

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 v.)
)
 DONALD TRUMP, in his official capacity)
 as President of the United States; U.S.)
 DEPARTMENT OF HOMELAND)
 SECURITY; JOHN F. KELLY, in his official)
 capacity as Secretary of the Department of)
 Homeland Security; TOM SHANNON, in his)
 official capacity as Acting Secretary of State;)
 and the UNITED STATES OF AMERICA,)
)
 Defendants.)

Case No. 2:17-cv-00141-JLR

**PROPOSED BRIEF OF AMICUS
CURIAE LAW PROFESSORS ON
THE SUBJECT OF STATE
STANDING**

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I. INTERESTS OF AMICUS CURIAE

The non-party law professors are Todd Aagaard of Villanova University, Robin Kundis Craig of the University of Utah, Lincoln L. Davies of the University of Utah, Noah Hall of Wayne State University, F. Andrew Hessick of the University of North Carolina, Zygmunt J. B. Plater of Boston College, Alexander T. Skibine of the University of Utah, Lisa Grow Sun of Brigham Young University, Joseph P. Tomain of University of Cincinnati, and Amy J. Wildermuth of the University of Utah (“the Law Professors”). The Law Professors research, teach, and write on federal courts, constitutional law, and administrative law. They are scholars who have spent considerable time studying the question of state standing. As such, the Law Professors have a strong interest in ensuring that the Court’s decision on standing is consistent with this complicated, evolving body of law.

II. ARGUMENT¹

A. State Standing Basics

Under Article III of the U.S. Constitution, a federal court must examine whether a plaintiff has standing to bring a case before turning to the merits. In this case, the State of Washington has brought suit against a number of federal officials, a federal agency, and the federal government, asserting claims under the U.S. Constitution as well as several federal statutes, including the Administrative Procedure Act. A relevant question in this case is thus whether the State of Washington has Article III standing to sue.

Increasingly, courts are faced with the question of whether states have standing to sue the federal government. This question was less common before the advent of the modern

¹ This brief draws from two of the principal drafter’s articles: Amy J. Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 J. LAND, RESOURCES, & ENVTL. L. 273 (2007), <http://epubs.utah.edu/index.php/jlrel/article/view/53/46>, and Kathryn A. Watts and Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other Than Global Warming*, 102 NW. U. L. REV. 1029 (2008), 102 NW. U. L. REV. COLLOQUY 1 (2007), available at <http://www.law.northwestern.edu/lawreview/Colloquy/2007/17/LRColl2007n17Watts.pdf>.

1 administrative state, but now arises more frequently because, as the relations between states
2 and the federal government have become more intertwined, there are more disagreements
3 between them. *See* Comment, *State Standing To Challenge Federal Administrative Action: A*
4 *Re-Examination of the Parens Patriae Doctrine*, 125 U. PA. L. REV. 1069, 1086 (1977).
5 Moreover, states often have a strong interest in ensuring that the federal government complies
6 with statutory and constitutional mandates, particularly given the overlapping nature of many
7 regulatory burdens. *See* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in*
8 *Administrative Law*, 2006 SUP. CT. REV. 201, 203, 207–08.

9 The Supreme Court has provided only limited guidance regarding state standing for
10 these cases. The key starting point is *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*,
11 458 U.S. 592 (1982). In *Snapp*, the question before the Court was whether Puerto Rico had
12 standing to sue a number of Virginia apple growers on behalf of its residents, based on
13 allegations that the growers were discriminating against Puerto Rican migrant workers in favor
14 of foreign workers. *Id.* at 598. The Court began its state standing discussion by dividing the
15 potential interests of a sovereign into three categories:

- 16 (1) proprietary interests,
- 17 (2) quasi-sovereign interests, and
- 18 (3) sovereign interests.

19 *Id.* at 601–02. The Court then determined that Puerto Rico’s interest in the case was properly
20 characterized as a quasi-sovereign interest and concluded that Puerto Rico could bring the suit
21 on that basis. *Id.* at 608–09.

22 What is most important about these three categories of interests is that the standing
23 analysis is quite different for each. It is therefore essential in a case involving state standing
24 that the analysis begin with correctly identifying the type of categories at stake.

25 **B. Proprietary Interests**

26 Proprietary interests are direct interests, such as ownership of land or participation in a
27 business venture. *Id.* at 601–02. These interests are the same kind of interest that a private party

1 would assert in litigation. *Id.* As a result, when a state asserts an injury to—or interference
 2 with—this kind of interest in litigation, the state should be treated just as a private party would
 3 when determining whether Article III standing exists. *Cf.* *Snapp*, 458 U.S. 592, 611 (1982)
 4 (Brennan, J., concurring) (“At the *very* least, the prerogative of a State to bring suits in federal
 5 court should be commensurate with the ability of private organizations. A private organization
 6 may bring suit to vindicate its own concrete interest in performing those activities for which it
 7 was formed.”).

8 Courts therefore consistently require that sovereigns asserting a proprietary interest
 9 satisfy the well-known requirements of *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992): In
 10 order to have standing to bring suit in federal court under Article III, a state must show that (1)
 11 it has any injury that is actual and concrete, (2) the injury is traceable to the conduct of the
 12 defendant, and (3) a favorable decision will likely redress the injury. *Id.* at 560–61.

13 Courts often apply *Lujan* to determine whether a state has standing when proprietary
 14 interests are at stake.² For example, in *Hodges v. Abraham*, 300 F.3d 432 (4th Cir. 2002), the
 15 question was whether the governor of South Carolina—acting in his official capacity on behalf
 16 of the state—had standing to bring suit against the Department of Energy for allegedly failing
 17 to follow the requirements of the National Environmental Policy Act when it approved the
 18 transfer of surplus plutonium. *Id.* at 436. After reciting the *Lujan* requirements, the Fourth
 19 Circuit took note that the governor’s claimed interest was “not simply in protecting the well-
 20 being of South Carolinians,” but rather in preventing injury to the “land, streams, and drinking
 21 water of South Carolina.” *Id.* at 444. Because it was “uncontroverted that at least one state
 22 highway runs through [the proposed storage site], and that several streams and wildlife habitats
 23 are located near [the proposed storage site],” the court concluded that the alleged injury to the
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25 ² See, e.g., *Idaho By and Through Idaho PUC v. ICC*, 35 F.3d 585, 591–92 (D.C. Cir. 1994) (concluding that the
 26 state had standing because it alleged that proposed salvage activities would pollute land owned by the state);
 27 *California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 459 F. Supp. 2d 874, 889 (N.D. Cal. 2006) (holding *Lujan*
 requirements were satisfied where the state’s injury was to its “natural resources and . . . specific lands whose
 resources would be affected by roadless policies”).

1 state’s proprietary interests was sufficient to establish standing under *Lujan. Id.* at 445. Courts
 2 have also found standing when a federal law forces a state to pay money, *United States v.*
 3 *Texas*, 809 F.3d 134, 155 (5th Cir. 2015) (cost of issuing driving licenses to undocumented
 4 aliens), as well as when a federal law deprives a state of expected revenue, *Davis v. EPA*, 348
 5 F.3d 772, 778 (9th Cir. 2003) (loss of federal highway funds).

6 C. Quasi-Sovereign Interests

7 Of the three categories, quasi-sovereign interests are the most difficult to describe. The
 8 Court has never precisely defined these interests, leading several scholars to characterize them
 9 as “admittedly vague.” 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND
 10 PROCEDURE JURIS. 2D § 3531.11, at 31 (1984).

11 What is clear from *Snapp* is that when a sovereign brings suit based on quasi-sovereign
 12 interests, “the State must articulate an interest apart from the interests of particular private
 13 parties.” *Snapp*, 458 U.S. at 607. This separate interest is then generally described as the State’s
 14 interest “in the well-being of its populace.” *Id.* at 602.

15 In *Snapp*, the Court gave two examples of quasi-sovereign interests: (1) a sovereign’s
 16 interest in protecting the health and well-being—“both physical and economic”—of its citizens
 17 from injuries such as transboundary pollution;³ and (2) a sovereign’s interest in seeing that its
 18 “residents are not excluded from the benefits that flow from participation in the federal
 19 system,” such as when railroads conspire to fix freight rates in a manner that discriminates
 20 against a particular state’s shippers in violation of federal antitrust law. *Id.* at 607–08 (citing,
 21 among others, *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945)).

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 24 ³ See Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 303 n.44 (2005)
 25 (listing the following transboundary cases that fit this mold: “North Dakota v. Minnesota, 263 U.S. 365 (1923)
 26 (flooding); New York v. New Jersey, 256 U.S. 296 (1921) (water pollution); Georgia v. Tennessee Copper Co.,
 27 206 U.S. 230 (1907) (air pollution in Georgia caused by discharge of noxious gases from the defendant’s plant in
 Tennessee); Kansas v. Colorado, 185 U.S. 125 (1902) (diversion of water), [sic] Missouri v. Illinois, 180 U.S. 208
 (1901) (sought to enjoin defendants from discharging sewage in such a way as to pollute the Mississippi river in
 Missouri)”).

1 According to *Snapp*, “the roots” of state quasi-sovereign interests are found “in the
2 common-law concept of the ‘royal prerogative,’” which “included the right or responsibility to
3 take care of persons who ‘are legally unable, on account of mental incapacity.’” *Id.* at 600
4 (quoting J. CHITTY, PREROGATIVES OF THE CROWN 155 (1820)). As it developed in U.S. law,
5 this prerogative became known as *parens patriae* standing. If the concept had remained
6 consistent with its common-law roots, the connection to the state’s residents would be quite
7 easy to understand: *Parens patriae* suits would be permitted because the individuals are unable
8 to bring suit on their own. Modern *parens patriae*, however, is no longer consistent with the
9 original common-law concept on which it was based. In fact, as the Supreme Court made clear
10 in *Snapp*, a state may not bring suit as *parens patriae* to represent persons who are unable to
11 represent themselves. *Id.* at 600. Accordingly, it is now understood that a sovereign may bring
12 suit as *parens patriae* on the basis of an injustice to its populace: It may bring suit either to
13 protect the health and well-being of its populace, or it may bring suit based on the denial of
14 benefits assured to its residents by federal law. *Snapp*, 458 U.S. at 602, 607.

15 This, however, raises another question: If the federal government has a similar duty to
16 protect those same residents, does a state have the right to sue to protect the well-being of its
17 residents from the federal government? Previously, the decision in *Massachusetts v. Mellon*,
18 262 U.S. 447 (1923), was understood to have erected a bar to such suits: States could not sue
19 the federal government based on their *parens patriae* interests unless Congress had waived the
20 restriction. *See Maryland People’s Counsel v. FERC*, 760 F.2d 318, 322 (D.C. Cir. 1985)
21 (Scalia, J.).

22 In *Massachusetts v. EPA*, 549 U.S. 497 (2007), however, the Court appeared to lift the
23 bar to a state litigating against the federal government when a quasi-sovereign interest is at
24 stake. In doing so, The Court explained:

25 there is a critical difference between allowing a State “to protect her citizens from
26 the operation of federal statutes” (which is what *Mellon* prohibits) and allowing a
27 State to assert its rights under federal law (which it has standing to do).
Massachusetts does not here dispute that the Clean Air Act *applies* to its citizens;
it rather seeks to assert its rights under the Act.

1 *Id.* at 520 n.17. Although many commentators have noted that this passage seems to confuse
2 the different interests a state might have, there has never been any further clarification of the
3 point from the Court. As a result, although *Massachusetts v. EPA* offered little explanation, it
4 appears that a state can assert Article III standing based on a quasi-sovereign interest of
5 ensuring that its citizens are provided the benefits of federal law, such as when the federal
6 government acts or fails to act in a way that violates federal statutory or constitutional law. *See,*
7 *e.g.,* Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?:*
8 *Massachusetts v. EPA’s New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1769–74
9 (2008); Calvin Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249, 264–
10 66 (2009).

11 Once a state asserts a quasi-sovereign interest, the next issue is what further showing, if
12 any, is required in order to establish standing. The Court’s most recent articulation of what is
13 required is found in *Massachusetts v. EPA*. The Court began by reciting the three *Lujan*
14 factors—injury-in-fact, causation, and redressability—and went on to analyze each
15 requirement. As the dissenting opinion was quick to point out, however, the Court’s analysis
16 appeared to substantially “[r]elax[] Article III standing requirements.” *Massachusetts*, 549 U.S.
17 536–37 (Roberts, C.J., dissenting). Instead of a more rigid, traditional analysis of the *Lujan*
18 factors, the Court provided a “*Lujan-lite*” analysis, finding that Massachusetts had standing
19 even though its injury—the loss of coastal lands—was remote and whether it would be
20 remedied by the proposed regulations was less than certain. The Court partially acknowledged
21 its “lite” analysis, explaining that states are entitled to “special solicitude” when they assert
22 quasi-sovereign interests. *Id.* at 520.

23 Although the Court provided few tips on how “lite” the analysis should be, it appears
24 that, following *Massachusetts v. EPA*, some relaxation in application of the *Lujan* test is in
25 order. In addition, when determining the appropriate injury for this lighter analysis, it seems
26 that either (a) a resident’s interest or (b) a state’s proprietary interest may be used (such as the
27 loss of coastal lands in *Massachusetts*).

1 **D. Sovereign Interests**

2 Sovereign interests sufficient for state standing include a state’s “power to create and
3 enforce a legal code, both civil and criminal,” as well as the power to demand “recognition
4 from other sovereigns.” *Snapp*, 458 U.S. at 601. These are interests unique to the state, not
5 based on injuries that a private party could suffer (proprietary standing), and not based on
6 injuries to the well-being of a state’s populace (quasi-sovereign standing). For example, in *West*
7 *Virginia v. EPA*, 362 F.3d 861 (D.C. Cir. 2004), West Virginia and Illinois sought review of the
8 EPA’s rules requiring the states to revise their state implementation plans under the Clean Air
9 Act. *Id.* at 864. In concluding that there was standing, the D.C. Circuit explained that, because
10 the rules might interfere with the states’ sovereign interest in creating law, the states were not
11 suing as *parens patriae* but “as states.” *Id.* at 868.

12 **III. APPLICATION TO THIS CASE**

13 Based on our review of the preliminary record in this case, we want to offer some
14 general ideas about possible applications. In doing so, we note that the State of Washington is
15 the home to two world-class, research-intensive public institutions of higher education, the
16 University of Washington (“UW”) and Washington State University (“WSU”). Because we are
17 employed by universities like those, and we believe that these examples best illustrate the
18 standing principles in this case, we offer a few thoughts on the state standing analysis when the
19 state’s interest is reflected in its institutions of higher education.

20 One straightforward path to finding standing is under a proprietary interest analysis.
21 Much like the coastal land in *Massachusetts*, the State of Washington’s interest in its
22 institutions of higher education and their functioning is best viewed as proprietary. As an
23 institution and employer, like other institutions in Washington, the state may have lost revenue,
24 both because students can no longer enroll (thus costing institutions tuition dollars) and because
25 of cancelled trips and events of those within the university. As proprietary interests, these
26 injuries should be analyzed under the traditional *Lujan* framework. Moreover, if there was a
27 showing of actual financial harm to WU or WSU, as arms of the state, such an injury would be

1 sufficient under the traditional *Lujan* analysis to find standing on the part of the state to bring
2 the case.

3 On the other end of the spectrum, it does not appear on the face of the complaint that
4 the State of Washington has asserted a sovereign interest in this case. That is, there does not
5 appear to us to be any claim of preemption of state law, or an assertion of interference with the
6 creation or enforcement of state law. As such, at this time, this is an unlikely ground on which
7 to find standing.

8 A less certain but perhaps possible path for finding standing is for the state to claim
9 impacts on its residents in an effort to assert a quasi-sovereign interest. This is a more
10 complicated route because, as discussed above, *Massachusetts v. EPA* appears to change much
11 with little explanation. Building on what the Court did provide, with a particular focus again on
12 the potential impact on institutions of higher education as an example, a few routes to standing
13 may be possible. First, residents of Washington attending UW and WSU may have had their
14 education impacted by the federal government's actions. When the federal government
15 restricted the entry of those from listed countries, it reduced the ability of the institutions to
16 attract and retain students and faculty from certain countries. This in turn diminished and
17 devalued the rich and diverse learning environment that is core to the mission of higher
18 education. As the Court held in *Grutter*, "student body diversity promotes learning outcomes,
19 and better prepares students for an increasingly diverse workforce and society, and better
20 prepares them as professionals." *Grutter v. Gratz*, 539 U.S. 306, 330 (2003) (internal citations
21 omitted). In so holding, the Court noted that it has "repeatedly acknowledged the overriding
22 importance of preparing students for work and citizenship, describing education as pivotal to
23 sustaining our political and cultural heritage with a fundamental role in maintaining the fabric
24 of society." *Id.* at 331 (internal citations omitted). Actions that impede a Washington resident
25 student's preparation could create standing if they are found to harm the well-being of the
26 state's residents.

1 Another possibility is the impact on the ability of those residents at the university to do
2 important, often life-saving research. Many researchers must travel to present their work at
3 conferences, which is critical to the progress of research. Even more important, however, is the
4 ability to physically travel to sites where raw data or information is located that is the subject of
5 their research. They also often travel to other labs around the globe to learn new techniques and
6 processes.

7 Any restrictions on travel—particularly this kind of travel, which requires a great deal
8 of advance planning—would slow the progress of research dramatically. While this certainly
9 impacts the world in delaying the progress on life-altering medical research, it directly impacts
10 one’s job performance as a faculty member. If a faculty member cannot perform his research,
11 the ability to attract grant funding to support his work is jeopardized. In addition to the
12 potential loss of salary from the loss of grant funding, the inability of a faculty member to
13 perform the research required for their employment could result in lowered earnings in terms of
14 any base salary provided by the university. If the inability to conduct one’s research continues
15 for a long period, it might also result in termination. *See, e.g., Henry Fountain, Science Will*
16 *Suffer Under Trump’s Travel Ban, Researchers Say*, N.Y. TIMES (Jan. 30, 2017),
17 https://www.nytimes.com/2017/01/30/science/scientists-donald-trump-travel-ban.html?_r=0.

18 Both of these examples illustrate possible considerations that a court should analyze as
19 a state’s quasi-sovereign interests, as they reflect the state’s interest in the well-being of its
20 residents. In addition, because the suit asserts federal government violations of law,
21 *Massachusetts v. EPA* suggests that there is no prohibition—no *Mellon* bar—to the state
22 bringing the suit against the federal government.

23 As a result, if a state were to assert these injuries and a court accepted them as quasi-
24 sovereign interests, they would be subjected to relaxed requirements with respect to injury-in-
25 fact, causation, and redressability factors under *Lujan*. And when compared to the standing
26 analysis in *Massachusetts*—an injury to coastal lands many years in the future, a more
27 attenuated causal chain, and unclear redressability in connecting emissions from new motor

1 vehicles to solving the global climate change problem—the injuries of the sort described above
2 to a student’s learning environment and to a researcher’s ability to do her work would satisfy
3 the special standing requirements for a state asserting quasi-sovereign interests.

4 **IV. CONCLUSION**

5 Although *amici curiae* offer no recommendation on the ultimate outcome of this case,
6 we hope the Court will find the foregoing analysis and examples helpful when resolving the
7 issue of state standing.

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10 DATED: February 2, 2017

11 LANE POWELL PC

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