

Massachusetts v. EPA Without Massachusetts: Private Party Standing in Climate Change Litigation

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I. INTRODUCTION

On a superficial level, Article III standing is remarkably simple. To satisfy the case-or-controversy requirement of Article III, the Supreme Court has repeatedly stated that a plaintiff must demonstrate that he has suffered an injury in fact that is fairly traceable to the challenged conduct and likely to be redressed by a favorable court decision.¹

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¹ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Valley Forge*

Despite this concept's familiarity, however, the standing doctrine has long been regarded as anything but simple to apply,² and the Court's recent forays into climate change litigation have helped further this reputation. In *Massachusetts v. EPA*, the Court revived a forgotten standing concept and cryptically suggested that states, in their *parens patriae* capacity, are subject to either a relaxed form of the usual injury-causation-redressability standing test or a distinct standing analysis altogether.³ After explaining why Massachusetts was entitled to this "special solicitude,"⁴ the Court curiously appeared to disregard this consideration and explain why Massachusetts met every element of conventional standing doctrine.⁵ More recently in *American Electric Power Co. v. Connecticut (AEP)*,⁶ the Court considered once again whether states, and other litigants, could seek redress of climate-change-related injuries in the federal courts. With Justice Sotomayor recused, however, the Court affirmed the court of appeals' exercise of jurisdiction by an equally divided Court,⁷ missing an opportunity to provide clarity in a wanting area of law.

Notwithstanding the complexities and inconsistencies of the Court's standing cases, the Court's decisions in *Massachusetts* and *AEP* do demonstrate a current direction in the Court's standing jurisprudence, at least as it relates to climate change litigants. Commentators have focused on the implications of these cases, particularly *Massachusetts*, for state litigants suing in their *parens patriae* capacity.⁸ Although certainly interesting and important, the practical implications of *parens patriae* standing are relatively limited. This Article argues that *Massachusetts* carries far greater significance in demonstrating that Massachusetts, even if it were a private litigant, would have had Article III

Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464, 472 (1982).

² For criticism of the Supreme Court's standing jurisprudence, see, e.g., Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 463-64 (2008); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276 (2008); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 613-14 (2004); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 639-41 (1999).

³ 549 U.S. 497, 518-20 (2007).

⁴ *Id.* at 520. The Court also found that Massachusetts was entitled to special solicitude considering Massachusetts's vested procedural right. *Id.*

⁵ *Id.* at 521-26.

⁶ 131 S. Ct. 2527 (2011).

⁷ *Id.* at 2535.

⁸ See, e.g., Gregory Bradford, *Simplifying State Standing: The Role of Sovereign Interests in Future Climate Litigation*, 52 B.C. L. REV. 1065 (2011); Katherine Mims Crocker, *Securing Sovereign State Standing*, 97 VA. L. REV. 2051 (2011); 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) [hereinafter Mank, *Should States Have Greater Standing Rights*]; Robert A. Weinstock, *The Lorax State: Parens Patriae and the Provision of Public Goods*, 109 COLUM. L. REV. 798 (2009); Amy J. Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 J. LAND RESOURCES & ENVTL. L. 273 (2007); Sara Zdeb, *From Georgia v. Tennessee Copper to Massachusetts v. EPA: Parens Patriae Standing for State Global-Warming Plaintiffs*, 96 GEO. L.J. 1059 (2008).

standing.

Part I of this Article provides an overview of the Court's current treatment of Article III standing under the traditional injury-causation-redressability analysis along with a background of *parens patriae* standing. Part II then discusses the roles that these two standing doctrines played in the Court's two climate change cases to date, with a focus on *Massachusetts*. In particular, it interprets the *Massachusetts* Court's decision as finding that Massachusetts had standing in two distinct capacities—as *parens patriae* entitled to “special solicitude,” and as a proprietor subject to the ordinary standing requirements.

To be clear, this interpretation of *Massachusetts* is not entirely new. In fact, the Second Circuit in *AEP* applied the injury-causation-redressability analysis of *Massachusetts* as if it were equally applicable to both state and private litigants.⁹ But this interpretation has not found favor in the majority of the courts to consider the issue. These courts have interpreted *Massachusetts* to be premised on the fact that Massachusetts was suing in its *parens patriae* capacity, and suggest that the Court's decision has little bearing in suits by private litigants. Part III of this Article demonstrates that this narrow reading of *Massachusetts* inappropriately interprets the Court's standing analysis to the detriment of private litigants.

Although the *Massachusetts* Court's analysis has been accurately characterized as less than clear, the opinion is not indecipherable for all intents and purposes. Two general points may fairly be taken away from the *Massachusetts* Court's discussion of standing. First, however one reads *Massachusetts*, it is clear that the standing analysis is altered to some degree when a state sues in its *parens patriae* capacity. Second, and more importantly here, the Court's analysis appeared to apply the injury, causation, and redressability tests without regard to Massachusetts's asserted quasi-sovereign interests or its vested procedural right. In so doing, the Court suggested that Massachusetts would have had standing even if it were a private litigant without any relaxation of the Court's conventional standing doctrine.

II. OVERVIEW OF ARTICLE III STANDING

Article III of the United States Constitution limits the jurisdiction of federal courts to “Cases” and “Controversies.”¹⁰ The Supreme Court has observed that the doctrine of standing—along with the doctrines of mootness, ripeness, and political question—enforces the Constitution's case-or-controversy requirement,¹¹ and that it does so by assuring concrete adversity. In *Baker v.*

⁹ *Connecticut v. Am. Elec. Power Co. (AEP)*, 582 F.3d 309, 339-49 (2d Cir. 2009), *rev'd on other grounds*, 131 S. Ct. 2527 (2011).

¹⁰ U.S. CONST. art. III, § 2, cl. 1.

¹¹ *Allen v. Wright*, 468 U.S. 737, 750 (1984) (stating that “Article III of the Constitution

Carr, for example, the Court explained that “the gist of the question of standing” is whether the petitioner has “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.”¹² In other words, the standing doctrine helps assure that parties will be sufficiently motivated to argue well.

A. *Traditional Article III Standing*

1. Injury, Causation, and Redressability

To ensure the requisite concrete adverseness, the modern Supreme Court has established a three-part standing test that is largely attributable to the Court’s decision in *Lujan v. Defenders of Wildlife*.¹³ Per *Lujan*, a plaintiff must have (1) suffered an “injury in fact” that is (2) fairly traceable to the challenged conduct and (3) likely to be redressed by a favorable court decision.¹⁴ Although acknowledging that the “standing doctrine incorporates concepts conceded not susceptible of precise definition,”¹⁵ the Court has provided further direction.

An “injury in fact” has been defined as an invasion of a legally protected interest that is concrete,¹⁶ particularized,¹⁷ and actual or imminent.¹⁸ The Court

confines the federal courts to adjudicating actual ‘cases’ and ‘controversies,’” and that it does so through the doctrines of “‘not only standing but mootness, ripeness, political question, and the like’” (citation omitted)).

¹² 369 U.S. 186, 204 (1962).

¹³ 504 U.S. 555 (1992).

¹⁴ See *id.* at 560-61; see also *Allen*, 468 U.S. at 751; *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982).

¹⁵ *Allen*, 468 U.S. at 751. The Court in *Allen* explained that “[t]hese terms cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise.” *Id.*

¹⁶ *Id.* at 756.

¹⁷ The Court in *Lujan* noted that “[b]y particularized, we mean that the injury must affect the plaintiff in a personal and individual way.” *Lujan*, 504 U.S. at 560 n.1. Significantly, this requirement does not necessarily preclude suit for widely-shared injuries. The Court in *Federal Election Commission v. Akins* explained: “[W]here a harm is concrete, though widely shared, the Court has found ‘injury in fact.’” 524 U.S. 11, 24 (1998); see also *Massachusetts v. EPA*, 549 U.S. 497, 526 n.24 (2007) (“To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.” (citation omitted)). Notably, the *Akins* Court appeared to suggest that an injury is particularized so long as it is concrete. The Court did not require the petitioners to show that the alleged harm—a lack of information—was distinct from that of the general populace. See *Akins*, 524 U.S. at 24-25 (“We conclude that . . . the informational injury at issue here . . . is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.”). The *Massachusetts* Court, however, implicitly rejected such an interpretation. The Court interpreted *Akins* as supporting the proposition that a widely-shared injury may nonetheless be concrete. See *Massachusetts*, 549 U.S. at 522 (“That these climate-change risks are ‘widely shared’ does not minimize Massachusetts’ interest in the outcome of this litigation.”). The Court then went on to establish independently that Massachusetts’s alleged injuries were additionally particularized.

has observed that the invaded interest may take a variety of forms—including injury to economic,¹⁹ recreational,²⁰ and aesthetic²¹ interests—and that the alleged injury need not exceed some particular magnitude—as long as the injury is cognizable, an “identifiable trifle” will do.²²

The Court has provided further direction with respect to causation and redressability. The causation requirement ensures largely that the alleged injury is not one that “results from the independent action of some third party not before the court.”²³ The Court has made clear that although this requirement does not demand “but for” causation,²⁴ the test is not whether the alleged injury “can somehow be traced” to the challenged conduct.²⁵ The final standing requirement—redressability—is related to but distinct from causation.²⁶ To

See id. (“Because the Commonwealth ‘owns a substantial portion of the state’s coastal property,’ . . . it has alleged a particularized injury.”).

¹⁸ The Court has observed that the imminency requirement is a “somewhat elastic concept,” which focuses on the certainty of the injury occurring in the future, seeking to ensure that the injury is not too speculative. *Lujan*, 504 U.S. at 564 n.2; *Connecticut v. Am. Elec. Power Co. (AEP)*, 582 F.3d 309, 343 (2d Cir. 2009) (stating that the *Lujan* Court, in describing imminence, “focused on the certainty of that injury occurring in the future, seeking to ensure that the injury was not speculative”); *see also* *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (“A threatened injury must be ‘certainly impending’ to constitute injury in fact.”).

¹⁹ *Ass’n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 152 (1970) (noting that the “first question [in the standing analysis] is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise”).

²⁰ *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 184 (2000) (finding “injury in fact” as “a company’s continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use . . . and would subject them to other economic and aesthetic harms”).

²¹ *Sierra Club v. Morton*, 405 U.S. 727, 742 (1972) (“[N]o doubt exists that ‘injury in fact’ to ‘aesthetic’ and ‘conservational’ interests is here sufficiently [*sic*] threatened to satisfy the case-or-controversy clause.”).

²² *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 690 n.14 (1973) (quoting Kenneth C. Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1967)).

²³ *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *see* *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (“The ‘fairly traceable’ requirement is in large part designed to ensure that the injury complained of is ‘not the result of the independent action of some third party not before the court.’” (citation omitted)).

²⁴ *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 77-78 (1978) (rejecting the idea that a litigant must show “but for” causation to establish standing and explaining that “[n]othing in our prior cases requires a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief”); *Warth v. Seldin*, 422 U.S. 490, 505 (1975) (Although it may make it substantially more difficult, “the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights.”).

²⁵ *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 614 (2007).

²⁶ *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984) (“The ‘fairly traceable’ and ‘redressability’ components of the constitutional standing inquiry were initially articulated by this Court as ‘two facets of a single causation requirement.’ [To] the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief

establish redressability, the Court has emphasized that a party “need not show that a favorable decision will relieve his every injury.”²⁷ That the injury is likely to be redressed to “some extent” suffices.²⁸

2. Relaxed Standing for Procedural-Injury Litigants

Although often citing the above elements—*injury*, *causation*, and *redressability*—as forming the “irreducible minimum” for Article III standing,²⁹ the Court has recognized that these requirements are in fact reducible, at least to an extent.

In *Lujan*, a plurality of the Court observed in a footnote that a “person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.”³⁰ The majority of the Court in *Massachusetts* adopted the *Lujan* plurality’s language³¹ and explained its effect on redressability: “When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.”³² Thus, rather than having to show a “likelihood,”³³ such a litigant need only demonstrate “some possibility” that the alleged injury will be redressed.

The Court in *Summers v. Earth Island Institute*³⁴ appeared to go further. There, the Court suggested that Congress could remove the redressability requirement from the standing inquiry altogether.³⁵ In general, this interpretation appears hardly more demanding than the requirement that the litigant demonstrate “some possibility” of redressability. Indeed, it is difficult to conceive of a situation—apart from one where the action is effectively moot³⁶—where the litigant would fail such a burden. Dropping entirely the redressability

requested.”); *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 801 (D.C. Cir. 1987) (“The ‘traceability’ and ‘redressability’ requirements are closely related.”).

²⁷ *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982).

²⁸ *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007).

²⁹ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

³⁰ *Lujan*, 504 U.S. at 572 n.7.

³¹ *Massachusetts*, 549 U.S. at 517-18.

³² *Id.* at 518.

³³ *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 103 (1998).

³⁴ 555 U.S. 488 (2009).

³⁵ *Id.* at 497 (“Unlike redressability, . . . the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.”).

³⁶ “[A] case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287 (2000) (quoting *City of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). “[T]he second aspect of mootness, that is, the parties’ interest in the litigation[,] has [been] referred to . . . as the ‘personal stake’ requirement.” *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 396 (1980) (citations omitted).

requirement where a litigant suffers a procedural injury therefore carries some appeal, especially since a “some possibility” standard risks turning the plaintiff’s burden into nothing more than an “ingenious academic exercise in the conceivable.”³⁷

However, the risks attached to an alternative doing away with the redressability requirement altogether are much higher; in particular, it risks wasting court resources where parties are indifferent to their cases’ outcome. More fundamentally, this alternative forgets the overarching purpose of standing doctrine to ensure the petitioner has a sufficient “personal stake in the outcome of the controversy.”³⁸ Certainly, if an injury is unredressable, the requisite personal stake in the outcome would be absent. To grant standing in such circumstances would only effect a waste of the “the scarce resources of the federal courts.”³⁹ Thus, consistent with *Massachusetts*, courts must require a procedural-injury litigant—and all other litigants for that matter—to demonstrate at least some possibility that the alleged injury will be redressed by a favorable decision. This consideration carries particular importance when analyzing the exceptionally hazy doctrine of *parens patriae* standing.

B. *Parens Patriae* Standing

Although the above three-part *Lujan* test clearly applies to private litigants, the Supreme Court has never held that the same analysis necessarily applies to state litigants. In fact, the Court’s standing jurisprudence prior to *Lujan* suggested that it would not. Beginning with *Louisiana v. Texas*, the Court recognized that states are distinct from private litigants for the purposes of invoking federal jurisdiction.⁴⁰ A year later in *Missouri v. Illinois*, the Court explained that this special treatment derives from the states’ presumed prior status as independent sovereigns.⁴¹ When a state enters the Union, it presumably surrenders certain sovereign prerogatives to the federal government—such as the right to declare war on neighboring states—and thereby limits its ability to remedy perceived injuries.⁴² The *Missouri* Court reasoned that, in certain circumstances at least, states are therefore entitled to special treatment where suit in court serves as their only remaining remedial tool.⁴³ In such

³⁷ U.S. v. Students Challenging Regulatory Agency Procedures (*SCRAP*), 412 U.S. 669, 688 (1973).

³⁸ *Baker v. Carr*, 369 U.S. 186, 204 (1962).

³⁹ *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 191 (2000).

⁴⁰ 176 U.S. 1, 19 (1900) (recognizing Louisiana’s right to “present[] herself in the attitude of *parens patriae*, trustee, guardian, or representative of all her citizens”).

⁴¹ 180 U.S. 208, 241 (1901).

⁴² *See id.* (“If Missouri were an independent and sovereign state all must admit that she could seek a remedy by negotiation, and, that failing, by force.”).

⁴³ *See id.* (“Diplomatic powers and the right to make war having been surrendered to the [federal] government, it was to be expected that upon the latter would be devolved the duty of

circumstances, states bring suit in their *parens patriae* capacity.

More recently, in *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez (Snapp)*,⁴⁴ the Court provided its most in-depth discussion of when a state may bring suit in its *parens patriae* capacity. To establish *parens patriae* standing, “the State must assert an injury to what has been characterized as a ‘quasi-sovereign’ interest,”⁴⁵ an admittedly amorphous concept “that does not lend itself to a simple or exact definition” and that is perhaps best understood by identifying what it is not.⁴⁶ It is not, the *Snapp* Court explained, a sovereign interest,⁴⁷ a proprietary interest comparable to that of a private party, or a private interest pursued by the state as a nominal party.⁴⁸

Generally stated, a quasi-sovereign interest is instead an interest “apart from the interests of particular private parties”⁴⁹ that “the State has in the well-being of its populace.”⁵⁰ A vague interest in the populace’s well-being, however, is not in and of itself sufficient to establish *parens patriae* standing: “A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant.”⁵¹ This requirement ties in to the “gist” of the standing inquiry in attempting to “assure that concrete adverseness”⁵² which enables a court to perform its job effectively.

The Court in *Snapp* went on to identify two general categories of quasi-sovereign interests recognized in earlier case law. “First, a State has a quasi-

providing a remedy, and that remedy, we think, is found in [court.]”).

⁴⁴ 458 U.S. 592 (1982).

⁴⁵ *Id.* at 601. Several courts, including the Second Circuit in *AEP* have incorrectly characterized *Snapp* as requiring “[a] state[to] (1) ‘. . . articulate an interest apart from the interests of particular private parties . . .’; (2) ‘. . . express a quasi-sovereign interest’; and (3) ‘. . . allege[] injury to a sufficiently substantial segment of its population.’” *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 335-36 (2d Cir. 2009) (footnote omitted) (citing *Snapp*, 458 U.S. at 607); *see Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1179 (N.D. Okla. 2009); *Connecticut v. Physicians Health Servs. of Conn., Inc.*, 103 F. Supp. 2d 495, 504 (D. Conn. 2000). These opinions conflate the requirements of quasi-sovereign interests and *parens patriae* standing. To satisfy the injury prong of *parens patriae* standing, a state need only assert an injury to a concrete quasi-sovereign interest. *Snapp*, 458 U.S. at 601-02. A quasi-sovereign interest, in turn, is an interest “apart from the interests of particular private parties” that relates to “a sufficiently substantial segment of [the state’s] population.” *Id.* at 607.

⁴⁶ *Snapp*, 458 U.S. at 601.

⁴⁷ The *Snapp* Court noted two “easily identified” sovereign interests: A state has a sovereign interest in the enforcement of its laws and the recognition of its borders. *Id.*

⁴⁸ *Id.* at 602.

⁴⁹ *Id.* at 607.

⁵⁰ *Id.* at 602. Without specifying the “definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior,” the Court explained that the state must allege injury to a “sufficiently substantial segment of its population” and that both the direct and indirect effects of the injury must be considered in determining whether the state’s allegations are sufficient. *Id.* at 607.

⁵¹ *Id.* at 602.

⁵² *See Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

sovereign interest in the health and well-being—both physical and economic—of its residents in general.”⁵³ For example, the Court in *Georgia v. Tennessee Copper Co.* held that Georgia had standing as *parens patriae* to seek an injunction against companies whose sulfur emissions allegedly caused substantial harm to the state’s forests and inhabitants.⁵⁴ “Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.”⁵⁵ In *Snapp*, Puerto Rico asserted such a quasi-sovereign interest by alleging that Puerto Ricans were denied the benefits of access to domestic work opportunities that the federal statutes at issue were designed to secure for United States workers.⁵⁶ Because Puerto Rico’s allegations “[f]ell within the Commonwealth’s quasi-sovereign interests,” the Court held that Puerto Rico could “support a *parens patriae* action.”⁵⁷

But the *Snapp* Court did not mean to say that a state’s quasi-sovereign interest is sufficient in itself to support standing. *Snapp*, in focusing on clarifying the meaning of a “quasi-sovereign” interest, fell short of providing a full test for *parens patriae* standing. For example, although the Court did further explain that the state must be “adversely affected by the challenged behavior,” this certainly was no attempt to delineate the particular requirements of causation in *parens patriae* actions; rather, this casual note was merely the tail end of a statement relating to what may qualify as a quasi-sovereign interest.⁵⁸ Considering *Snapp* together with the Court’s prior decisions, the test for *parens patriae* standing appears as follows: A state has *parens patriae* standing where it alleges (1) actual or threatened injury⁵⁹ to a concrete quasi-sovereign interest⁶⁰ (2) that is traceable, to some yet unclarified extent, to the challenged conduct⁶¹ and (3) that is, at least potentially, redressable by a favorable court decision.⁶²

⁵³ *Snapp*, 458 U.S. at 607.

⁵⁴ See 206 U.S. 230, 236-37 (1907).

⁵⁵ *Snapp*, 458 U.S. at 607.

⁵⁶ *Id.* at 608. Puerto Rico additionally asserted “a quasi-sovereign interest in the health and well-being . . . of its residents in general” by alleging that certain Virginia individuals and companies discriminated against Puerto Ricans in favor of foreign laborers. *Id.* at 607-08.

⁵⁷ *Id.* at 608.

⁵⁸ See *id.* at 607 (“The Court has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior.”).

⁵⁹ *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 258 (1972) (“[A] State [has standing] to sue as *parens patriae* to prevent or repair harm to its ‘quasisovereign’ [*sic*] interests.” (emphasis added)).

⁶⁰ *Snapp*, 458 U.S. at 607.

⁶¹ See *id.* (noting that the state must be “adversely affected by the challenged behavior”).

⁶² In *Maryland v. Louisiana*, the Court indicated that all litigants, including states suing in their *parens patriae* capacity, must demonstrate some measure of redressability. See 451 U.S. 725, 735-36 (1981) (“In order to constitute a proper ‘controversy’ under our original jurisdiction, ‘it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress’” (citation omitted)). Although the Court has never clearly applied a redressability requirement in a *parens patriae* action, the Court’s *parens patriae* cases cannot be

The latter two requirements of causation and redressability are potentially replicas of the same requirements as discussed in *Lujan*,⁶³ but if the “special solicitude”⁶⁴ owed states is to have any significance, one would expect these requirements to be somewhat less demanding.

III. CLIMATE CHANGE LITIGATION IN THE SUPREME COURT

A. *Massachusetts v. EPA*

In April 2007, the Supreme Court decided *Massachusetts v. EPA* where it considered for the first time the role of *parens patriae* standing post-*Lujan*. The Court held that the petitioners—ten states and six trade associations—had standing to challenge a decision by the U.S. Environmental Protection Agency (EPA) not to regulate greenhouse gas emissions from new motor vehicles under the Clean Air Act (CAA).⁶⁵

The Court began its standing analysis by referencing the familiar three-part *Lujan* test.⁶⁶ The Court, however, subsequently noted two considerations that would move it away from the conventional *Lujan* analysis. First, citing *Lujan*, the majority observed that “a litigant to whom Congress has ‘accorded a procedural right to protect his concrete interests. . . [may establish standing] without meeting all the normal standards for redressability and immediacy.’”⁶⁷ The Court then backed away from *Lujan* altogether and stated that it was “of considerable relevance that the party seeking review here [wa]s a sovereign State and not, as it was in *Lujan*, a private individual.”⁶⁸ Summarizing, the Court explained that “[g]iven [Massachusetts’s] procedural right and [its] stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”⁶⁹

read to do away with standing’s redressability requirement, as some scholars suggest. *See Zdeb, supra* note 8, at 1082 (arguing that “states need only assert a valid quasi-sovereign interest in protecting the health and welfare of their citizens—which global warming plainly implicates—to establish standing in their capacity as *parens patriae*”). Absent a redressability requirement, courts could inappropriately grant standing in cases where parties are indifferent to its outcome. *See supra* text accompanying notes 34-39. At a minimum, courts must require all litigants, even states, to demonstrate “some possibility” that the alleged injury will be redressed by a favorable decision, *see Massachusetts v. EPA*, 549 U.S.497, 518 (2007), in order to effectively gauge whether litigants possess a sufficient “personal stake in the outcome of the controversy,” *id.* at 517 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

⁶³ *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

⁶⁴ *See Massachusetts*, 549 U.S. at 520.

⁶⁵ *Id.* at 526. Because “[o]nly one of the petitioners needs to have standing to permit . . . review,” *id.* at 518, the Court’s standing analysis focused exclusively on Massachusetts.

⁶⁶ *Id.* at 517.

⁶⁷ *Id.* at 517-18 (citing *Lujan*, 504 U.S. at 572 n.7).

⁶⁸ *Id.* at 518.

⁶⁹ *Id.* at 520.

But the Court never followed through to explain the effect of this “special solicitude” on the standing analysis. After noting Massachusetts’s special entitlement, the majority proceeded to apply the *Lujan* injury, causation, and redressability tests and concluded that “Massachusetts ha[d] satisfied the most demanding standards of the adversarial process.”⁷⁰ Notably, in analyzing standing under *Lujan*, the Court neither mentioned Massachusetts’s quasi-sovereign interests nor its procedural right to challenge EPA action under the CAA.

1. Effect on *Parens Patriae* Standing Doctrine

The *Massachusetts* Court’s standing analysis has elicited much commentary and criticism. At worst, the Court’s opinion has been described as “muddled”⁷¹ and “befuddl[ing]”⁷²; at best, it has been said to be “less than clear.”⁷³ The Court’s puzzling decision has received two general interpretations. First, that “States are not normal litigants”⁷⁴ subject to the *Lujan* injury, causation, and redressability tests, but rather are subject to an altogether different Article III standing test—seemingly that articulated in *Snapp*—when suing in their *parens patriae* capacity.⁷⁵ Alternatively, the “special solicitude” owed Massachusetts and other similarly situated states has been interpreted to relax the *Lujan*

⁷⁰ *Id.* at 521.

⁷¹ See *Connecticut v. Am. Elec. Power Co. (AEP)*, 582 F.3d 309, 337 (2d Cir. 2009).

⁷² See Weinstock, *supra* note 8, at 814.

⁷³ See Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 397 (2011).

⁷⁴ *Massachusetts*, 549 U.S. at 518.

⁷⁵ See Weinstock, *supra* note 8, at 827 (stating that the *Massachusetts* opinion “reveals the doctrinal separation between *parens patriae* and *Lujan* standing” and that these separate standing doctrines offered “independent routes to standing”); Zdeb, *supra* note 8, at 1073 (arguing that “[a]s long as [a state] properly asserts a quasi-sovereign interest in the health and well-being of its citizens, it will have established standing in its capacity as *parens patriae*”). In *Ctr. for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466 (D.C. Cir. 2009), the D.C. Circuit appeared to have accepted this interpretation. See *id.* at 477 (“Outside of the very limited factual setting of *Massachusetts*, the Supreme Court’s decision in [*Lujan*] sets forth the test for standing.”). However, a subsequent D.C. Circuit opinion suggested that *Lujan* provided the proper framework regardless of any “special solicitude.” See *North Carolina v. EPA*, 587 F.3d 422, 425–26 (D.C. Cir. 2009) (stating that “the [*Lujan*] Court described the Article III . . . requirements for standing” and that, “notwithstanding any ‘special solicitude’ to which [a sovereign state] may be entitled . . . , it must demonstrate Article III standing”). But in finding that every litigant must satisfy the three-part *Lujan* test, the court ignored its previous acknowledgment that, given North Carolina’s procedural right, the state could satisfy the redressability prong of standing by demonstrating “some possibility that the requested relief w[ould] prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.” *Id.* at 426 (quoting *Massachusetts*, 549 U.S. at 518). Rather than apply this relaxed redressability requirement, the court went on to find that North Carolina failed to establish redressability because the requested relief was not “likely to redress” the state’s asserted injury. *Id.* at 429.

standing requirements.⁷⁶ Each interpretation will be discussed in turn.

a. *Parens Patriae* Standing as an Alternative to Traditional Article III Standing

The idea that the *Massachusetts* Court applied a distinct standing analysis for states is perhaps based more in the Court's earlier cases than in the *Massachusetts* decision itself. On its face, *Massachusetts* says very little about how the standing framework is altered when a state seeks to protect its quasi-sovereign interests. The majority tells us that, in such circumstances, states are entitled to "special solicitude,"⁷⁷ but declines to clarify what this "special solicitude" in fact entails. Once one considers the cases on which the Court relies, however, one can identify an implicit distinction between *parens patriae* and traditional *Lujan* standing.

In relying on the Court's precedent in *Tennessee Copper and Snapp*,⁷⁸ the *Massachusetts* Court suggested that a state may establish Article III standing by asserting injury to a recognized quasi-sovereign interest without satisfying all the specific requirements of *Lujan*.⁷⁹ Although eventually applying *Lujan*, the Court hinted this was an entirely distinct standing analysis. According to the Court, *Lujan* did not provide the sole standards for determining Article III standing; rather, it provided "the most demanding standards of the adversarial process."⁸⁰ *Parens patriae* standing was, apparently, something altogether different. Indeed, in applying *Lujan*, the Court included not a single reference to Massachusetts's sovereign capacity.

The Court's prior decisions are somewhat less subtle in suggesting such an alternate standing test for state litigants. In *Maryland v. Louisiana*, several

⁷⁶ See Wyoming *ex rel.* Crank v. United States, 539 F.3d 1236, 1241-42 (10th Cir. 2008) (applying "the familiar three-pronged standing analysis" of *Lujan* while keeping in mind "the 'special solicitude' the *Massachusetts* Court afforded to states"); Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279, 1294 n.2, 1297 (D.C. Cir. 2007) (describing the standing requirements of *Lujan* and stating in a footnote that the *Massachusetts* Court applied a diluted form of these requirements, "including [in the] analysis of imminence," in light of the "special solicitude" owed states); Mank, *Should States Have Greater Standing Rights*, *supra* note 8, at 1727 (stating that "the Court . . . applied a more generous standing analysis [under the *Lujan* test] because Massachusetts is a state"); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2039 (2008) (noting that *Massachusetts* could be interpreted as providing a "forgiving application of the standard *Lujan v. Defenders of Wildlife* standing analysis"); Wildermuth, *supra* note 8, at 320 (stating that *Massachusetts* demonstrates that states, when seeking to protect their quasi-sovereign interests, are subject to a "*Lujan*-lite analysis").

⁷⁷ *Massachusetts*, 549 U.S. at 519-20.

⁷⁸ *Id.* at 518-19.

⁷⁹ This is, in fact, how Chief Justice Roberts interpreted the majority's opinion: "The Court, in effect, takes what has always been regarded as a necessary condition for *parens patriae* standing—a quasi-sovereign interest—and converts it into a sufficient showing for purposes of Article III." *Id.* at 538 (Roberts, C.J., dissenting).

⁸⁰ *Id.* at 521 (majority opinion).

states, joined by the United States and a number of pipeline companies, challenged the constitutionality of Louisiana's "First-Use Tax" imposed on certain uses of natural gas brought into Louisiana.⁸¹ In analyzing standing, the Court made clear that the challenging states had standing to sue in two distinct capacities: as consumers and as *parens patriae*.⁸²

With respect to the states' consumer interest, Louisiana argued that the states could not have standing based on this interest as it was not a sovereign concern.⁸³ The Court disagreed and held that a state, like a private party, may establish standing "if the injury alleged 'fairly can be traced to the challenged action of the defendant.'"⁸⁴ The Court then concluded that the challenging states had standing as substantial consumers of natural gas whose costs increased as a direct result of the tax.⁸⁵ But that was not the end of the Court's standing analysis. The Court next found that "[j]urisdiction [wa]s also supported by the States' interest as *parens patriae*."⁸⁶ The Court likened the litigants to other states seeking to prevent or repair harm to "quasi-sovereign" interests,⁸⁷ and found sufficient for standing purposes that "the injury alleged affect[ed] the general population of the states in a substantial way."⁸⁸

The *Maryland* Court's analysis of *parens patriae* standing as distinct from traditional private litigant standing was consistent with the Court's prior decisions as well as its later decision in *Snapp*.⁸⁹ The Court in *Massachusetts* suggested that *Lujan* did not alter this standing dichotomy. Although the *Massachusetts* Court, in contrast to the *Maryland* Court,⁹⁰ was not explicit that it was analyzing the state's standing in two separate capacities, the Court did imply that it was granting standing on *parens patriae* grounds and treating injury to the state's proprietary interests as an alternate basis for standing. The Court stated that Massachusetts's desire to protect its quasi-sovereign interests, like

⁸¹ 451 U.S. 725, 728 (1981).

⁸² *Id.* at 736-37.

⁸³ *Id.* at 736.

⁸⁴ *Id.* (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

⁸⁵ *Id.*

⁸⁶ *Id.* at 737.

⁸⁷ *Id.* at 738.

⁸⁸ *Id.* at 737.

⁸⁹ *See, e.g.*, *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 445 (1945); *North Dakota v. Minnesota*, 263 U.S. 365, 366-67 (1923); *Wyoming v. Colorado*, 259 U.S. 419, 468 (1922); *New York v. New Jersey*, 256 U.S. 296, 309 (1921); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237-38 (1907); *Kansas v. Colorado*, 206 U.S. 46, 99-100 (1907); *Kansas v. Colorado*, 185 U.S. 125, 146-47 (1902); *Missouri v. Illinois & Sanitary Dist. of Chi.*, 180 U.S. 208, 242 (1901); *Louisiana v. Texas*, 176 U.S. 1, 19 (1900).

⁹⁰ *See* *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) (after concluding that the states had standing as substantial consumers of natural gas, the Court stated that "[j]urisdiction [wa]s also supported by the States' interest as *parens patriae*").

Georgia's in *Tennessee Copper*, sufficed to establish Article III standing,⁹¹ and that the injury to Massachusetts's proprietary interests "reinforce[d] th[is] conclusion."⁹² The Court then analyzed injury to the state "in its capacity as a landowner"⁹³ and concluded that Massachusetts's allegations "satisfied the most demanding standards of the adversarial process"⁹⁴—those of *Lujan*.

Of course, apart from a brief discussion of the injury to Massachusetts's quasi-sovereign interests,⁹⁵ the *Massachusetts* Court declined to apply the three-part *parens patriae* standing analysis⁹⁶ suggested by its precedent. But the lack of a discussion of causation and redressability with respect to the state's quasi-sovereign interests is unsurprising given the Court's eventual application in full of the very similar three-part *Lujan* test.⁹⁷ This omission is particularly understandable given the inextricable link between Massachusetts's quasi-sovereign and proprietary interests at stake, and the inevitable repetitiveness that would have resulted if the Court were to have analyzed causation and redressability with respect to each injured interest. Indeed, unlike *Tennessee Copper* and *Maryland*, the *Massachusetts* Court's standing analysis never clearly separated the state's quasi-sovereign and proprietary interests. Instead, the Court appeared to analyze the same alleged injuries—injuries to Massachusetts's coastal property—under both the *parens patriae* standing analysis as well as the traditional standing test of *Lujan*.⁹⁸

⁹¹ *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007) ("Just as Georgia's independent interest 'in all the earth and air within its domain' supported federal jurisdiction a century ago, so too does Massachusetts' well-founded desire to preserve its sovereign territory today.").

⁹² *Id.* ("That Massachusetts does in fact own a great deal of the 'territory alleged to be affected' only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power."). In reading *Massachusetts*, one might conclude that a state's proprietary and quasi-sovereign interests are altogether separate for standing purposes—that one interest or the other must be sufficient in and of itself to establish standing. But this either-or reading forgets the "gist" of standing to determine whether the petitioners have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Baker v. Carr*, 369 U.S. 186, 204 (1962). By staying grounded in the standing doctrine's ultimate purpose, one can recognize that it would make little "sense . . . to say that categorically distinct interests cannot be additive." *See Ewing & Kysar, supra* note 73, at 398-99. Although these distinct interests may be additive, however, the *Massachusetts* Court appeared to find that the state's quasi-sovereign and proprietary interests were each independently sufficient to establish standing. *See Massachusetts*, 549 U.S. at 519 (stating that "Massachusetts' well-founded desire to preserve its sovereign territory" in its capacity as a quasi-sovereign sufficed to establish standing); *id.* at 522 (analyzing separately injury to the state "in its capacity as a landowner" and finding the three-prong *Lujan* test satisfied). *But see Ewing & Kysar, supra* note 73, at 397-99; Weinstock, *supra* note 8, at 826 (arguing that the Court found standing because of Massachusetts's combined quasi-sovereign and proprietary interests).

⁹³ *Massachusetts*, 549 U.S. at 522.

⁹⁴ *Id.* at 521.

⁹⁵ *See id.* at 518-20.

⁹⁶ *See supra* text accompanying notes 59-62.

⁹⁷ *Massachusetts*, 549 U.S. at 521-26.

⁹⁸ *See id.* at 519 (stating that Massachusetts had a quasi-sovereign interest in seeking to protect

Given the broad threat to Massachusetts's coastal property, the Court's finding that climate change implicated both quasi-sovereign and proprietary interests was unsurprising. That the Court was less than clear in separating Massachusetts's quasi-sovereign and proprietary interests perhaps relates to the fact that the Court only considered the state's territory generally without regard to its specific uses. Why the Court provided only a generalized analysis is easy to explain: the petitioners never briefed the issue of *parens patriae* standing.

b. *Parens Patriae* Standing as a Relaxed Form of *Lujan*

An alternative explanation for the *Massachusetts* Court's standing analysis works within the traditional injury-causation-redressability test of *Lujan*. The explanation is straightforward. Rather than suggesting the existence of a separate standing test, the Court was recognizing that Massachusetts's asserted

"its sovereign territory"); *id.* at 521-22 (analyzing under the three-part *Lujan* test Massachusetts's alleged injuries to its territory from climate change). Courts and commentators have argued that this analysis reflects nothing more than the *Massachusetts* Court's conflating of the state's proprietary and quasi-sovereign interests. *See Connecticut v. Am. Elec. Power Co. (AEP)*, 582 F.3d 309, 338 (2d Cir. 2009) (stating that the Court "appear[ed] to conflate, to an extent, state *parens patriae* standing and proprietary standing"); Mank, *Should States Have Greater Standing Rights*, *supra* note 8, at 1736 (finding that "the majority confuse[d] the distinction between quasi-sovereign interests and property interests"); Zdeb, *supra* note 8, at 1073 (stating that "[t]he *Massachusetts v. EPA* Court conflated proprietary and quasi-sovereign interests"). This conclusion, however, incorrectly assumes that a state never sues in its quasi-sovereign capacity when it owns the property at issue. The Court in *Snapp* noted that a state acts in its proprietary capacity when "it is likely to have the same interests as other similarly situated proprietors," for example, when it "participate[s] in a business venture." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). Surely, Massachusetts was acting as more than just a proprietor when it sought to protect the state's coastal and other properties. Indeed, under Massachusetts law, the state government holds much of this property in trust for the public's benefit. *See, e.g., Trio Algarvio, Inc. v. Comm'r of Dep't of Envtl. Prot.*, 440 Mass. 94, 97 (2003) (noting that in Massachusetts, the public trust doctrine requires the government "to protect the public's interest in, among other things, navigation of the Commonwealth's waterways"). A state's interest in protecting such natural resources has long been recognized to constitute a quasi-sovereign interest. In *Tennessee Copper*, for example, the Court held that a state has a quasi-sovereign interest "in all the earth and air within its domain," *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907), and that this interest is independent of ownership, *id.* (in its quasi-sovereign capacity, "the state has an interest independent of and behind the titles of its citizens"); *see also Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) ("[I]t is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a [*sic*] standing in court to protect the atmosphere, the water, and the forests within its territory."); *Maine v. M/V Tamano*, 357 F. Supp. 1097, 1100 (D. Me. 1973) (holding that a state has a quasi-sovereign interest in protecting coastal resources); *cf. McCready v. Virginia*, 94 U.S. 391, 394 (1876) ("The principle has long been settled in this court, that each State owns the beds of all tide-waters [and the tide-waters themselves] within its jurisdiction, unless they have been granted away. . . . For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty." (citations omitted)). As *Snapp* made clear, the essential requirement for *parens patriae* standing is only that the state's interest concerns "the well-being of its populace." *Snapp*, 458 U.S. at 602, and this requirement was doubtless satisfied in *Massachusetts*. *But see Wildermuth, supra* note 8, at 305 (stating that "the Court's cases on quasi-sovereign interests have all required a connection to a state's residents rather than simply reflect[ing] the state's own interest").

quasi-sovereign interests permitted a relaxation of the *Lujan* factors. By this interpretation, a state's stake in protecting its quasi-sovereign interests is comparable to a litigant's procedural right: both serve to relax the standing test in recognition of the "special solicitude"⁹⁹ owed the litigant.

With respect to procedural rights, the Court has repeatedly recognized that a litigant that has been accorded such a right may establish standing "without meeting all the normal standards for redressability and immediacy."¹⁰⁰ The test in such circumstances, however, is still *Lujan*. Arguably, the same is true where a state is suing in its *parens patriae* capacity: in such circumstances, courts should still apply the three-part *Lujan* test, albeit a more relaxed form of the test. This appears to be the prevailing interpretation of *Massachusetts*.¹⁰¹

Although this interpretation is perhaps correct, the *Massachusetts* Court did not appear to grant any "special solicitude" to Massachusetts in order to relax the *Lujan* framework. Instead, the Court seemed to suggest a standing framework that it subsequently declined to apply. In applying the *Lujan* factors, the Court refrained from discussing either Massachusetts's quasi-sovereign interests or its procedural right. Nor did the Court, in applying the *Lujan* test, mention a single case involving a state or a procedural-injury plaintiff. This approach was consistent with the Court's earlier remark that *Massachusetts* satisfied the "most demanding"¹⁰² standing standards—that is, the most stringent form of *Lujan* rather than one in which its requirements are diluted.

Aside from the particular effect of the "special solicitude" owed Massachusetts, the question then is which interpretation—*parens patriae* as a distinct standing analysis or as a relaxed form of *Lujan*—is correct. This question seeks more a label than a particular test. Whatever the label, a litigant suing in its *parens patriae* capacity will have to satisfy a three-part test remarkably similar to that articulated in *Lujan*. Given the similarities between the tests, one could reasonably conclude that the *parens patriae* analysis merely reflects a modification of the familiar *Lujan* test where the alleged injury

⁹⁹ *Massachusetts*, 549 U.S. at 520.

¹⁰⁰ *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)); *Massachusetts*, 549 U.S. at 516-17 (citation omitted).

¹⁰¹ See, e.g., *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1241-42 (10th Cir. 2008) (applying "the familiar three-pronged standing analysis" of *Lujan* while keeping in mind "the 'special solicitude' the *Massachusetts* Court afforded to states"); *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1297 & n.2 (D.C. Cir. 2007) (describing the standing requirements of *Lujan* and stating in a footnote that the *Massachusetts* Court applied a diluted form of these requirements, "including [in the] analysis of imminence," in light of the "special solicitude" owed states); Mank, *Should States Have Greater Standing Rights*, *supra* note 8, at 1727 (stating that "the Court . . . applied a more generous standing analysis [under the *Lujan* test] because Massachusetts is a state"); Wildermuth, *supra* note 8, at 320 (stating that *Massachusetts* demonstrates the states, when seeking to protect their quasi-sovereign interests, are subject to a "*Lujan*-lite analysis").

¹⁰² *Massachusetts*, 549 U.S. at 521.

concerns a quasi-sovereign interest. Of course, the test for *parens patriae* standing must in fact be different, even apart from the particular interest at play, if the Court's reference to "special solicitude" is to have any significance. But the standing analysis is also different where a litigant suffers a procedural injury, and this has not prevented the Court from stating that the *Lujan* factors are eased in such circumstances rather than replaced by an alternate standing test.¹⁰³

Regardless of the particular relationship between *Lujan* and *parens patriae* standing, there are two general points to take away from the *Massachusetts* Court's discussion of standing. First, however one reads *Massachusetts*, it is clear that the standing analysis is altered to some degree when a state sues in its *parens patriae* capacity. The exact effect, however, is unclear. Second, the Court's analysis appeared to apply the injury-causation-redressability test of *Lujan* without regard to Massachusetts's asserted quasi-sovereign interests or its procedural right to challenge EPA action under the CAA. By ignoring these considerations, the Court's analysis under *Lujan* appeared to say more about how a private litigant could invoke federal-court jurisdiction than it did of state *parens patriae* standing.

2. The *Massachusetts* Court's Application of *Lujan*

The *Massachusetts* Court's application of the *Lujan* factors is perhaps the most significant aspect of the decision in suggesting that Massachusetts would have had standing even if it were a private litigant. After explaining why Massachusetts was entitled to "special solicitude" in the Court's standing analysis, the Court went on to disregard this consideration and explain in "completely conventional terms"¹⁰⁴ why Massachusetts met every element of traditional standing doctrine. In doing so, the Court refrained from subscribing to the strict formalism of *Lujan*. Instead, the Court loosely applied the *Lujan* framework with a general focus on assuring that Massachusetts possessed the requisite "personal stake in the outcome of the controversy."¹⁰⁵

Beginning with the injury prong of *Lujan*, the Court declared that the "harms associated with climate change are serious and well recognized."¹⁰⁶ Although these harms are also widely shared, the Court emphasized that Massachusetts did not necessarily lack standing as a result.¹⁰⁷ Citing *Federal Election Commission v. Akins*, the Court noted that where a harm is concrete, though

¹⁰³ See *Lujan*, 504 U.S. at 572 n.7 (setting forth the general requirements for standing and stating that a "person who has been accorded a procedural right to protect his concrete interests" is subject to a less stringent form of these requirements).

¹⁰⁴ Robert V. Percival, *Massachusetts v. EPA: Escaping the Common Law's Growing Shadow*, 2007 SUP. CT. REV. 111, 134 (2007).

¹⁰⁵ *Massachusetts*, 549 U.S. at 517 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

¹⁰⁶ *Id.* at 521.

¹⁰⁷ *Id.* at 522.

widely shared, a litigant may demonstrate an “injury in fact.”¹⁰⁸ The Court then explained why Massachusetts demonstrated such an injury.

The Court found Massachusetts’s alleged injury actual and concrete considering “petitioners’ unchallenged affidavits” that “global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming,” and that “[t]hese rising seas have already begun to swallow Massachusetts’ coastal land.”¹⁰⁹ The Court further found imminent injury as the “severity of [Massachusetts’s] injury w[ould] only increase over the course of the next century.”¹¹⁰ Because Massachusetts “own[ed] a substantial portion of the state’s coastal property”¹¹¹ allegedly harmed by climate change, the Court reasoned that Massachusetts had “alleged a particularized injury in its capacity as a landowner.”¹¹²

As to causation, the Court began by noting that the EPA did not dispute the causal connection between manmade greenhouse gas emissions and global warming.¹¹³ The Court then rejected the EPA’s argument that its decision not to regulate greenhouse gas emissions from new motor vehicles did not contribute sufficiently to Massachusetts’s alleged injuries.¹¹⁴ Because the U.S. transportation sector “accounts for more than 6% of worldwide carbon dioxide emissions,” the Court found that, “[j]udged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence, according to petitioners, to global warming.”¹¹⁵

Finally, in analyzing redressability, the Court emphasized that the question was not whether regulating motor-vehicle emissions would by itself reverse global warming.¹¹⁶ Instead, the question was whether the risk of injury would be reduced “to some extent” by a favorable decision.¹¹⁷ The Court further explained that this reduction need not occur immediately in light of the magnitude of the potential harm: “Because of the enormity of the potential consequences associated with manmade climate change, the fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant.”¹¹⁸ The Court then concluded that Massachusetts demonstrated redressability as “[a] reduction in domestic emissions would slow the pace of global emissions

¹⁰⁸ *Id.* (quoting *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 24 (1998)).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 522-23.

¹¹¹ *Id.* at 522 (citation omitted).

¹¹² *Id.*

¹¹³ *Id.* at 523.

¹¹⁴ *Id.* at 523-24.

¹¹⁵ *Id.* at 524-25.

¹¹⁶ *Id.* at 525.

¹¹⁷ *Id.* at 526.

¹¹⁸ *Id.* at 525.

increases, no matter what happens elsewhere.”¹¹⁹

Significantly, the majority suggested that Massachusetts not only satisfied the requirements of causation and redressability, but that it did so with ease. Addressing these overlapping requirements, the Court noted that a tentative step to address a massive problem—such as climate change—“does not by itself support the notion that federal courts lack jurisdiction to determine whether that step conforms to law.”¹²⁰ The Court then observed that “reducing domestic automobile emissions is hardly a tentative step,” and that, “[j]udged by *any* standard, U.S. motor-vehicle emissions make a meaningful contribution . . . to global warming.”¹²¹

The Court’s apparent conclusion that Massachusetts’s allegations clearly satisfied the requirements of causation and redressability is particularly noteworthy as EPA regulation over greenhouse gas emissions from new motor vehicles certainly would not have the effect of decreasing emissions anywhere close to 6 percent—the percent that the U.S. transportation sector contributes to global carbon dioxide emissions.¹²² As Chief Justice Roberts explained in dissent, domestic motor vehicles contribute about 4 percent of global greenhouse gas emissions, in contrast to 6 percent of global carbon dioxide emissions, and the CAA “covers only *new* motor vehicles and *new* motor vehicle engines.”¹²³ As a result, “petitioners’ desired emission standards might reduce only a fraction of 4 percent of global emissions.”¹²⁴ In nevertheless finding the petitioners’ allegations sufficient for standing purposes,¹²⁵ the majority firmly rejected the notion that “a small incremental step, because it is incremental, can never be attacked in a federal judicial forum.”¹²⁶

B. *AEP v. Connecticut*

In September 2009, the Second Circuit in *Connecticut v. American Electric*

¹¹⁹ *Id.* at 526. The Court’s analysis of redressability provides the greatest indication that the majority did not rely on Massachusetts’s “special solicitude” in finding standing under *Lujan*. Considering Massachusetts’s procedural injury, the majority noted at the start of its standing analysis that Massachusetts could establish standing without meeting all the normal standards for redressability and immediacy. *Id.* at 517-18. The Court observed that, to satisfy the redressability prong, Massachusetts needed only to demonstrate “some possibility” that the requested relief would prompt the EPA to reconsider its decision not to regulate motor-vehicle emissions. *Id.* at 518. But the Court never applied this standard in its analysis of the *Lujan* factors. Instead, the Court considered whether Massachusetts’s risk of injury would in fact be reduced by a favorable decision. *Id.* at 526.

¹²⁰ *Id.* at 524.

¹²¹ *Id.* at 524-25 (emphasis added).

¹²² *Id.* at 524.

¹²³ *Id.* at 544 (Roberts, C.J., dissenting) (emphasis in original).

¹²⁴ *Id.* (Roberts, C.J., dissenting).

¹²⁵ *Id.* at 526 (majority opinion).

¹²⁶ *Id.* at 524.

Power Co. was tasked with interpreting the standing analysis of *Massachusetts v. EPA*. The court considered whether two groups of plaintiffs—one consisting of eight states and a city, and the other of three land trusts—had standing to bring forth common law nuisance claims against four private power corporations and the federal Tennessee Valley Authority,¹²⁷ allegedly the “five largest emitters of carbon dioxide in the United States.”¹²⁸ Annually, defendants collectively emitted 650 million tons per year of carbon dioxide,¹²⁹ constituting approximately 10 percent of manmade carbon dioxide emissions in the United States,¹³⁰ and 2.5 percent of manmade carbon dioxide emissions worldwide.¹³¹ The plaintiffs sought the “abatement of the Defendants’ ongoing contributions to the public nuisance of global warming.”¹³²

At the outset, the Second Circuit expressed confusion with the *Massachusetts* Court’s “arguably muddled” standing analysis.¹³³ The court questioned “the role of Article III *parens patriae* standing in relation to the test set out in *Lujan*” in light of “*Massachusetts*’ discussion of state standing.”¹³⁴ However, the court declined to attempt to clarify the roles of the two standing doctrines because it concluded that “all of the plaintiffs ha[d] met the *Lujan* test for standing.”¹³⁵

Adhering closely to *Massachusetts*, the Second Circuit concluded that the state plaintiffs had adequately alleged actual as well as imminent injury.¹³⁶ The court found actual injury considering California’s reduced snowpack and the resulting flooding and reduction in state water supplies.¹³⁷ The court further found that climate change threatened imminent injury to the states’ coastal properties, wildlife, groundwater aquifers, hydropower production, crop yields, and hardwood forests.¹³⁸ For similar reasons, the court found that the land trust plaintiffs had sufficiently alleged future injury to the ecological and aesthetic

¹²⁷ *Connecticut v. Am. Elec. Power Co. (AEP)*, 582 F.3d 309, 314-15 (2d Cir. 2009).

¹²⁸ *Id.* at 314 (quoting *Connecticut v. Am. Elec. Power Co. (AEP)*, 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005)).

¹²⁹ *Id.*

¹³⁰ *Id.* at 316.

¹³¹ *Id.* at 347.

¹³² *Id.* at 314.

¹³³ *Id.* at 337.

¹³⁴ *Id.* at 338.

¹³⁵ *Id.* In addition to finding *Lujan* satisfied, the Second Circuit further held that the state plaintiffs had “adequately alleged the requirements for *parens patriae* standing.” *Id.* In finding that all the plaintiffs had standing, the court noted the lowered bar for standing at the pleading stage, stating that “general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we ‘presum[e] that general allegations embrace those specific facts that are necessary to support the claim.’” *Id.* at 333 (quoting *Lujan*, 504 U.S. at 561).

¹³⁶ *Id.* at 341-42.

¹³⁷ *Id.*

¹³⁸ *Id.* at 342-44.

value of their properties.¹³⁹

In finding causation, the court emphasized that the plaintiffs were “not required to pinpoint which specific harms of the many injuries they assert[ed] [were] caused by particular Defendants, nor [were] they required to show that Defendants’ emissions alone cause[d] their injuries.”¹⁴⁰ Relying on *Massachusetts*, the court found it “sufficient that [the plaintiffs] allege[d] that Defendants’ emissions contribute[d] to their injuries.”¹⁴¹

Finally, the court found that the question of redressability was, in effect, already answered by *Massachusetts*. The court noted that the *Massachusetts* Court had found redressability satisfied where the remedy sought—reduced domestic emissions—“would slow the pace of global emissions increases,”¹⁴² and thus global climate change, and the Second Circuit concluded that this same rationale decided the issue in the plaintiffs’ favor.¹⁴³

Considering *Massachusetts*, the Second Circuit’s conclusion that the state plaintiffs had standing was unsurprising given that both cases concerned climate-change-related injuries resulting from significant carbon dioxide emissions. Of course, the state plaintiffs in *Connecticut v. AEP* did not possess a procedural right like *Massachusetts*; but the *Massachusetts* Court never purported to relax the standing analysis because of this right. In fact, the Court clearly refrained from applying the relaxed standing framework it recognized for procedural-injury litigants.¹⁴⁴ But the Second Circuit went a step further in concluding that the City of New York and the land trusts plaintiffs had standing, even though the court found that neither could establish *parens patriae* standing.¹⁴⁵ In finding that all the plaintiffs had standing, the court’s standing analysis was consistent with the idea that *Massachusetts* applied the traditional injury-causation-redressability test without regard to any “special solicitude”¹⁴⁶

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 347.

¹⁴¹ *Id.* The court found it “[t]elling[] [that], in *Massachusetts*’ discussion of causation, the Court rejected EPA’s argument that ‘its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners’ injuries that the agency cannot be haled into federal court to answer for them.’” *Id.* (quoting *Massachusetts v. EPA*, 549 U.S. 497, 523 (2007)).

¹⁴² *Id.* at 348-49 (quoting *Massachusetts*, 549 U.S. at 525-26).

¹⁴³ *Id.* at 349 (finding redressability satisfied because “[e]ven if emissions increase elsewhere, the magnitude of Plaintiffs’ injuries will be less if Defendants’ emissions are reduced than they would be without a remedy”).

¹⁴⁴ In light of *Massachusetts*’s procedural injury, the Court stated that *Massachusetts* needed only to demonstrate “some possibility” that the requested relief would prompt the EPA to reconsider its decision not to regulate motor-vehicle emissions. *Massachusetts*, 549 U.S. at 518. But the Court never applied such a “some possibility” standard. Instead, the Court considered whether *Massachusetts*’s risk of injury would in fact be reduced by a favorable decision. *Id.* at 526.

¹⁴⁵ See *AEP*, 582 F.3d at 339 n.17 (finding that “New York City may not assert *parens patriae* standing”); see also *id.* at 334 (noting that “the States are suing in both their proprietary and *parens patriae* capacities, and New York City and the Trusts are suing in their proprietary capacities”).

¹⁴⁶ *Massachusetts*, 549 U.S. at 520.

owed Massachusetts.¹⁴⁷

The Supreme Court, in granting certiorari in *AEP*, had the opportunity to resolve any confusion that might have resulted from its decision in *Massachusetts*. However, with Justice Sotomayor recused,¹⁴⁸ the remaining Justices affirmed the Second Circuit's exercise of jurisdiction by an equally divided Court.¹⁴⁹ Four Justices concluded that "at least some plaintiffs ha[d] Article III standing under *Massachusetts*,"¹⁵⁰ and four Justices—no doubt the same four that dissented in *Massachusetts*¹⁵¹—believed that none of the plaintiffs had Article III standing.¹⁵² The Court therefore affirmed the Second Circuit's standing determination by an equally divided Court without deciding the issue, missing an opportunity to clarify *Massachusetts* for future litigants.

Nonetheless, the *AEP* plurality's brief remarks on standing are in fact noteworthy. The plurality's finding of standing demonstrates not only the *Massachusetts* decision's continued validity, but also emphasizes that the *Massachusetts* Court's ultimate finding of standing was not dependent on Massachusetts's procedural right to challenge EPA action under the CAA. The plurality's opinion, however, gives no indication on whether the same is true of Massachusetts's stake in protecting its quasi-sovereign interests.

Had Justice Sotomayor not recused herself, commentators have speculated that the resulting majority would have found for the plaintiffs on the question of standing.¹⁵³ A significant question remains, however, whether this majority

¹⁴⁷ Similar to the Second Circuit in *AEP*, the Fifth Circuit in *Comer v. Murphy Oil USA* suggested that the *Massachusetts* Court's injury-causation-redressability analysis was applicable to all litigants, regardless of whether the litigant was entitled to special solicitude. *See* 585 F.3d 855, 865 (5th Cir. 2009) (finding that the defendants' contention that the plaintiffs—private landowners—did not have standing was without merit in light of the *Massachusetts* Court's standing analysis), *vacated and reh'g en banc granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010). However, the *Comer* opinion was subsequently vacated pending a rehearing en banc. *Comer*, 598 F.3d at 208. But the rehearing never occurred. After a series of recusals and disqualifications, the Fifth Circuit held that it lacked a quorum and a rehearing was consequently not possible. *Comer*, 607 F.3d at 1053-54.

¹⁴⁸ Justice Sotomayor recused herself because she sat on the Second Circuit panel that heard the case below, though she was appointed to the Supreme Court before the Second Circuit actually decided the case. *See* *Am. Elec. Power Co., v. Connecticut (AEP)*, 131 S. Ct. 2527, 2540 (2011) (noting that Justice Sotomayor took no part in the case).

¹⁴⁹ *See id.* at 2535.

¹⁵⁰ *See id.*

¹⁵¹ Although the Court's opinion did not announce the identities of the Justices who voted for or against standing, commentators have assumed that Chief Justice Roberts and Justices Scalia, Thomas, and Alito voted against finding standing consistent with their dissent in *Massachusetts*. *See, e.g.*, Bradford C. Mank, Reading the Standing Tea Leaves in *American Electric Power Co. v. Connecticut*, 46 U. RICH. L. REV. 543, 592 (2012) [hereinafter Mank, *Standing Tea Leaves*]; James R. May, *AEP v. Connecticut and the Future of the Political Question Doctrine*, 121 YALE L.J. ONLINE 127, 130 (2011).

¹⁵² *See AEP*, 131 S. Ct. at 2535.

¹⁵³ Jonathan H. Adler, The Supreme Court Disposes of A Nuisance Suit: *American Electric Power v. Connecticut*, 2011 CATO SUP. CT. REV. 295, 313 (2011); Mank, *Standing Tea Leaves*,

would have affirmed the Second Circuit's broad finding of standing with respect to both state and private litigants, or instead more narrowly decided the standing question based on the state plaintiffs alone as it had in *Massachusetts*.

IV. APPLYING *MASSACHUSETTS* TO PRIVATE LITIGANTS

Five years after *Massachusetts v. EPA*, lower courts have continued to struggle in interpreting what effect *Massachusetts* has beyond the realm of state-led climate change litigation. In *Massachusetts*, the Court stressed that it was of "considerable relevance" that the party seeking review was "a sovereign state and not, as it was in *Lujan*, a private individual."¹⁵⁴ Although the Court never clarified whether *Massachusetts*'s sovereign status was also determinative to the Court's ultimate finding of standing, lower courts have increasingly tended toward this interpretation. These courts have interpreted the *Massachusetts* decision to be premised on the fact that *Massachusetts* was suing in its *parens patriae* capacity, and suggest that the Court's decision has limited import in suits by private litigants.¹⁵⁵ Even in the Second Circuit, which in *AEP* implicitly acknowledged that the injury-causation-redressability analysis of *Massachusetts* was equally applicable to both state and private litigants,¹⁵⁶ at least five judges have demonstrated a willingness to limit the applicability of *Massachusetts* to cases where the party seeking review is a sovereign state with a vested procedural right.¹⁵⁷

supra note 151, at 593.

¹⁵⁴ *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007).

¹⁵⁵ See *North Carolina v. EPA*, 587 F.3d 422, 426 (D.C. Cir. 2009) (stating that "Massachusetts had standing to challenge EPA's failure to regulate certain air pollutants, because Massachusetts has 'quasi-sovereign interests' in reducing air pollution and a procedural right to challenge EPA under 42 U.S.C. § 7607(b)(1)"); *Ctr. for Biological Diversity v. U.S. Dept. of Interior*, 563 F.3d 466, 476 (D.C. Cir. 2009) (finding that *Massachusetts* was based on the "special solicitude" afforded Massachusetts due to its sovereign capacity and since it "sought to assert its own [procedural] rights as a state under the Clean Air Act"); *Comer v. Murphy Oil USA, Inc.*, 839 F. Supp. 2d 849, 861 (S.D. Miss. 2012) ("[T]he Supreme Court was only able to find that Massachusetts had standing to sue the EPA for failure to regulate emissions by granting it "special solicitude" due to its sovereign status."); *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, 816 F. Supp. 2d 1118, 1133 (D.N.M. 2011) ("In *Mass. v. EPA*, the Supreme Court found standing based primarily on *parens patriae* and Massachusetts' role as the sovereign guardian of all the earth and air within its domain."); *Coal. for a Sustainable Delta v. Carlson*, 1:08-CV-00397 OWWGSA, 2008 WL 2899725, at *7 (E.D. Cal. July 24, 2008) ("Because standing in *Massachusetts v. EPA* was premised on [Massachusetts's] 'special position and interest,' it is of limited relevance to this case, brought by private citizens."); *California v. Gen. Motors Corp.*, C06-05755 MJJ, 2007 WL 2726871, at *11 (N.D. Cal. Sept. 17, 2007) (stating that the *Massachusetts* Court, in finding standing, "relied upon the notion that certain constitutional principles of sovereignty afford the States 'special solitude' to seek judicial review of decisions by federal regulatory agencies"); see also Bradford, *supra* note 8, at 1068 (stating that *Massachusetts* has "limited applicability [beyond] *parens patriae* environmental lawsuits").

¹⁵⁶ See *Connecticut v. Am. Elec. Power Co. (AEP)*, 582 F.3d 309, 339-49 (2d Cir. 2009)

¹⁵⁷ See *Amnesty Int'l USA v. Clapper*, 667 F.3d 163, 197 (2d Cir. 2011) (Raggi, J., dissenting from denial of rehearing en banc, joined by Jacobs, C.J., and Cabranes, Wesley, and Livingston, JJ.)

However, the *Massachusetts* Court implicitly—and arguably explicitly—rejected this conclusion.¹⁵⁸ Although first acknowledging Massachusetts’s *parens patriae* capacity and its procedural right to challenge EPA actions, the Court subsequently declared that “Massachusetts ha[d] satisfied the most demanding standards of the adversarial process.”¹⁵⁹ This declaration was in seeming reference to the fact that Massachusetts established standing without regard to any “special solicitude” owed the state.¹⁶⁰ The Court’s subsequent application of the injury-causation-redressability test bears out what the Court previously suggested. In applying the *Lujan* factors, the Court made not a single reference to Massachusetts’s asserted quasi-sovereign interest or its vested procedural right.¹⁶¹ Nor did the Court, in supporting its analysis, reference a single case involving a state or a procedural-injury plaintiff.

Certainly, the finding that states are entitled to special solicitude in the courts’ standing analysis is not disputed; but the conclusion that this “special solicitude” modified the *Massachusetts* Court’s standing analysis under *Lujan* appears misplaced. Indeed, if there is one thing we know about the significance of Massachusetts’s entitlement to “special solicitude,” it is that Massachusetts could have satisfied the standing doctrine’s redressability prong by demonstrating “some possibility” of redressability.¹⁶² But the Court never applied such a standard. Instead, the Court considered whether Massachusetts’s risk of injury was likely to be reduced by a favorable decision,¹⁶³ bringing the Court’s analysis within familiar *Lujan* territory.

Courts that have nonetheless read *Massachusetts* as dependent upon the state’s entitlement to relaxed or distinct standing requirements have inappropriately raised the standing burden for private litigants. The D.C. Circuit’s opinion in *Center for Biological Diversity v. U.S. Department of Interior*¹⁶⁴ demonstrates this problem along with the lower courts’ general confusion on how to apply *Massachusetts*.

In *Center for Biological Diversity*, non-profit organizations petitioned for review of the U.S. Department of Interior’s approval of a five-year program to

(stating that the *Massachusetts* Court found injury in fact “only in a context in which it also carefully noted that at least two special circumstances . . . justified relaxation of the traditional standing rules that would otherwise apply”).

¹⁵⁸ See *supra* Part II.A.

¹⁵⁹ *Massachusetts*, 549 U.S. at 521.

¹⁶⁰ That is to say, the Court suggested that it would have reached the same decision even if the petitioner were a private litigant who held no procedural right, so long as all other facts remained largely the same.

¹⁶¹ See *Massachusetts*, 549 U.S. at 521-26.

¹⁶² *Id.* at 518.

¹⁶³ *Id.* at 526.

¹⁶⁴ 563 F.3d 466 (D.C. Cir. 2009).

expand leasing areas for oil and gas development off the coast of Alaska.¹⁶⁵ The petitioners argued, among other things, that the leasing program violated the Outer Continental Shelf Lands Act (OCSLA) and the National Environmental Policy Act (NEPA) “because Interior failed to take into consideration both the effects of climate change on [Outer Continental Shelf] areas and the Leasing Program’s effects on climate change.”¹⁶⁶ In support of their claims, the petitioners advanced both a substantive and a procedural theory of standing.¹⁶⁷

Beginning with the petitioners’ substantive theory of standing, the court emphasized that the *Massachusetts* Court’s standing analysis did not govern on the reasoning that the decision was based on the “special solicitude” afforded Massachusetts in light of its sovereign capacity and procedural right to challenge EPA action under the CAA.¹⁶⁸ The court continued: “Outside of the very limited factual setting of *Massachusetts*, the Supreme Court’s decision in [*Lujan*] sets forth the test for standing.”¹⁶⁹ The court then found that the petitioners’ claims failed because they did not establish either the injury or causation element of standing.¹⁷⁰

After explaining why the petitioners had failed to allege a sufficiently imminent and particularized injury,¹⁷¹ the court found that the petitioners further relied on “too tenuous a causal link” considering the various actions that must occur before the challenged action—the Interior Department’s approving of a plan to expand leasing areas for oil and gas development¹⁷²—could lead to increased emissions.¹⁷³ The court reasoned that the petitioners would have to argue that the adoption of the leasing program would “bring about drilling; drilling, in turn, [would] bring about more oil; this oil [would] be consumed; the consumption of this oil [would] result in additional carbon dioxide being dispersed into the air; this carbon dioxide [would] consequently cause climate change; [and] this climate change [would] adversely affect the animals and their habitat.”¹⁷⁴ Of course, the obvious expectation of the oil leasing program was that it would lead to the discovery, sale, and consumption of more oil.

More importantly, the causal chain appears hardly more “tenuous” than that in *Massachusetts*. In *Massachusetts*, the Supreme Court found the causation requirement of *Lujan* satisfied even though, by the *Center for Biological Diversity* court’s logic, the petitioners would have to show that the EPA’s

¹⁶⁵ *Id.* at 471-72.

¹⁶⁶ *Id.* at 471.

¹⁶⁷ *Id.* at 475.

¹⁶⁸ *Id.* at 476.

¹⁶⁹ *Id.* at 477.

¹⁷⁰ *Id.* at 478.

¹⁷¹ *Id.*

¹⁷² *Id.* at 471.

¹⁷³ *Id.* at 478.

¹⁷⁴ *Id.*

promulgation of greenhouse gas emission standards for new motor vehicles would have led vehicle manufacturers to produce lower greenhouse-gas-emitting vehicles; consumers would have purchased these vehicles; consumers would have driven these vehicles; this use would have resulted in less additional carbon dioxide being dispersed into the air; this reduction in carbon dioxide emissions would have consequently reduced climate change; and this reduction in climate change would have reduced adverse impacts to Massachusetts's territory.¹⁷⁵ *Massachusetts* and *Center for Biological Diversity* demonstrate that climate change injuries will always be somewhat removed from the alleged cause. But, in light of *Massachusetts*, this does not mean that such injuries necessarily entail too tenuous a causal link to satisfy standing's causation requirement.

Oddly, the *Center for Biological Diversity* court went on to find that the petitioners established standing under their procedural standing theory.¹⁷⁶ The court found the petitioners' alleged injury to be both imminent and particularized¹⁷⁷ even though the asserted injury—the substantive injury to petitioners' "enjoyment of the indigenous animals of the Alaskan areas listed in the Leasing Program"¹⁷⁸—was the same under the petitioners' substantive standing theory.¹⁷⁹ In sharp contrast to its earlier causation analysis, the court further found it "substantially probable that [Interior's conduct] w[ould] cause the essential injury to the plaintiff's own interest."¹⁸⁰

The court's differing conclusions with respect to each standing theory certainly had something to do with the petitioners' procedural right "designed to protect [its] threatened concrete interest,"¹⁸¹ with that right being the only clear distinction between the petitioners' separate theories of standing. Such a procedural right, however, does not serve to dilute the requirements of either injury in fact or causation.¹⁸² The court's analysis thus appears to reflect a consideration apart from this relatively concrete aspect of standing doctrine—the abstract influence of *Massachusetts v. EPA*. In addressing the petitioners' substantive standing theory, the court explained that *Massachusetts* was

¹⁷⁵ See *Massachusetts v. EPA*, 549 U.S. 497, 523-25 (2007) (finding the causation element of standing satisfied).

¹⁷⁶ *Ctr. for Biological Diversity*, 563 F.3d at 479.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See *id.* at 475-76 ("Under their substantive theory of standing, Petitioners argue that Interior's approval of the Program brings about climate change, which in turn adversely affects the species and ecosystems of those OCS areas, thereby threatening Petitioners' enjoyment of the OCS areas and their inhabitants.").

¹⁸⁰ *Id.* at 479 (quoting *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664-65 (D.C. Cir. 1996)).

¹⁸¹ *Id.* (quoting *Lujan*, 504 U.S. at 573 n.8).

¹⁸² See *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (stating that Congress "can loosen the strictures of the redressability prong of our standing inquiry," but that "the requirement of injury in fact[, unlike redressability,] is a hard floor of Article III jurisdiction that cannot be removed by statute").

inapposite.¹⁸³ But the court never disclaimed *Massachusetts* in its discussion of the petitioners' procedural theory of standing. In finding standing under the latter theory, the court suggested that some measure of "special solicitude" in the standing analysis was required, be it due to the litigant's sovereign status or the litigant's possession of a particular procedural right, before it would find *Massachusetts* of relevance and grant standing.

In addition to demonstrating the difficulty in interpreting *Massachusetts*, *Center for Biological Diversity* and other climate change cases emphasize the peculiar and unique nature of climate change for Article III standing. For example, as *Center for Biological Diversity* demonstrates, the causal connection between alleged climate-change-related harms and greenhouse-gas-emitting conduct will always be somewhat attenuated; in the context of climate change, there simply are no direct injuries. Further, the injury most likely to be recognized by courts will often manifest itself hundreds, if not thousands, of miles from the challenged conduct. In *Amigos Bravos v. U.S. Bureau of Land Management*,¹⁸⁴ the district court alluded to this peculiar characteristic in finding that the plaintiffs—six environmental organizations—failed to establish Article III standing.

In *Amigos Bravos*, the plaintiffs brought suit against the U.S. Bureau of Land Management for allegedly violating NEPA in not fully considering the climate change impacts of two approved oil and gas lease sales in New Mexico.¹⁸⁵ In finding that the plaintiffs failed to satisfy the injury-in-fact requirement, the court noted that "where Massachusetts[] faced a clear threat from rising sea levels, the full magnitude of the climate threat to New Mexico, and the various ecological regions within the State, is not yet fully understood or easily quantified."¹⁸⁶ As a result, the court seemingly suggested that if the plaintiffs owned Massachusetts coastal property, as opposed to New Mexico property, it would have found the injury-in-fact requirement satisfied.¹⁸⁷

Of course, it is odd to suggest that a litigant thousands of miles from the challenged conduct in Massachusetts could more easily satisfy the injury-in-fact requirement than a litigant in the direct vicinity. Even more odd is the suggestion that Massachusetts necessarily has a cognizable injury in fact for all future climate change cases. But that conclusion does not appear so far-fetched. Indeed, the Supreme Court has already recognized that climate change harms

¹⁸³ *Ctr. for Biological Diversity*, 563 F.3d at 476.

¹⁸⁴ 816 F. Supp. 2d 1118 (D.N.M. 2011).

¹⁸⁵ *Id.* at 1122.

¹⁸⁶ *Id.* at 1133.

¹⁸⁷ Although the court did note that, in the Tenth Circuit, courts require a "geographical nexus to, or actual use of the site of the agency action," *id.* at 1127, the court subsequently acknowledged that such a standard "may not be a proper measure" when considering injuries resulting from climate change, *id.* at 1136.

Massachusetts's coastal properties,¹⁸⁸ and there is no reason to expect this harm to dissipate in the foreseeable future. Consequently, as the *Amigos Bravos* court suggested in referencing Massachusetts's "clear threat from rising sea levels,"¹⁸⁹ Massachusetts has apparently satisfied the injury-in-fact requirement in all climate change litigation going forward. Rather than demonstrating the problems with current standing doctrine, this peculiar outcome reflects the uniqueness of climate change given its global rather than localized nature, and the difficulties that courts will continue to face in analyzing standing in the context of climate change.

V. CONCLUSION

The Supreme Court's standing doctrine presents unique obstacles for climate change litigants, and particularly for those that are private parties. With respect to the injury requirement, climate change litigants face significant hurdles in having to show that a harm of global magnitude is somehow particularized. Moreover, the alleged injuries often relate to apprehension of future injuries resulting from greenhouse gas emissions, the exact effects of which remain uncertain. The traceability and redressability requirements pose their own substantial obstacles. For example, how much must a defendant contribute to global emissions for it to be said that the alleged injury fairly can be traced to the challenged conduct? An individual's automobile emissions certainly cannot be found sufficient, but the nation's automobile emissions clearly are sufficient. A hard question arises with respect to emission levels that are in between these extremes.

These issues have made a plaintiff's burden in establishing standing in climate change litigation difficult to say the least, but the task is not insurmountable. *Massachusetts v. EPA* demonstrates as much. *Massachusetts* tells us that a state accorded a procedural right and seeking to protect its quasi-sovereign interests can invoke federal-court jurisdiction to redress climate-change-related injuries, and then shows us how a litigant can establish standing in such cases without regard to either of these considerations. In so doing, the majority's standing analysis perhaps says more about how a private litigant can establish standing than it says about state *parens patriae* standing. Indeed, where the Court treated Massachusetts as it would treat "normal litigants,"¹⁹⁰ the Court provided the clearest portion of its standing discussion. There, without any reference to Massachusetts's sovereign capacity or its vested procedural right, the Court applied the traditional injury, causation, and redressability tests of

¹⁸⁸ *Massachusetts v. EPA*, 549 U.S. 497, 521-23 (2007).

¹⁸⁹ *Amigos Bravos*, 816 F. Supp. 2d at 1133.

¹⁹⁰ *See Massachusetts*, 549 U.S. at 518.

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Lujan and found that Massachusetts, “as a landowner,”¹⁹¹ established Article III standing.¹⁹²

In providing a standing framework applicable to all litigants, the Court demonstrated a willingness to open the federal courts to consider a threat of the highest order—global climate change—that, given its global nature and the uncertainty of its harms, has and will continue to pose profound and complex challenges for litigants and the courts. Despite these challenges, however, lower courts should not be so quick to dismiss *Massachusetts* as inapposite where the litigant is a private party rather than a state, and should, consistent with *Massachusetts*, be willing to reach the merits to consider “the most pressing environmental challenge of our time.”¹⁹³

¹⁹¹ *Id.* at 522.

¹⁹² *Id.* at 526.

¹⁹³ *Id.* at 505 (quoting the petition for certiorari).