas lacked a judicially cognizable injury.[150] Justice Alito started by analogizing this case to *Massachusetts v. EPA*, which he argued supported the notion that plaintiffs with an injury traditionally recognized by the Judiciary have standing against federal agency nonenforcement decisions.[151] The majority in *Massachusetts v. EPA* discussed Massachusetts's inability to address the harms of climate change because of its entry into the Union, which relinquished the State's power to police things such as emissions produced in a neighboring state.[152] Justice Alito likened Texas's inability as a sovereign "to police its borders and regulate the entry of aliens" to Massachusetts's inability to regulate emissions.[153] He reasoned that the "Constitution and federal immigration laws have taken away most of that power" and that the statutory provisions relieving states of bearing the costs of border control are what provide states with only "some" protection against unlawful immigration.[154] Therefore, because of Texas's entry into the Union, the dissent argued that the State gave up sovereign abilities to protect certain interests—the same harm that Massachusetts experienced.[155]

Justice Alito also related Texas's harms and requested relief to *Biden v. Texas*, where two states had standing to sue for the continued detention of noncitizens.[156] There, the States claimed they had spent money on driver's licenses and healthcare for noncitizens because the Executive had completely suspended a detention program for noncitizens, contrary to the relevant statute requiring either detention or contiguous-territory return.[157] Additionally, Justice Alito criticized the majority's interpretation of *Linda R.S.*, adopting Justice Barrett's rebuttal of the majority's argument.[158]

Lastly, Justice Alito discounted the majority's suggestion that a

148. *Id.*
149. *Id.* at 1994.
150. *Id.* at 1996.
151. *Id.*
152. *Id.* at 1996-97.
153. *Id.* at 1997.
154. *Id.*
155. *Id.*
156. *Id.* at 1998. *See* Biden v. Tex., 142 S. Ct. 2528 (2022).
157. *Biden v. Tex.*, 142 S. Ct. at 2536.
158. *U.S. v. Tex.*, 143 S. Ct. at 1999 (Alito, J., dissenting).

plaintiff might have standing when the federal government completely abandons its statutory duties. He questioned how many duties the federal government had to neglect in order to "wholly abandon" its responsibilities.[159] For example, could a plaintiff have standing if the Executive only obeyed eighty percent of immigration laws? Justice Alito therefore did not agree that this "exception" would really allow plaintiffs to have standing.[160] Ultimately, Justice Alito viewed the Guidelines as a violation of the relevant immigration law and of separation of powers principles.[161]

III. DISCUSSION

Massachusetts v. EPA is good law. *U.S. v. Texas* is good law. At first glance, it does not seem like the two holdings—with different takes on state standing in suits against the Executive—can exist harmoniously. Though narrow, there is a thread that preserves both holdings. The key is to recognize what lines of reasoning were truly necessary to reach each decision. Section III identifies these lines of reasoning. Part A first combines academic critiques of *Massachusetts v. EPA* with relevant case law to discuss the merit of the majority opinion in *Massachusetts v. EPA*. Then, Part B analyzes the various standing arguments in *U.S. v. Texas* and discusses *Massachusetts v. EPA*'s influence over *U.S. v. Texas*. Finally, Part C breaks down the precedential effect that *U.S. v. Texas* and *Massachusetts v. EPA* might have on future suits against the federal government.

A. The Merit of Massachusetts v. EPA

The majority's opinion in *Massachusetts v. EPA* was disjointed and confusing. The Court applied *parens patriae* precedent, seemingly invented special solicitude, and discussed Massachusetts's own injury via a traditional Article III standing analysis.[162] To make matters worse, the Court has not clarified or overturned the decision.[163] So, the decision remains good law in the eyes of courts, but does the opinion have any practical effect? There are two lines of reasoning attempting to support standing in *Massachusetts v. EPA*: special solicitude for *parens patriae* suits and Massachusetts's personal injury claim of property damage. To effectively reconcile the seemingly unreconcilable, this Comment

159. *Id.* at 1999-2001.

160. *Id.*

161. *Id.* at 2001-04.

162. Mass. v. EPA, 549 U.S. 497 (2007).

163. *See U.S. v. Tex.*, 143 S. Ct. at 1977 (Gorsuch, J., concurring).

advocates for giving precedential weight only to the traditional Article III analysis necessary to the decision.

The first step in making this argument for *Massachusetts v. EPA* is to contest the Court's use of special solicitude and *parens patriae* precedent. This Comment considers three gap-filling theories advanced by academics: special solicitude as a part of *parens patriae* suits; special solicitude necessarily applied to the causation and redressability of an environmental claim; and sovereign preemption state standing.

Professor Mank's argument that courts have always awarded states special solicitude in *parens patriae* suits is appealing, but not fully convincing. The Court has previously decided *parens patriae* suits with strict criteria, arguably making it harder for states to reach the standing threshold under this doctrine than in suits involving their own injury.[164] The Court requires that the state have an actual interest in the outcome of the litigation with a sufficiently concrete quasi-sovereign interest.[165] Therefore, the state suing must have a stake in the litigation, just as in traditional Article III standing. However, there is room to argue that a state receives special solicitude where its interest is just *sufficiently* concrete and not concrete enough to constitute its own particularized injury. In practice, this argument does not hold true. When states have had standing in past *parens patriae* suits, they typically have a concrete injury in addition to the larger injury affecting a substantial portion of their population. In *Georgia*, many citizens experienced property damage, but so did the State.[166] In *Pennsylvania*, the restricted gas supply had the potential to gravely affect the States' economies.[167] In *Maryland*, both the States *and* the citizens were consumers affected by the tax on uses of natural gas.[168] Therefore, the States had concrete injuries—no special solicitude necessary—that created their actual interest in the outcome of the *parens patriae* litigation.

One case that may support Professor Mank's argument is *Alfred*, where the Court focused on a Virginia company's discriminatory actions against Puerto Rican citizens and the wrongful denial of federal benefits.[169] The denial of federal benefits could have led to economic detriments for Puerto Rico, but it is less obvious what Puerto Rico's injury was in a case of discrimination against its citizens. However, the same logic for denial of federal benefits applies to discrimination. Fundamentally, when the company discriminated against Puerto Ricans in the employment context,

164. *See Mass. v. EPA*, 549 U.S. at 537 (Roberts, C.J., dissenting).

165. *See* Alfred L. Snapp & Son v. P.R., 458 U.S. 592 (1982).

166. *See* Ga. v. Tenn. Copper Co., 206 U.S. 230, 237 (1907).

167. *See* Pa. v. W. Va., 262 U.S. 553, 588 (1923).

168. Md. v. La., 451 U.S. 725, 736-37 (1981).

169. *Alfred*, 458 U.S. at 608.

this too risked harming Puerto Rico's economy. Puerto Rico therefore was not merely a nominal party in *Alfred*. If a state needed special solicitude in the *parens patriae* context, as Professor Mank argues, it would likely not have its own injury creating a concrete stake in the litigation, potentially making the state merely a nominal party representing private interests. And, the Court has been clear that states acting as nominal parties do not have valid quasi-sovereign interests. Therefore, past *parens patriae* suits have not displayed a need for special solicitude.

Professors Young, Metzger, and Nash have also put forth possible meanings behind the Court's usage of special solicitude—that special solicitude was necessarily applied to the causation and redressability of an environmental claim and the theory of sovereign preemption state standing.[170] However, these explanations only attempt to provide context for why the Court used special solicitude, as well as its scope. Neither of these theories put forth a justification rooted in jurisprudence for why states *should* receive special solicitude. As the jurisprudence stands, special solicitude has no justification that should lead courts to invoke it in future state standing cases.

This conclusion naturally transitions into the argument that the only part of *Massachusetts v. EPA* courts should consider to be good law is the traditional Article III standing analysis. Despite the majority's convoluted rationale, the opinion, as written, found standing through the traditional three-part test based solely on Massachusetts's own concrete injury, separate from its quasi-sovereign interests. Damage to state-owned property is undeniably a concrete and particularized harm. The Court also found that the U.S.'s large contribution to global emissions and the clear link between increased emissions and climate change effects satisfied the causation and redressability prongs for Massachusetts's claim.[171] The Court's causation and redressability conclusions demand the most scrutiny. However, full exploration of these arguments would require delving into the relevant climate change research and environmental law jurisprudence, both of which are beyond the scope of this Comment. Therefore, this Comment adopts the majority's Article III standing arguments.

Overall, courts should consider the three-part standing analysis in *Massachusetts v. EPA* to be good law but resist treating special solicitude in *parens patriae* suits as valid precedent. This approach would effectively eliminate the conflict between *Massachusetts v. EPA* and *Mellon* and would close the door to *parens patriae* suits against the

170. *See supra* Section II.C.

171. Mass. v. EPA, 549 U.S. 497, 524-25 (2007).

federal government. Additionally, the Court has previously declined to apply broad-sweeping statements as precedent to future cases when the statements were unnecessary to the decision.[172] This Comment advocates for the application of a similar approach to *Massachusetts v. EPA*. The majority held that Massachusetts's claim met the injury, causation, and redressability requirements of Article III, yet never explicitly extended special solicitude to any of those elements. Therefore, in future state standing cases, the Court should resist extending the unnecessary theory of special solicitude in *parens patriae* suits and apply only the Article III standing analysis that was necessary to *Massachusetts v. EPA*.

B. How Massachusetts v. EPA *Impacts* U.S. v. Texas

Facially, *U.S. v. Texas*—rejecting Texas's lack of enforcement claim against the DHS—seems to conflict with the Court's holding in *Massachusetts v. EPA*—accepting Massachusetts's lack of regulation claim against the EPA. This Comment now discusses Texas's claim, recognizing *Massachusetts v. EPA* as good law, via a traditional Article III standing analysis.

1. Texas Did Not Have a Judicially Cognizable Interest

Texas claimed that it suffered monetary losses and would continue to suffer harm as a direct result of the Guidelines.[173] The Court has long viewed monetary losses as a concrete injury.[174] However, the injury must also be cognizable in a federal court.[175] In *Linda R.S.*, the Court discussed precedent supporting the assertion that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."[176] The majority in *U.S. v. Texas* applied *Linda R.S.* to Texas's claim, finding a lack of a judicially cognizable interest. Conversely, both Justices Barrett and Alito argued against extending *Linda R.S.* to either of the States' claims.[177] Instead, the Justices contended that Texas held a different interest than the plaintiff in *Linda R.S.* because it did not seek the prosecution of any "particular" individual.[178] However, this argument is flawed. As phrased in *Linda R.S.*,

172. *See* Younger v. Harris, 401 U.S. 37, 50 (1971) (discussing Dombrowski v. Pfister, 380 U.S. 379 (1965)).

173. U.S. v. Tex., 143 S. Ct. 1964, 1970 (2023).

174. *See, e.g.,* Pa. v. W. Va., 262 U.S. 553 (1923); Md. v. La., 451 U.S. 725 (1981); Mass. v. EPA, 549 U.S. 497 (2007).

175. Alfred L. Snapp & Son v. P.R., 458 U.S. 592, 611 (1982) (Brennan, J., concurring).

176. Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973).

177. *See supra* Sections II.E.3, II.E.4.

178. *Id.*; *U.S. v. Tex.*, 143 S. Ct. at 1987 (Barrett, J., concurring).

Texas sought the "prosecution of another."[179] Texas specifically requested the vacation of the Guidelines so the DHS would prosecute more noncitizens.[180] Any private individual likely could not claim an interest in vacating the Guidelines because, again, "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution."[181] And for the standing analysis, Texas similarly should not be able to declare an interest in the prosecution of another, named or not. Therefore, for Texas to succeed in contesting the policies of the Executive, the State would need special solicitude in the standing analysis, as set forth by *Massachusetts v. EPA*.

Justice Alito followed this logic in his dissent and tried to confer special solicitude upon Texas's claim.[182] But as this Comment explored in Section III.A, special solicitude is vague and created out of whole cloth, making it harder to fully analyze the merits of Justice Alito's argument. Further, there are three fundamental differences between *Massachusetts v. EPA* and *U.S. v. Texas* that dispute the dissent's argument and disqualify Texas from receiving any special solicitude.

First, Texas did not completely lose its ability to protect its borders upon entering the Union. The dissent analogized Texas's limitations regarding border protection to Massachusetts's inability to prevent other states from emitting harmful greenhouse gases.[183] However, this argument contains a fatal flaw. Massachusetts truly had *no* ability to regulate emissions from other states nor negotiate with other nations to reduce global emissions.[184] On the other hand, Texas still had some ability to regulate its borders.[185] Texas essentially admitted this by bringing suit against the DHS because its injury stems from using Texas's resources in the same border-protection capacity that it sought from the Executive.[186]

Second, Massachusetts attacked the EPA's complete lack of regulation, while Texas merely attacked *how* the Executive exercised its prosecutorial discretion via the Guidelines.[187] The dissent tried to refute this difference by invoking *Biden v. Texas*. Justice Alito argued that, as in *Biden v. Texas*, Texas had standing to challenge the Executive's immigration policies.[188] However, the Court in *Biden v. Texas* found

179. *Linda R.S.*, 410 U.S. at 619.
180. Tex. v. U.S., 606 F. Supp. 3d 437, 497-98 (Tex. S.D. 2022).
181. *Linda R.S.*, 410 U.S. at 619.
182. U.S. v. Tex., 143 S. Ct. 1964, 1997 (2023) (Alito, J., dissenting).
183. *Id.* at 1997.
184. Mass. v. EPA, 549 U.S. 497, 519 (2007).
185. *See* U.S. v. Tex., 143 S. Ct. at 1969.
186. *Id*.
187. *See supra* Sections II.B.1, II.E.1.
188. *U.S. v. Tex*., 143 S. Ct. at 1998 (Alito, J., dissenting).

standing when there was a *complete suspension* of action by the Executive.[189] Again, the Guidelines did not completely suspend the DHS's arrests.[190]

Allen v. Wright further supports that Texas's alleged injury was not judicially cognizable because there was not a complete abandonment of duties by the Executive. In *Allen*, plaintiffs brought a suit against the Executive alleging that the Internal Revenue Service had not fulfilled its duty to deny tax-exempt status to segregated private schools.[191] The Court ultimately held that federal financial aid going to segregated institutions did not constitute a judicially cognizable injury because the federal courts were not a place to complain about the enforcement of the Executive's policies.[192] Similar to the plaintiffs in *Allen*, Texas essentially complained about the enforcement of the Executive's prosecutorial discretion. The Executive had not "wholly abandoned" its duties; the Executive had just taken actions Texas believed were insufficient.[193] Therefore, the Court has traditionally held that the type of injury Texas alleged against the Executive is not judicially cognizable.

Third, the Court did not identify *U.S. v. Texas* as a *parens patriae* suit. Conversely, the Court in *Massachusetts v. EPA* seemed to apply special solicitude in the context of a *parens patriae* suit.[194] If the Court in *Massachusetts v. EPA* only intended special solicitude to apply to *parens patriae* suits, then this precedent clearly does not control *U.S. v. Texas*. If, alternatively, the Court did not limit special solicitude to *parens patriae* suits, then the issue remains as to which part of Massachusetts's claim the Court granted special solicitude. Without this clarity, it is unreasonable to justify any part of Texas's claim via special solicitude. Overall, given the vague nature of *Massachusetts v. EPA*, the Court should exercise restraint in extending this precedent to cases that have such significant variances. It is also worth noting that Justice Alito dissented in *Massachusetts v. EPA*, arguing there is no basis for special solicitude in state standing.[195]

Lastly, Justice Gorsuch attempted to find a contradiction between the injury analyses in the majority opinions of *Massachusetts v. EPA* and *U.S. v. Texas*.[196] Specifically, Justice Gorsuch disputed the majority's reasoning in *U.S. v. Texas* that an absence of coercive force over Texas

189. Biden v. Tex., 142 S. Ct. 2528, 2536 (2022).

190. Tex. v. U.S., 606 F. Supp. 3d 437, 454-56 (Tex. S.D. 2022).

191. Allen v. Wright, 468 U.S. 737, 739 (1984).

192. *Id.* at 766.

193. *See* U.S. v. Tex., 143 S. Ct. 1964 (2023).

194. *See supra* Section III.A.

195. Mass. v. EPA, 549 U.S. 497, 535 (2007).

196. *U.S. v. Tex.*, 143 S. Ct. at 1977 (Gorsuch, J., concurring).

precluded standing.[197] He argued that the EPA in *Massachusetts v. EPA* displayed a lack of coercive force over the plaintiff, Massachusetts, just as the DHS did in *U.S. v. Texas*.[198] However, this argument is easy to refute. When the majority discussed a lack of coercion in *U.S. v. Texas*, Justice Kavanaugh was referring to the reason a claimant does not have an interest in the prosecution of another, not the reason a claimant should not have standing against the Executive.[199] In other words, Texas cannot have a valid interest in how the Executive exerts coercive force over another individual. This is a nonissue in Massachusetts's case because Massachusetts did not assert an interest in how the Executive was treating another individual.[200] Thus, Justice Gorsuch took Justice Kavanaugh's statement out of context. Ultimately, *U.S. v. Texas* and *Massachusetts v. EPA* do not conflict on this point because *Massachusetts v. EPA* does not comment on the Executive's exertion of coercive force over another individual or, more specifically, the Executive's prosecutorial discretion. Therefore, the overall argument that Texas lacked a judicially cognizable interest stands without opposition from *Massachusetts v. EPA*.

2. Texas Established Causation, but Failed on Redressability

Regarding the causation and redressability of Texas's alleged injury, the district court found that DHS officials refrained from detaining noncitizens, directly causing Texas to incur more costs for border protection.[201] Following these findings, there is a clear causal relationship between the Guidelines and the costs incurred by Texas to detain criminal noncitizens.

The issue of redressability, however, is convoluted. Whether Texas's injury is redressable via enjoining the Guidelines hinges on the Court's interpretation of 8 U.S.C. § 1252(f)(1). Again, this statutory provision says that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of" the immigration laws relevant in *U.S. v. Texas*.[202] Justice Gorsuch argued that the statute precluded the district court from granting an injunction, meaning Texas and Louisiana did not have standing to sue.[203] However, the dissent argued that Texas had standing to seek injunctive relief in the Supreme

197. *Id.*
198. *Id.*
199. *Id.* at 1971.
200. *Mass. v. EPA*, 549 U.S. at 522.
201. Tex. v. U.S., 606 F. Supp. 3d 437, 467 (Tex. S.D. 2022).
202. 8 U.S.C. § 1252(f)(1) (2023).
203. U.S. v. Tex., 143 S. Ct. 1964, 1978 (2023) (Gorsuch, J., concurring).

Court.[204] Clarifying which interpretation is correct is a job for the Legislature.

Despite this issue with redressability, the dissent argued that vacating the Guidelines nevertheless redressed Texas's injury without raising a question under 8 U.S.C. § 1252(f)(1).[205] The concurrence disagreed.[206] While the district court found a causal link between the Guidelines and Texas's increased expenditures, a question still remains as to whether vacating the Guidelines would have impacted the DHS's actions to the point of preventing future harm to Texas. The Guidelines are just that: guidelines. Because the Executive has always had the ability to prioritize certain arrests,[207] there is a real possibility that, even without the Guidelines, the Executive will prioritize arrests in a similar way. In fact, the first memorandum clarified that arrests not qualifying as a priority were not prohibited.[208] Further, the DHS has limited resources, suggesting that the number of arrests might not actually increase in the absence of the Guidelines.[209] There is a strong argument for redressability via vacatur, given the causal link between the injury and the Guidelines. However, there is a stronger argument against redressability, considering the vacatur would not require the DHS to change its actions.

This Comment therefore concludes that Texas did not meet the Article III standing requirements because it lacked an injury that is judicially cognizable in federal courts, and it lacked redressability. Further, this conclusion—and the majority's necessary line of reasoning in *U.S. v. Texas*—aligns with the Article III analysis within *Massachusetts v. EPA*, given the pertinent factual differences between the claims.

C. Now, What Controls?

Over the years, states have flooded federal courts with suits against the Executive. This has inspired cases like *U.S. v. Texas* and *Biden v. Nebraska* in 2023.[210] Further, this trend has left courts to interpret what precedential role *Massachusetts v. EPA* plays in the larger body of state standing case law. As discussed above, courts typically do not rely upon *Massachusetts v. EPA* when deciding state standing cases.[211] But the question of how courts would decide a case factually similar to

204. *Id.* at 1995.

205. *Id.*

206. *Id.* at 1978-79.

207. *U.S. v. Tex.*, 143 S. Ct. at 1971.

208. Tex. v. U.S., 606 F. Supp. 3d 437, 455 (Tex. S.D. 2022).

209. *See U.S. v. Tex.*, 143 S. Ct. at 1972.

210. *See* Biden v. Neb., 143 S. Ct. 2355 (2023) (holding Missouri had standing to sue President Biden for his and the Secretary of Education's student loan forgiveness plan).

211. *See supra* Section II.D.

Massachusetts v. EPA still remains. For example, what if California sued the federal government alleging that the forest fires in 2023 resulted from the Executive's inaction or incorrect action that contributed to climate change?

At the end of the opinion, the majority in *U.S. v. Texas* stated, "[t]he Court's standing decision today is narrow and simply maintains the longstanding jurisprudential status quo."[212] The Court seems to answer the question of precedent for the legal community—*U.S. v. Texas* should only control the specific facts presented within the case. However, there is one aspect of *U.S. v. Texas* that may provide guidance when *Massachusetts v. EPA* doesn't. That is, when a plaintiff seeks to change actions already taken by the federal government. Therefore, this Comment proposes that *Massachusetts v. EPA* is the relevant precedent in cases involving a complete absence of governmental action, whereas *U.S. v. Texas*, although read very narrowly, could serve as precedent for extinguishing suits that seek to change the government's existing actions.

The majority in *U.S. v. Texas* even noted that the outcome of the case may have been different had the DHS completely abandoned its prosecutorial duties.[213] That said, the opinion did not explicitly state that Texas would have had standing with a complete absence of action.[214] Further, Justice Alito's dissent argued that referring to a complete abandonment of duties is confusing and should not determine the standing analysis.[215] However, there is a clear distinction between a case like *Massachusetts v. EPA*, where the EPA refused to regulate new motor vehicles at all, and *U.S. v. Texas*, where the DHS modified its approach to criminal noncitizen arrests. That is a large enough difference to clearly distinguish the cases, unlike what Justice Alito argued.[216] Additionally, as discussed above, *Allen* also held that merely seeking a change in the Executive's enforcement actions is not a judicially cognizable injury.[217] Thus, should California bring a suit alleging the federal government has not done enough to regulate emissions and therefore contributed to the 2023 forest fires, then *U.S. v. Texas*, coupled with precedent like *Allen*, may preclude California from establishing Article III standing.

Conversely, *Massachusetts v. EPA*'s three-part standing analysis could support California's claim if the federal government was guilty of completely abandoning a legal duty. Because the question of which parts of *Massachusetts v. EPA* are good law remains unanswered, courts may

212. *U.S. v. Tex.*, 143 S. Ct. at 1975.
213. *Id.* at 1973-74.
214. *Id.* at 1974.
215. *Id.* at 1999-2001 (Alito, J., dissenting).
216. *See id.*
217. Allen v. Wright, 468 U.S. 737, 766 (1984).

choose not to rely solely on the decision to support future environmental and climate change cases. However, courts could choose to couple *Massachusetts v. EPA* with similar precedent, like *Biden v. Texas*, to make a strong argument for standing to sue the federal government in cases of complete governmental inaction.

U.S. v. Texas may have more precedential relevance than the majority claimed. Courts therefore should consider *U.S. v. Texas* in the context of state suits seeking to change federal government actions. Following this, courts should cautiously rely on *Massachusetts v. EPA* in future nonenforcement claims against the federal government.

IV. CONCLUSION

Massachusetts v. EPA spurred uncertainty about the status of state standing and, as a result, generated years of lawsuits brought by states against the federal government.[218] The decision requires clarification. If nothing else, the Court's 5–4–1 split decision in *U.S. v. Texas* is evidence of this need.

This Comment fulfills that need, advancing a principle that the Court itself has followed over and over—only treat the *necessary* parts of a decision as binding.[219] Applying this principle to state standing, courts should accord *Massachusetts v. EPA* full precedential weight in only those cases where similar facts are present. Further, courts should excise special solicitude from state standing issues because, based on the jurisprudence, states are simply not entitled to special solicitude. And in any event, Massachusetts did not have standing via *parens patriae*, as the majority claimed. Therefore, courts should not view the decision as allowing *parens patriae* suits against the federal government.

Turning to *U.S. v. Texas* and applying the standing analysis in *Massachusetts v. EPA*, the majority correctly found that Texas lacked a judicially cognizable interest in the prosecution of criminal noncitizens. This Comment distinguishes *U.S. v. Texas* from *Massachusetts v. EPA* on the grounds that *U.S. v. Texas* involved state parties seeking to change the actions of the Executive, while *Massachusetts v. EPA* pertained to the Executive's nonaction. Therefore, the determination of which case serves as relevant precedent for future claims should turn on the specific facts of the case, as well as whether the claim involves a complete lack of Executive action.

At first glance, the two cases seem to conflict, but this Comment has proven that, when following only the *necessary* lines of reasoning in each

218. *See* Note, *An Abdication Approach to State Standing*, *supra* note 94, at 1306.

219. *See supra* Section III.A.

of the decisions, the holding in *U.S. v. Texas* can fit within the holding of *Massachusetts v. EPA*. The Court's use of special solicitude for *parens patriae* suits in *Massachusetts v. EPA* was not necessary to the decision and should not be treated as precedent. Therefore, recognizing the crucial difference between the two cases—challenging the government's refusal to act versus changing the government's existing actions—is the key to reconciling why Massachusetts established Article III standing when Texas could not.